

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)
A.W., Appellant)

and)

DEPARTMENT OF THE TREASURY,)
INTERNAL REVENUE SERVICE,)
Baltimore, MD, Employer)
_____)

Docket No. 21-0572
Issued: February 11, 2022

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On March 2, 2021 appellant filed a timely appeal from September 11 and October 2, 2020 merit decisions and a December 22, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act²

¹ The Board notes that, during the pendency of this appeal, OWCP issued an August 10, 2021 decision, which granted appellant's request for modification of the October 2, 2020 schedule award decision, and an August 11, 2021 decision granted appellant a schedule award for 7 percent right upper extremity permanent impairment and 15 percent right lower extremity permanent impairment. (RD 8/10, 11/2021) The Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s). 20 C.F.R. § § 501.2(c)(3), 10.626; *see D.P.*, Docket No. 20-1330 (issued February 19, 2021); *J.C.*, Docket No. 19-1849, n.2 (issued November 17, 2020); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990). Consequently, OWCP's August 10 and 11, 2021 decisions are set aside as null and void.

² 5 U.S.C. § 8101 *et seq.*

(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish disability from work for the period August 2 through September 13, 2019; (2) whether she has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award; and (3) whether OWCP abused its discretion in denying appellant's request for a hearing pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On June 13, 2019 appellant, then a 52-year-old customer service representative, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained right shoulder, arm, wrist, hip, leg, and ankle injuries when she slipped and fell on a damp/wet bathroom floor near a sink. She stopped work on the date of injury and returned to work on September 16, 2019.

OWCP accepted right shoulder sprain, right knee sprain, and right hip traumatic trochanteric bursitis as a result of the accepted June 13, 2019 employment incident.

In an August 14, 2019 Form CA-20, Dr. Bridgette Provost, a physician specializing in internal medicine, noted appellant's history of injury and diagnoses of right shoulder joint sprain, right knees sprain, and right hip traumatic trochanteric bursitis. She attributed the diagnosed conditions to appellant's fall on June 13, 2019 and found appellant totally disabled for the period June 13 through August 28, 2019. Dr. Provost advised that any return to work would be determined at a later date.

In a report dated August 29, 2019, Dr. Kevin E. McGovern, a Board-certified orthopedic surgeon, diagnosed right hip trochanteric bursitis, which he attributed to the June 13, 2019 employment injury. Physical examination findings included slight reduced right hip motion, pain on extremes of motion, no swelling or crepitus, and tenderness over the greater trochanter. Dr. McGovern advised that appellant was to remain off work and continue with her physical therapy three times a week for four weeks.

In a duty status report (Form CA-17) dated September 17, 2019, Dr. McGovern diagnosed right hip bursitis and right knee and shoulder strains. He indicated that appellant was unable to perform her usual work duties and held her off work. Dr. McGovern, in a form CA-20 of even date, described the June 13, 2019 injury and diagnosed right hip bursitis and right knee and

³ The Board notes that, following the December 22, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

shoulder strains due to a slip and fall on June 13, 2019. He noted the period of disability as June 1 through September 26, 2019.

On June 6, 2020 appellant filed a claim for compensation (Form CA-7) claiming disability from work for the period August 2 through September 13, 2019. On the reverse side of the claim form appellant's supervisor detailed pay status, including a time off award applied on August 6 to 7, 2019; sick leave used on August 5, 2019; and annual leave used on August 2, 2019.

In a separate Form CA-7 of even date, appellant filed a claim for a schedule award.

In a compensation claim development letter dated June 29, 2020, OWCP informed appellant that additional evidence was required to establish disability for the period August 2 through September 13, 2019 claimed.⁴ It advised her of the type of evidence required to establish her claim, including a comprehensive report from her treating physician addressing the periods of disability. Appellant was afforded 30 days to provide the necessary evidence. No response was received.

In a July 7, 2020 development letter concerning appellant's schedule award claim, OWCP requested that appellant's treating physician submit a permanent impairment evaluation report in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ It afforded her 30 days to submit additional medical evidence in support of her schedule award claim. No response was received.

By decision dated September 11, 2020, OWCP denied appellant's claim for wage-loss compensation for the period August 2 through September 13, 2019. It noted that she failed to submit any medical evidence establishing disability for the dates and hours claimed due to her accepted employment injury.

By decision dated October 2, 2020, OWCP denied appellant's claim for a schedule award.

On November 30, 2020 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review regarding the October 2, 2020 denial of her schedule award claim.

Appellant submitted a November 13, 2020 report from Dr. Timothy S. Frazier, an orthopedic surgeon. Dr. Frazier diagnosed chronic right shoulder, lumbar, and right knee sprains, L4-5 disc disease, and chronic right hip trochanteric bursitis, which he attributed to the accepted June 13, 2019 employment injury. Using the sixth edition of the A.M.A., *Guides*, he found 23 percent right upper extremity permanent impairment, 25 percent permanent impairment of her right hip, 21 percent whole person impairment for her lumbar spine, and 24 percent right lower extremity permanent due to the accepted June 13, 2019 employment.

⁴ OWCP noted that clarification was required concerning the type of leave appellant was claiming as it appeared she was claiming LWOP, leave buy back, and a schedule award on different Form CA-7s. It also noted that some of the leave she claimed conflicted with her continuation of pay dates.

⁵ A.M.A., *Guides* (6th ed. 2009).

By decision dated December 22, 2020, the Branch of Hearings and Review denied appellant's hearing request, finding that it was untimely filed as it was not received until November 30, 2020, more than 30 days after its October 2, 2020 merit decision. After exercising its discretion, OWCP further found that the issue in the case could equally be addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁶ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence.⁷ The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.⁸ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.⁹

Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical evidence. The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹⁰

ANALYSIS -- ISSUE 1

The Board has duly considered the matter and finds that the case is not in posture for a decision with regard to appellant's claim for wage-loss compensation for the period August 2 through September 13, 2019.

In the case of *William A. Couch*,¹¹ the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued.

While OWCP is not required to list every piece of evidence submitted to the record, the record is clear that the documents, which appellant submitted prior to the acceptance of her claim,

⁶ *Supra* note 2.

⁷ *See A.N.*, Docket No. 20-0320 (issued March 31, 2021); *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *see also Amelia S. Jefferson*, 57 ECAB 183 (2005); *Nathaniel Milton*, 37 ECAB 712 (1986).

⁸ 20 C.F.R. § 10.5(f); *A.N., id.*; *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁹ *See A.N., supra* note 7; *D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson, supra* note 7.

¹⁰ *W.C.*, Docket No. 19-1740 (issued June 4, 2020); *J.B.*, Docket No. 19-0715 (issued September 12, 2019).

¹¹ 41 ECAB 548 (1990); *T.G.*, Docket No. 19-1930 (issued January 8, 2021); *D.M.*, Docket No. 20-0099 (issued July 16, 2020); *see also R.D.*, Docket No. 17-1818 (issued April 3, 2018).

were not reviewed by OWCP. In its September 11, 2020 decision, OWCP failed to consider an August 14, 2019 Form CA-20 from Dr. Provost, as well as August 29 and September 17, 2019 reports from Dr. McGovern. As OWCP did not note receipt or consideration of this medical evidence, it failed to follow its own procedures by properly discussing the relevant medical reports of record.¹²

It is crucial that OWCP review all evidence received prior to the issuance of its final decision, as the Board's decisions are final with regard to the subject matter appealed.¹³ The Board finds that this case is not in posture for decision as OWCP did not review the above-noted evidence in its September 11, 2020 decision.¹⁴ On remand OWCP shall review all evidence of record, and following any further development as it deems necessary, it shall issue a *de novo* decision regarding appellant's wage-loss compensation claim.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provisions of FECA¹⁵ and its implementing federal regulations,¹⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants.¹⁷ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.¹⁸ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹⁹

A claimant has the burden of proof under FECA to establish permanent impairment of a scheduled member or function of the body as a result of his or her employment injury entitling

¹² *P.B.*, Docket No. 21-0157 (issued September 2, 2021). All evidence submitted should be reviewed and discussed in the decision. Evidence received following development that lacks probative value should also be acknowledged. Whenever possible, the evidence should be referenced by author and date. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Denials*, Chapter 2.1401.5(b)(2) (November 2012).

¹³ See *T.G.*, *supra* note 11; *C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); see also *William A. Couch*, *supra* note 11.

¹⁴ See *T.G.*, *id.*; *V.C.*, Docket No. 16-0694 (issued August 19, 2016).

¹⁵ 5 U.S.C. § 8107.

¹⁶ 20 C.F.R. § 10.404.

¹⁷ *Id.* at § 10.404(a).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); see also *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁹ *D.P.*, Docket No. 20-1330 (issued February 19, 2021); *D.S.*, Docket No. 18-1140 (issued January 29, 2019); *Isidoro Rivera*, 12 ECAB 348 (1961).

him or her to a schedule award.²⁰ OWCP's procedures provide that, to support a schedule award, the file must contain competent medical evidence, which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.²¹ Its procedures further provide that, if a claimant has not submitted a permanent impairment evaluation, it should request a detailed report that includes a discussion of how the impairment rating was calculated.²² If the claimant does not provide an impairment evaluation and there is no indication of permanent impairment in the medical evidence of file, the claims examiner may proceed with a formal denial of the award.²³

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

On June 6, 2020 appellant filed a claim for a schedule award. No medical evidence was received in support of her schedule award claim. In a July 7, 2020 development letter, OWCP requested a medical opinion from appellant's treating physician regarding the extent of her permanent impairment in accordance with the A.M.A., *Guides*. Appellant, however, did not submit the necessary evidence.

As noted above, if the claimant does not provide a report from a treating physician from which appellant's permanent impairment of a scheduled member or function of the body can be visualized, and there is no indication of permanent impairment in the medical evidence of file, the claims examiner may proceed with a formal denial of the award.²⁴ Because appellant did not submit medical evidence to establish permanent impairment of a scheduled member or function of the body, in accordance with the sixth edition of the A.M.A., *Guides*, she has not met her burden of proof to establish her schedule award claim.²⁵

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of FECA provides that "a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance

²⁰ *D.P., id.; M.G.*, Docket No. 19-0823 (issued September 17, 2019); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

²¹ *Supra* note 18 at Chapter 2.808.5 (March 2017).

²² *Id.* at Chapter 2.808.6(a) (March 2017).

²³ *Id.* at Chapter 2.808.6(c) (March 2017).

²⁴ *Id.*

²⁵ *See D.P., supra* note 19; *T.M.*, Docket No. 19-1126 (issued September 22, 2020).

of the decision, to a hearing on his [or her] claim before a representative of the Secretary.”²⁶ Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.²⁷ A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier’s date marking and before the claimant has requested reconsideration.²⁸ Although there is no right to a review of the written record or an oral hearing, if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant’s request and must exercise its discretion.

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied appellant’s request for telephonic hearing pursuant to 5 U.S.C. § 8124(b) as untimely filed.

OWCP’s regulations provide that the request for an oral hearing must be made within 30 days of the date of the decision for which a review is sought.²⁹ Appellant’s hearing request was dated November 30, 2020, which was more than 30 days after October 2, 2020 decision. As such, the Board finds that her hearing request was untimely filed and she was, therefore, not entitled to an oral hearing as a matter of right.³⁰

OWCP also has the discretionary power to grant an oral hearing or review of the written record even if the claimant is not entitled to a review as a matter of right. The Board finds that OWCP properly exercised its discretion in its December 22, 2020 decision, as it noted that it had determined that the issue could be equally well addressed through a request for reconsideration. The Board has held that the only limitation on OWCP’s discretionary authority is reasonableness. An abuse of discretion is shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to logic and probable deduction from established facts.³¹ In this case, the evidence of record does not establish that OWCP abused its discretion in denying appellant’s request for a hearing. Accordingly, the Board finds that OWCP properly denied her request for an oral hearing.³²

²⁶ 5 U.S.C. § 8124(b)(1).

²⁷ 20 C.F.R. §§ 10.616, 10.617.

²⁸ *Id.* at § 10.616(a).

²⁹ *Id.*

³⁰ *A.G.*, Docket No. 20-1319 (issued May 19, 2021); *B.H.*, Docket No. 20-0777 (issued October 21, 2020). Timeliness is determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used. *See J.H.*, Docket No. 06-1565 (issued February 20, 2007); *James B. Moses*, 52 ECAB 465 (2001), *citing William J. Kapfhammer*, 42 ECAB 271 (1990); *see also Douglas McLean*, 42 ECAB 759 (1991).

³¹ *A.G.*, *id.*; *W.H.*, Docket No. 20-0562 (issued August 6, 2020).

³² *Id.*

CONCLUSION

The Board finds that this case is not in posture for decision with regard to appellant's claim for compensation for disability from work for the period August 2 through September 13, 2019. The Board further finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award. The Board also finds that OWCP properly denied her request for an oral hearing pursuant to 5 U.S.C. § 8124(b) as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the October 2 and December 22, 2020 decisions of the Office of Workers' Compensation Programs are affirmed. The September 11, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further action consistent with this decision of the Board.

Issued: February 11, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board