

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

J.K., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Nashville, TN, Employer)

Docket No. 09-2242
Issued: June 2, 2010

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 8, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 14, 2009, which denied his request for an oral hearing as untimely. As the most recent merit decision of the Office was issued on May 11, 2006, the Board lacks jurisdiction to review the merits of this case pursuant to 20 C.F.R. §§ 501.2 and 501.3.¹

ISSUE

The issue is whether the Office properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On August 4, 2004 appellant, then a 53-year-old letter carrier, sustained a right shoulder injury while lifting mail. He did not stop work. The Office accepted appellant's claim for right shoulder tendinitis and authorized arthroscopic surgery.

¹ For Office decisions dated November 19, 2008 or later, a claimant has 180 days to file an appeal with the Board. 20 C.F.R. § 501.3(e) (2008). For Office decisions issued before November 19, 2008, a claimant had one year in which to file an appeal. See 20 C.F.R. § 501.3(d)(2).

From August 4 to September 10, 2004, appellant was treated by Dr. Jay Hammett, Jr., a Board-certified orthopedic surgeon, who diagnosed right shoulder pain, probably bicep tendon strain, recommended steroid injections and returned appellant to light-duty work. A magnetic resonance imaging scan of the right shoulder dated September 15, 2004 revealed a complete tear of the supraspinatus tendon, arthritic changes with osteophyte formation. Appellant came under the treatment of Dr. Paul Naylor from September 21, 2004 to August 14, 2005, who diagnosed a right rotator cuff tear and acromioclavicular joint arthritis. On October 24, 2004 Dr. Naylor performed a right shoulder arthroscopy with open repair of a large rotator cuff tear. In reports dated November 3, 2004 to August 14, 2005, he advised that appellant was progressing well and diagnosed a stable right shoulder.

On November 7, 2005 appellant requested a schedule award.

In a decision dated May 11, 2006, the Office granted appellant a schedule award for five percent impairment of the right upper extremity. The period of the award was from March 28 to July 15, 2005.

On April 22, 2009 appellant requested an additional schedule award claiming impairment to his right hand. He submitted an electromyogram dated January 27, 2009, which revealed right brachial plexopathy with involvement of either the lower trunk or medial cord, inconclusive with regard to carpal tunnel syndrome, left ulnar nerve mononeuropathy and mild sensorimotor peripheral neuropathy of uncertain etiology.

In a letter dated May 26, 2009, the Office advised appellant to follow the appeal rights attached to the May 11, 2006 decision if he wanted an additional schedule award.

On July 15, 2009 appellant requested an oral hearing. He indicated that he underwent a right carpal tunnel release on April 24, 2006, which did not improve his symptoms or increase his grip strength. Appellant asserted that he had more than five percent impairment to his right arm. He submitted a February 3, 2009 report from Dr. Alan L. Whiton, a Board-certified orthopedic surgeon, who advised that appellant did not have the classical signs or symptoms of carpal tunnel syndrome or median nerve entrapment and did not have impairment attributable to carpal tunnel syndrome.

In a decision dated August 14, 2009, the Office denied appellant's request for an oral hearing. It found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved, and that the request was further denied as the issues could be addressed by requesting reconsideration before the Office and submitting evidence not previously considered.

LEGAL PRECEDENT

Section 8124(b)(1) of the Federal Employees' Compensation Act 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 claim before a representative of the Secretary."² Section 10.617 and 10.618 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an

² 5 U.S.C. § 8124(b)(1).

oral hearing or a review of the written record by a representative of the Secretary.³ 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, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.⁴ The Office's procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).⁵

ANALYSIS

Appellant requested a hearing before the Office's Branch of Hearings and Review in a letter dated July 15, 2009. As the request was submitted more than 30 days following issuance of the May 11, 2006 decision, it was untimely filed.

The Office considered the matter in relation to the issue involved and found that additional evidence could be submitted with a request for reconsideration. It has administrative discretion in determining whether a hearing should be granted even though the request is untimely. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.⁶ The Board finds that the Office did not abuse its discretion in determining that appellant could further pursue the matter through the reconsideration process and the submissions of medical evidence relevant to his claim of greater impairment.

On appeal appellant asserts that he could not timely appeal the initial schedule award decision because he was not aware of additional impairment of his right shoulder until Dr. Whiton issued his report in 2009. The Board notes that appellant is not precluded from pursuing a claim for increased impairment before the Office.⁷ Rather, appellant is not entitled to an oral hearing with regard to the May 11, 2006 decision because it was not timely filed.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing as untimely.

³ 20 C.F.R. §§ 10.616, 10.617.

⁴ *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

⁵ See *R.T.*, 60 ECAB ____ (Docket No. 08-408, issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

⁶ *Samuel R. Johnson*, 51 ECAB 612 (2000).

⁷ See *Linda T. Brown*, 51 ECAB 115 (1999) (a claimant may seek an increased schedule award if the medical evidence establishes that progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated); see also *A.A.*, 59 ECAB ____ (Docket No. 08-951, issued September 22, 2008).

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 2, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board