United States Department of Labor
Employees' Compensation Appeals Board

RITA T. HICKMAN, Appellant	)	
and	)	**Docket No. 05-240**
	)	**Issued: April 18, 2005**
DEPARTMENT OF VETERANS AFFAIRS, OUTPATIENT CENTER, Chattanooga, TN, Employer	)	

Appearances:
Rita T. Hickman, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 3, 2004 appellant filed a timely appeal of a schedule award decision of the Office of Workers' Compensation Programs dated August 9, 2004. The record also contains an October 22, 2004 decision finding that appellant's request for reconsideration was untimely with respect to a July 19, 2002 termination decision and that it failed to demonstrate clear evidence of error. Pursuant to 20 C.F.R. § 501.3, the Board's jurisdiction is limited to final decisions issued within one year of the filing of the appeal and therefore the Board has jurisdiction to review the October 22 and August 9, 2004 decisions on this appeal.

ISSUES

The issues are: (1) whether appellant has more than a three percent permanent impairment to her right upper extremity, for which she received a schedule award on August 9, 2004; and (2) whether the Office properly determined that appellant's October 4, 2004 request for reconsideration was untimely with respect to a July 19, 2002 termination decision and that it failed to show clear evidence of error.

FACTUAL HISTORY

On June 12, 2000 appellant, then a 41-year-old dental assistant, filed an occupational disease claim for compensation (Form CA-2). Appellant noted that she had pain and numbness in her right hand and arm. On December 21, 2000 the Office accepted the claim for carpal tunnel syndrome. Appellant underwent right carpal tunnel release surgery on March 13, 2001.

By report dated August 6, 2001, Dr. Mark Sumida, an attending orthopedic surgeon, noted that appellant had developed tremors in both wrists, right more significant than the left. He stated that he did not think it was related to the carpal tunnel release, and that appellant should have recovered from the carpal tunnel. Dr. Sumida indicated that appellant was working light duty but she could not yet return to her date-of-injury position because of the tremors. In response to inquiry from the Office on March 18, 2002, Dr. Sumida stated that appellant did not have any work-related residuals, he noted that appellant continued to have bilateral tremors that were unrelated to the carpal tunnel syndrome.

The Office advised appellant by letter dated April 1, 2002 that it proposed to terminate her compensation. By decision dated July 19, 2002, the Office terminated compensation benefits effective July 18, 2002.

In a report dated March 4, 2004, Dr. Sumida noted that appellant had a functional capacity evaluation in October 2003. Dr. Sumida indicated that appellant had reduced grip strength in the right hand. With respect to permanent impairment, he identified Table 16-15 and reported that the maximum impairment for a motor deficit in the median nerve (below midforearm) was 10 percent. Dr. Sumida then graded the impairment as Grade 4 under Table 16-11 for complete active range of motion against gravity with some resistance. Grade 4 provides up to 25 percent of the maximum, and therefore Dr. Sumida opined that appellant had a 3 percent right arm impairment.

An Office medical adviser reviewed Dr. Sumida's report and opined, in a July 26, 2004 report, that appellant had a three percent right upper extremity impairment pursuant to Tables 16-15 and 16-11. The medical adviser found that the date of maximum medical improvement was March 4, 2004. By decision dated August 9, 2004, the Office issued a schedule award for a three percent permanent impairment to her right upper extremity. The period of the award was 9.56 weeks commencing March 4, 2004.

In a letter dated October 4, 2004, appellant stated that she was requesting reconsideration of the August 9, 2004 decision. Appellant noted that the decision stated that, after the award ended, her entitlement to compensation would be based solely on disability for work from the accepted injury, and she may claim compensation by submitting evidence showing that her employment injury prevented her from earning wages she was earning on the date of injury. She submitted a letter from the employing establishment dated February 12, 2004 indicating that her employment would be terminated because of her physical inability to perform the dental assistant position.

By decision dated October 22, 2004, the Office determined that appellant's arguments related to the termination of her compensation by decision dated July 19, 2002. The Office

found that the October 4, 2004 reconsideration request was untimely with respect to the July 19, 2002 decision, and that she did not show clear evidence of error in the decision. The Office therefore denied the request for reconsideration without reviewing the merits of the termination issue.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[1] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.[2] As of February 1, 2001, the fifth edition of the A.M.A., *Guides* was to be used to calculate schedule awards.[3]

ANALYSIS -- ISSUE 1

The attending physician, Dr. Sumida, indicated in his March 4, 2004 report that appellant had a loss of right hand grip strength. He opined that appellant had a three percent right arm impairment based on motor deficit in the median nerve.[4] Table 16-15 provides a maximum of 10 percent for motor deficit impairment to the median nerve below the forearm.[5] The A.M.A., *Guides* indicate that, once the nerve is identified, the impairment is graded under Table 16-11.[6] Dr. Sumida graded the impairment at Grade 4, for complete active range of motion against gravity with some resistance. A Grade 4 impairment is 1 to 25 percent of the maximum impairment for the identified nerve; Dr. Sumida opined that appellant had 25 percent of the maximum 10 percent, or 2.5 percent, which is rounded to 3 percent.[7] An Office medical adviser concurred with the impairment rating.

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[1] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[2] *A. George Lampo*, 45 ECAB 441 (1994).

[3] FECA Bulletin No. 01-05 (issued January 29, 2001).

[4] The Board notes that the A.M.A., *Guides* provide impairment ratings based on measurable loss of grip strength with a dynamometer; however, this method is used only in the rare case that the impairing factor is not adequately considered by other methods. A.M.A., *Guides* 508. The A.M.A., *Guides* note that strength measurements are functional tests influenced by subjective factors that are difficult to control, and impairment ratings based on objective anatomic findings take precedence.

[5] A.M.A., *Guides* 492, Table 16-15.

[6] *Id.* at 484, Table 16-11.

[7] Office procedures state that the percentage of impairment is rounded to the nearest whole point. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3 (June 2003).

There is no probative medical evidence indicating a greater impairment than the three percent awarded. Both Dr. Sumida and the Office medical adviser applied the A.M.A., *Guides* and provided a reasoned medical opinion as to the degree of permanent impairment. Accordingly, the Board finds that the Office properly issued a schedule award for a three percent permanent impairment to the right arm in this case. The Board notes that the number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the arm, the maximum number of weeks of compensation is 312 weeks. Since appellant's permanent impairment was 3 percent, she is entitled to 3 percent of 312 weeks, or 9.36 weeks of compensation. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.[8] In this case, the Office medical adviser properly concluded that the date of maximum medical improvement was the date of examination by Dr. Sumida. The award therefore properly runs for 9.36 weeks commencing March 4, 2004.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[9] does not entitle a claimant to a review of an Office decision as a matter of right.[10] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[11] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[12] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[13] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[14]

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[15] In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set

[8] *Albert Valverde*, 36 ECAB 233, 237 (1984).

[9] 5 U.S.C. § 8128(a).

[10] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[11] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[12] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

[13] 20 C.F.R. § 10.607(a).

[14] *See Leon D. Faidley, Jr.*, *supra* note 10.

[15] *Leonard E. Redway*, 28 ECAB 242 (1977).

forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[16]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[17] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[18] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[19] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[20] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[21] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[22] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office improperly denied merit review in the face of such evidence.[23]

ANALYSIS -- ISSUE 2

Although the October 4, 2004 letter referred to the August 9, 2004 decision, the arguments raised by appellant appear to relate to continuing entitlement to disability for wage loss. Appellant noted that the schedule award stated that she could be entitled to compensation after the schedule award ended if the evidence showed that the employment injury caused disability for work. She argued that she was disabled and submitted evidence that the employing establishment had terminated her employment because she could not work as a dental assistant.

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[17] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[18] *See Leona N. Travis*, 43 ECAB 227 (1991).

[19] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[20] *See Leona N. Travis*, *supra* note 18.

[21] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[22] *Leon D. Faidley, Jr.*, *supra* note 10.

[23] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied.*, 41 ECAB 458 (1990).

The Office interpreted appellant's letter as a request for reconsideration of the July 19, 2002 termination of compensation benefits decision.[24] Since the October 4, 2004 letter was dated more than one year after the July 19, 2002, it is untimely with respect to that decision.

In the July 19, 1992 decision, the Office determined that appellant no longer had residuals of the accepted carpal tunnel syndrome condition. Appellant did not submit any evidence showing clear evidence of error in the July 19, 2002 decision. On reconsideration she submitted evidence that a position was no longer available to her at the employing establishment, but the underlying disability issue is whether there is disability causally related to the accepted employment injury. The medical evidence from Dr. Sumida had indicated that appellant had bilateral tremors that were not related to her employment injury. Appellant did not submit any evidence on reconsideration regarding disability causally related to the accepted carpal tunnel syndrome. In the absence of evidence showing clear evidence of error, the Office properly denied the request for reconsideration.

CONCLUSION

The Board finds that the evidence of record does not establish more than a three percent permanent impairment to the right arm, for which appellant received a schedule award on August 9, 2004. The Board further finds that appellant's October 4, 2004 letter was untimely with respect to a July 19, 2002 termination decision and it failed to show clear evidence of error in the decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 22 and August 9, 2004 are affirmed.

Issued: April 18, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[24] The Board reviewed the August 9, 2004 schedule award decision on this appeal and appellant has a year following a merit decision to request reconsideration before the Office. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (January 2004).