

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 23, 2019 appellant, then a 52-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that during the period June 27 through July 2, 2019 he injured his right foot due to prolonged walking on uneven surfaces, including grass, and slopes while in the performance of duty. OWCP accepted the claim for post-traumatic osteoarthritis of the right ankle and foot, stress fracture of right toe(s) with routine healing, and other acquired deformities of the toes of the right foot.

On February 25, 2020 appellant underwent OWCP-authorized right second, third, fourth, and fifth metatarsal osteotomies, right fourth plantar condylectomy, fourth extensor digitorum brevis tenotomy, medical claw plate implantation for the first, second, and third metatarsal osteotomies, and cortical screw fixation in the fourth and fifth metatarsal osteotomies, performed by Dr. Omar Saleem, a Board-certified orthopedic surgeon. Dr. Saleem provided periodic reports through February 7, 2023 noting ongoing severe deformities and postsurgical status of the right foot. He recommended removal of surgically implanted fixation hardware in the right foot.

On March 21, 2023 appellant filed a claim for compensation (Form CA-7) for a schedule award.²

In a development letter dated March 21, 2023, OWCP requested that appellant submit a detailed medical report from his physician addressing his permanent impairment due to his accepted employment injury, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ It specified that the medical report must address whether he had attained maximum medical improvement (MMI). OWCP afforded appellant 30 days to submit the requested information. It advised him that, if his physician was unable to provide such a report, he should respond in writing. OWCP further noted that it would refer appellant for a second opinion examination if the evidence of record demonstrated a work-related permanent injury to a scheduled member, but did not contain an impairment rating, which was sufficient to determine the extent of permanent impairment under the A.M.A., *Guides*.

In response, appellant submitted reports by Dr. Saleem dated from January 9 through March 24, 2023, noting a prominence at the fourth metatarsal of the right foot, which caused discomfort, and restricted motion of the right ankle. On examination, Dr. Saleem observed dorsiflexion of the right foot limited to 5 degrees, plantar flexion of the right foot to 30 degrees, inversion and eversion to 15 degrees, and neurologic findings within normal limits. He recommended removal of surgical fixation hardware, but noted that appellant had “declined removing the hardware.” Dr. Saleem diagnosed pain from implanted hardware, metatarsalgia of right foot, and hammertoe of right foot. He reported that appellant had reached MMI as of March 24, 2023.

² Appellant separated from the employing establishment effective April 30, 2023.

³ A.M.A., *Guides* (6th ed. 2009).

By decision dated April 25, 2023, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish a permanent impairment of a scheduled member or function of the body. It found that he had not submitted medical evidence, which established that the accepted right foot conditions had reached MMI and which contained an impairment rating made in accordance with the standards of the A.M.A., *Guides*.

OWCP received reports dated April 27 and June 1, 2023 by Dr. Saleem, reiterating prior findings of the right foot and ankle and recommending removal of fixation hardware. Dr. Saleem continued to report that appellant reached MMI on March 24, 2023.

In a letter dated June 17, 2023, appellant requested that his case be reviewed as OWCP had received additional medical evidence following the April 25, 2023 decision. OWCP interpreted his letter as a request for an oral hearing or review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated July 6, 2023, OWCP's Branch of Hearings and Review denied appellant's hearing request. It found that the request was untimely filed as it was dated June 17, 2023, more than 30 days after its April 25, 2023 merit decision. OWCP further exercised discretion, and determined that the issue in this case could be equally well-addressed through a request for reconsideration along with the submission of new evidence, which establishes that appellant sustained a permanent impairment due to his accepted employment factors.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,⁴ and its implementing federal regulations,⁵ 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 loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁶ 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.⁷

⁴ 5 U.S.C. § 8107(c).

⁵ 20 C.F.R. § 10.404.

⁶ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Chapter 3.700, Exhibit 1 (January 2010).

⁷ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

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.⁸ 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 that the date on which this occurred (date of MMI), 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*.⁹ 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.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 1

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

On March 21, 2023 appellant requested a schedule award. OWCP, in a March 21, 2023 development letter, requested that he submit a permanent impairment evaluation from his physician addressing the extent of any employment-related permanent impairment using the sixth edition of the A.M.A., *Guides*. Appellant submitted reports from Dr. Saleem dated from January 9 through March 24, 2023, noting a prominence at the fourth metatarsal of the right foot and restricted right foot and ankle motion. Dr. Saleem recommended removal of fixation hardware. Although he opined that appellant had reached MMI, he did not provide a permanent impairment rating under the appropriate standards of the A.M.A., *Guides*.¹²

As noted above, appellant must submit an evaluation from a physician that includes a description of impairment in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.¹³

⁸ *M.K.*, Docket No. 22-0397 (issued August 18, 2023); *see Y.M.*, Docket No. 21-0995 (issued March 2, 2022); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁹ *See supra* note 6 at Chapter 2.808.5b; *see also D.J.*, Docket No. 20-0017 (issued August 31, 2021); *B.V.*, Docket No. 17-0656 (issued March 13, 2018); *C.B.*, Docket No. 16-0060 (issued February 2, 2016); *P.L.*, Docket No. 13-1592 (issued January 7, 2014).

¹⁰ *Id.* at Chapter 2.808.6a.

¹¹ *Id.* at Chapter 2.808.6c.

¹² *M.K.*, *supra* note 8; *see K.J.*, Docket No. 19-1492 (issued February 26, 2020); *K.F.*, Docket No. 18-1517 (issued October 9, 2019) (finding that the claimant did not meet her burden of proof in that she failed to submit medical evidence supporting permanent impairment due to the accepted employment injury).

¹³ *See N.S.*, Docket No. 21-0508 (issued September 22, 2021); *D.J.*, *supra* note 9; *B.V.*, *supra* note 9; *C.B.*, *supra* note 9; *P.L.*, *supra* note 9.

As the medical evidence of record is insufficient to establish permanent impairment of a scheduled member or function of the body due to his accepted conditions, the Board finds that he has not met his burden of proof.¹⁴

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

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.”¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant’s request for either an oral hearing or review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

In correspondence dated June 17, 2023, appellant requested either an oral hearing or a review of the written record before a representative of OWCP’s Branch of Hearings and Review; however, this request was made more than 30 days after OWCP’s April 25, 2023 decision. The April 25, 2023 decision was properly addressed and mailed in the ordinary course of business and thus presumed to have been received under the mailbox rule.¹⁹ Section 8124(b)(1) of FECA is

¹⁴ See *A.M.*, Docket No. 21-1413 (issued March 28, 2022).

¹⁵ 5 U.S.C. § 8124(b)(1).

¹⁶ 20 C.F.R. §§ 10.616, 10.617.

¹⁷ *Id.* at § 10.616(a).

¹⁸ *E.H.*, Docket No. 23-0503 (issued July 20, 2023); *M.F.*, Docket No. 21-0878 (issued January 6, 2022); *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

¹⁹ See *C.W.*, Docket No. 21-0943 (issued February 17, 2023); *James A. Gray*, 54 ECAB 277 (2002).

unequivocal on the time limitation for filing a request for a hearing.²⁰ As such, the request was untimely filed, and appellant was not entitled to an oral hearing or review of the written record as a matter of right.²¹

The Board further finds that OWCP, in its July 6, 2023 decision, properly exercised its discretionary authority, explaining that it had considered the matter and denied appellant's request for an oral hearing or review of the written record as his claim could be equally well addressed through a reconsideration request.

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 deductions from established facts.²² In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for an oral hearing or review of the written record. Accordingly, the Board finds that OWCP properly denied his request for an oral hearing or review of the written record, pursuant to 5 U.S.C. § 8124(b), as untimely filed.

CONCLUSION

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

²⁰ *P.T.*, Docket No. 21-0328 (issued May 2, 2022); *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018); *see also K.N.*, Docket No. 22-0647 (issued August 29, 2022); *G.H.*, Docket No. 22-0122 (issued May 20, 2022).

²¹ *See D.R.*, Docket No. 22-0361 (issued July 8, 2022); *D.S.*, Docket No. 21-1296 (issued March 23, 2022); *P.C.*, *supra* note 18.

²² *See S.I.*, Docket No. 22-0538 (issued October 3, 2022); *T.G.*, Docket No. 19-0904 (issued November 25, 2019); *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the July 6 and April 25, 2023 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 12, 2024
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board