

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL T. DORAK and DEPARTMENT OF THE NAVY,  
NAVAL AIR PROPULSION CENTER, Trenton, N.J.

*Docket No. 96-2491; Submitted on the Record;  
Issued August 27, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to section 8124(b) of the Federal Employees' Compensation Act; and (2) whether appellant has established greater than a 30 percent permanent impairment of his left lower extremity for which he received a schedule award.

On April 30, 1991 appellant, then a 38-year-old test plant operating mechanic, filed a traumatic injury claim, alleging that he injured his left leg and knee when the pressure from a hydraulic line pump hit him in the leg while he was adjusting it. The Office accepted appellant's claim for contusions to the left thigh and knee and synovitis. On May 17, 1991 appellant returned to light-duty work.

On August 31, 1993 appellant filed a claim for a schedule award. In a decision dated February 15, 1994, appellant was granted a scheduled award for a 30 percent permanent impairment to his left leg for 86.4 weeks of compensation from November 5, 1993 to July 2, 1995. On January 12, 1995 appellant underwent surgery including a partial lateral meniscectomy, chondroplasty of the patella and lateral retinacular release of the left knee. The Office approved appellant's request for surgery and his claim for recurrence of total disability from January 12 to February 13, 1995.<sup>1</sup>

On June 26, 1995 appellant filed a claim for an additional schedule award. In a letter dated December 12, 1995, the Office advised appellant that the evidence submitted was insufficient to increase his schedule award and that additional medical documentation was needed. In a letter decision dated June 14, 1996, the Office denied appellant's claim for an additional schedule award.

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<sup>1</sup> Appellant resigned from his position with employing establishment effective April 17, 1995, and he went on leave without pay effective July 25, 1994. Appellant indicated that he began employment with a private company on July 11, 1994.

By letter dated June 18, 1996, appellant filed a request for a hearing before an Office hearing representative. In a decision dated July 24, 1996, the Office denied appellant's request as untimely filed.

The Board has carefully reviewed the entire record on appeal and finds that the Office improperly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the 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."<sup>2</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitations for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>3</sup>

In the present case, the Office issued its decision denying appellant's claim for an increased schedule award on June 14, 1996. The Office indicated that it had reviewed the medical evidence submitted and that no increase in the schedule award previously awarded was warranted. The Office advised appellant that if he disagreed with this decision he "should follow any one of the courses of action outlined in the Appeal Rights" attached to the February 15, 1994 decision. While the Office denied appellant's request for a hearing as untimely from the date of its February 15, 1994 decision, in this case appellant had filed a claim for an additional schedule award with supporting medical evidence and the April 19, 1996 report from his attending physician, Dr. Humberto A. Revollo. The Office referred this report to an Office medical adviser who, on April 19, 1996 opined that appellant had a 10 percent impairment of his left lower extremity. Consequently, the letter decision dated June 14, 1996 constitutes a merit decision as it found the medical evidence did not indicate any increase in impairment over the 30 percent previously awarded. Therefore, appellant is entitled to a hearing as a matter of right since his request for a hearing dated June 18, 1996 was within 30 days of the June 14, 1996 decision. This case will be remanded for a hearing on the merits.<sup>4</sup>

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<sup>2</sup> 5 U.S.C. § 8124(b)(1).

<sup>3</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

<sup>4</sup> In view of the disposition on appeal, any issues concerning the denial of appellant's claim for an increase in his schedule award cannot be addressed at this time. However, the Board notes that a review of the record indicates that the Office's denial of the increase in appellant's schedule award was based on a review of an x-ray that predated appellant's January 12, 1995 surgery although appellant's physician had indicated that measurements taken during the surgery formed the basis for his opinion that there was additional disability.

The decision of the Office of Workers' Compensation Programs dated July 24, 1996 is hereby set aside, and this case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.  
August 27, 1998

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member