

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

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<b>T.B., Appellant</b> )	)	
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<b>and</b> )	)	<b>Docket No. 20-0158</b>
)	)	<b>Issued: March 18, 2022</b>
<b>DEPARTMENT OF JUSTICE, U.S. MARSHALS</b> )	)	
<b>SERVICE, Arlington, VA, Employer</b> )	)	
_____ )	)	

*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 28, 2019 appellant filed a timely appeal from an August 22, 2019 merit decision and an October 10, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, he asserted that oral argument should be granted so that he will have an opportunity to establish his claim. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the October 10, 2019 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.*

## **ISSUES**

The issues are: (1) whether appellant has established a permanent impairment of a scheduled member or function of the body warranting a schedule award; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed under 5 U.S.C. § 8124(b).

## **FACTUAL HISTORY**

On February 7, 2017 appellant, then a 51-year-old inspector, filed a traumatic injury claim (Form CA-1) alleging that on January 30, 2017 he sustained a lacerated lower lip when he fell while in the performance of duty. He stopped work on January 30, 2017.

On January 30, 2019 OWCP accepted the claim for laceration without foreign body of lip, initial encounter.

On March 1, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a March 12, 2019 development letter, OWCP advised appellant that FECA provided a schedule award, not to exceed \$3,500.00, for serious disfigurement of the face, head, or neck if such disfigurement was likely to handicap an individual in securing or maintaining employment. It further provided instructions for submitting photographs of the claimed disfigurement. OWCP requested that appellant complete an attached disfigurement award application form, and that he arrange for an attending physician to complete and submit the form. No further response was received.

By decision dated August 22, 2019, OWCP denied appellant's claim for a schedule award finding that the evidence of record failed to establish permanent impairment of a scheduled member or function of the body.

On September 26, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated October 10, 2019, OWCP denied appellant's request for an oral hearing as untimely filed. The decision noted that his request dated September 26, 2019, was not made within 30 days of OWCP's August 22, 2019 decision. As such, appellant was not entitled to a hearing as a matter of right. OWCP considered a discretionary hearing, but declined to grant a hearing, noting that he could instead file for reconsideration and submit new evidence establishing an employment-related impairment due to his accepted January 30, 2017 employment injury.

## **LEGAL PRECEDENT -- ISSUE 1**

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.<sup>4</sup> To support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a

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<sup>4</sup> *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

permanent and fixed state and indicates the date on which this occurred, 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*.<sup>5</sup>

Section 8107(c)(21) of FECA provides that payment of compensation not to exceed \$3,500.00 may be made for disfigurement of the face, head, or neck which is likely to handicap the claimant in securing or maintaining employment.<sup>6</sup> OWCP procedures further provide that a district medical adviser (DMA) will be asked to review such claims and to evaluate the employee's disfigurement. If the DMA finds that maximum medical improvement (MMI) has occurred, he or she will review the photographs submitted along with the medical evidence of record and place a memorandum in the file describing the disfigurement and stating whether MMI has occurred. If the DMA finds MMI has occurred, the concurrence of the district director or assistant district director must be obtained. Following the file review, the district director or assistant district director will also write a memorandum which contains a description of the disfigurement.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not established permanent impairment of a scheduled member or function of the body warranting a schedule award.

As noted above, section 8107(c)(21) of FECA provides that payment of compensation not to exceed \$3,500.00 may be made for disfigurement of the face, head, or neck which is likely to handicap the claimant in securing or maintaining employment.<sup>8</sup> The Board finds that OWCP properly followed its procedures in determining that appellant was not entitled to an award for facial disfigurement.<sup>9</sup>

In a development letter dated March 12, 2019, OWCP advised appellant of the requirements for a schedule award. However, appellant did not submit medical evidence in

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<sup>5</sup> *B.J.*, Docket No. 19-0960 (issued October 7, 2019).

<sup>6</sup> 5 U.S.C. § 8107(c)(21).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.10 (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.5 (January 2010); *see J.S.*, Docket No. 19-1226 (issued December 23, 2019); *see L.J.*, Docket No. 13-0104 (issued October 21, 2013).

<sup>8</sup> 5 U.S.C. § 8107(c)(21).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.10 (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.5 (January 2010).

support of his claim for a schedule award. The Board thus finds that he has not met his burden of proof.

Appellant may request a schedule award or increased schedule award for his facial disfigurement at any time based on new medical evidence.

### **LEGAL PRECEDENT -- ISSUE 2**

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 of the decision, to a hearing on his or her claim before a representative of the Secretary.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied appellant's September 26, 2019 request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124(b).

On September 26, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review; however, this was more than 30 days after OWCP's August 22, 2019 decision.<sup>14</sup> Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.<sup>15</sup> As such, the request was untimely and appellant was not entitled to an oral hearing as a matter of right.

The Board further finds that OWCP, in its October 10, 2019 decision, properly exercised its discretionary authority by noting that it had considered the matter and denied appellant's request

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<sup>10</sup> 5 U.S.C. § 8124(b)(1).

<sup>11</sup> 20 C.F.R. §§ 10.616, 10.617, and 10.618.

<sup>12</sup> *Id.* at § 10.616(a).

<sup>13</sup> *J.T.*, Docket No. 18-0664 (issued August 12, 2019); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>14</sup> Under OWCP's regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011). If the postmark is illegible, the request will be deemed timely unless OWCP has kept evidence of date of delivery on the record reflecting that the request is untimely. *Id.*

<sup>15</sup> *See M.M.*, Docket No. 19-1171 (issued October 22, 2019); *William F. Osborne*, 46 ECAB 198 (1994).

for an oral hearing as his claim could be equally well addressed through a reconsideration application.

The Board has held that the only limitation on OWCP's authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.<sup>16</sup> The Board finds that the evidence of record does not establish that OWCP abused its discretion in denying appellant's request for an oral hearing before an OWCP hearing representative.<sup>17</sup>

### **CONCLUSION**

The Board finds that appellant has not established permanent impairment of a scheduled member or function of the body warranting a schedule award. The Board further finds that OWCP properly denied his September 26, 2019 request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124(b).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 10 and August 22, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 18, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>16</sup> *T.G.*, Docket No. 19-0904 (issued November 25, 2019); see *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

<sup>17</sup> *J.G.*, Docket No. 19-0555 (issued March 14, 2019).