United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 08-824**
	)	**Issued: January 5, 2009**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Cleveland, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 24, 2008 appellant filed a timely appeal from a March 27, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration, and a January 2, 2008 nonmerit decision of the Office denying her request for reconsideration on the grounds that it was not timely filed and did not present clear evidence of error. She also appealed a January 14, 2008 decision of the Office regarding a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award claim and over the nonmerit denials of reconsideration.

ISSUES

The issues are: (1) whether the Office properly denied appellant's February 27, 2007 request for reconsideration; (2) whether the Office properly denied appellant's November 10, 2007 request for reconsideration on the grounds that it was not timely filed and did not establish clear evidence of error; and (3) whether appellant has established that she sustained more than a nine percent impairment of the right upper extremity, for which she received a schedule award.

FACTUAL HISTORY

The Office accepted that, on March 23, 2003, appellant, then a 48-year-old mail handler, sustained a right shoulder contusion and aggravation of a right rotator cuff tear when struck by falling mail baskets.[1] It also accepted that on April 16, 2003 appellant sustained a lumbar strain while trying to move a wire cage.[2] Appellant performed full-time limited duty from May through August 2003. She worked part-time limited duty in 2004.

Dr. Antony M. George, an attending physician Board-certified in public health and general preventive medicine, treated appellant from April 2003 through March 2005 for ongoing lumbar and right shoulder pain and restricted motion.[3] He noted work restrictions.

The Office obtained a second opinion examination from Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, who submitted August 31, 2004 and January 4, 2005 reports noting limited right shoulder motion and congenital lumbar anomalies. Dr. Kaffen opined that appellant had residuals of the right shoulder injury but that the lumbar strain had resolved. He stated that appellant could work full-time limited duty.

The Office found a conflict of medical opinion between Dr. George, for appellant, and Dr. Kaffen, for the government, regarding the duration of the accepted conditions and related work restrictions. To resolve the conflict, it selected Dr. Robert H. Anscheutz, a Board-certified orthopedic surgeon, as impartial medical examiner. A copy of the medical record and a statement of accepted facts were provided for the physician's review.[4]

In a March 10, 2005 report, Dr. Anscheutz reviewed the medical record and statement of accepted facts. On examination, he noted objective signs of impingement syndrome and tendinitis in the right shoulder. Appellant had a nonoccupational right-sided sciatica related to congenital stenosis. Dr. Anschuetz opined that the accepted lumbar strain had resolved. In an April 4, 2005 supplemental report, he stated that appellant could work six hours a day with restrictions and gradually resume full-time work.

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[1] By decisions dated May 30 and August 22, 2003, the Office denied continuation of pay as appellant did not file her claim for the March 23, 2003 injury within 30 days.

[2] The claim currently on appeal before the Board is File No. xxxxxx310, accepted for March 23 and April 16, 2003 lumbar strains. On June 25, 2004 the Office designated File No. xxxxxx310 as the master file number for appellant's claims under File Nos. xxxxxx311, xxxxxx440, xxxxxx700, xxxxxx044 and xxxxxx081. File No. xxxxxx700 pertains to denied claims for April 6, 1992, March 25, 1997 and August 3, 1999 lumbar strains. File No. xxxxxx044 was combined with File No. xxxxxx440 and concerns a July 25, 1995 lumbar strain accepted for medical expenses only. File No. xxxxxx311 was accepted for a March 23, 2003 right shoulder strain and aggravation of right rotator cuff tear syndrome. File No. xxxxxx081 was accepted for a right arm contusion sustained on March 23, 2003.

[3] A July 3, 2003 lumbar magnetic resonance imaging (MRI) scan showed mild degeneration at L3-4. An MRI scan of the right shoulder performed the same day showed abnormalities of the supraspinatus tendon.

[4] On December 7, 2004 appellant claimed a schedule award for lumbar impairment. There is no decision of record directly adjudicating this claim.

By notice dated June 17, 2005, the Office proposed to terminate appellant's compensation and medical benefits for the accepted lumbar strain. It found that Dr. Anscheutz's opinion as impartial medical examiner was sufficient to establish that the lumbar strain ceased without residuals.

On July 11, 2005 appellant claimed a schedule award.[5]

In a July 18, 2005 report, Dr. Tim Nice, an attending Board-certified orthopedic surgeon, opined that appellant could work six hours a day light duty. He submitted March and April 2006 chart notes describing right arm and low back symptoms. In an April 17, 2006 report, Dr. Nice assessed whole person impairment due to lumbar spine conditions with no involvement of the lower extremities.

By decision dated May 19, 2006, the Office terminated compensation and medical benefits for the accepted lumbar strain, effective that day. Appellant remained entitled to monetary compensation and medical benefits for the accepted right shoulder conditions.

In a June 5, 2006 letter, appellant requested reconsideration. By decision dated August 7, 2006, the Office denied reconsideration on the grounds that appellant's June 5, 2006 letter did not raise substantive legal questions or include new, relevant evidence.

In an August 21, 2006 report, Dr. Nice performed a schedule award assessment for the right upper extremity. He found normal ranges of internal and external rotation of the right shoulder. Abduction and forward flexion were both limited to 90 degrees. Referring to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*), Dr. Nice noted that according to Table 16-43[6] appellant had a 9 percent impairment of the right upper extremity, 4 percent for limited abduction and adduction and 5 percent for limited flexion.

In a September 9, 2006 letter, appellant requested reconsideration, asserting that the accepted lumbar strain had not resolved. She submitted July 2006 physical therapy notes. By decision dated October 11, 2006, the Office denied reconsideration on the grounds that appellant's letter and physical therapy notes did not raise substantive legal questions or constitute new, relevant evidence.

Appellant again requested reconsideration on February 27, 2007, asserting the lumbar strain had not resolved. She submitted a duplicate of Dr. Nice's April 17, 2006 report. The Office denied reconsideration by decision dated March 27, 2007, finding that appellant's letter and the duplicate report did not raise substantive legal questions or constitute new, relevant evidence.

In a letter dated and postmarked November 10, 2007, appellant requested reconsideration of the May 19, 2006 decision. She asserted entitlement to a schedule award for lumbar

[5] Appellant filed duplicate schedule award claims on August 17, 2006 and September 27, 2007.

[6] Figure 16-43, page 477 of the fifth edition of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Abduction and Adduction of Shoulder."

impairment. Appellant submitted June 27, 2006, September 18 and October 16, 2007 reports from Dr. Nice reiterating previous schedule award findings. She also submitted duplicates of Dr. Nice's reports.

The Office referred Dr. Nice's schedule award rating to an Office medical adviser for review. In a November 14, 2007 report, an Office medical adviser found that appellant reached maximum medical improvement on August 21, 2006. The medical adviser opined that shoulder flexion limited to 90 degrees equaled five percent upper extremity impairment according to Table 16-40, page 476[7] of the A.M.A., *Guides*. Shoulder abduction limited to 90 degrees equaled four percent upper extremity impairment according to Table 16-43. The medical adviser combined the five and four percent impairments to equal a nine percent impairment of the right upper extremity.

By decision dated January 2, 2008, the Office denied appellant's November 10, 2007 request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

By decision dated January 14, 2008, the Office granted appellant a schedule award for a nine percent impairment of the right upper extremity. The period of the award ran from August 21, 2006 to March 5, 2007.

LEGAL PRECEDENT -- ISSUE 1

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[8] section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[9] Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[10]

In support of a request for reconsideration, appellant is not required to submit all evidence which may be necessary to discharge her burden of proof.[11] She need only submit relevant, pertinent evidence not previously considered by the Office.[12] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the

[7] Figure 16-40, page 476 of the fifth edition of the A.M.A., *Guides* is entitled "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Flexion and Extension of Shoulder."

[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.606(b)(2).

[10] 20 C.F.R. § 10.608(b). *See also T.E.*., 59 ECAB ___ (Docket No. 07-2227, issued March 19, 2008).

[11] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[12] *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[13]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbar strain. On May 19, 2006 it terminated appellant's compensation and medical benefits regarding an accepted lumbar condition. Appellant requested reconsideration by a February 27, 2007 letter. She asserted that the accepted lumbar strain remained symptomatic. Appellant submitted a copy of Dr. Nice's April 17, 2006 report previously of record.

Appellant's February 27, 2007 letter is repetitive of her prior arguments which were previously rejected. Dr. Nice's April 17, 2006 report was considered by the Office prior to issuance of the May 19, 2006 decision. Evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.[14] Thus, appellant's letter and the duplicate medical report do not require reopening the record for further merit review.

Appellant has not established that the Office improperly refused to reopen her claim for a review of the merits under section 8128(a) of the Act. She did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act[15] does not entitle a claimant to a review of an Office decision as a matter of right.[16] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[17] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.[18] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[19]

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[13] *Annette Louise*, 54 ECAB 783 (2003).

[14] *Denis M. Dupor*, 51 ECAB 482 (2000).

[15] 5 U.S.C. § 8128(a).

[16] *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

[17] *Thankamma Mathews*, *id*.; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

[18] 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[19] 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 16; *Jesus D. Sanchez*, *supra* note 17.

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulation.[20] Office regulation states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.[21]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[22] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[23] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[24] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[25] 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.[26]

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's decision.[27] The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[28]

ANALYSIS -- ISSUE 2

In its January 2, 2008 decision, the Office properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on May 19, 2006. Appellant's request for reconsideration was postmarked November 10, 2007, more than one year after May 19, 2006. Accordingly, her request for reconsideration was not timely filed.

[20] *Thankamma Mathews, supra* note 16.

[21] 20 C.F.R. § 10.607(b).

[22] *Thankamma Mathews, supra* note 16.

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

[24] *Jesus D. Sanchez, supra* note 17.

[25] *Leona N. Travis, supra* note 23.

[26] *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[27] *James R. Mirra*, 56 ECAB 738 (2005).

[28] *Gregory Griffin, supra* note 18

The Board finds that appellant's November 10, 2007 letter does not raise a substantial question as to whether the Office's May 19, 2006 decision was in error or *prima facie* shift the weight of the evidence in her favor. Therefore, it is insufficient to establish clear evidence of error. The medical evidence submitted in support of appellant's request for reconsideration is also insufficient to establish evidence of error by the Office. Dr. Nice's April 17, 2006 report asserts that appellant was entitled to "whole person" impairment for lumbar conditions in the absence of lower extremity involvement. The Act does not provide for schedule awards for the spine in the absence of extremity involvement.[29] Also, there is no provision under the Act for whole person impairments.[30] Dr. Nice's report is not the type of positive, precise, explicit evidence that would shift the weight of the evidence in appellant's favor. Therefore, the evidence accompanying the November 10, 2007 letter is insufficient to raise a substantial question as to the correctness of the Office's May 19, 2006 decision.

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in her favor and raise a substantial question as to the correctness of the Office's decision. Consequently, the Office properly denied appellant's reconsideration request as her request does not establish clear evidence of error.

LEGAL PRECEDENT -- ISSUE 3

The schedule award provisions of the Act[31] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a mater which rests in the sound discretion of the Office. 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. The A.M.A., *Guides* has been adopted by the Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[32] As of February 1, 2001, schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*, published in 2000.[33]

The standards for evaluation of the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.[34] Chapter 16

[29] The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19). The 1966 amendments to the Act provided for a schedule award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Thus, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine. *Tommy R. Martin*, 56 ECAB 273 (2005).

[30] *Marilyn S. Freeland*, 57 ECAB 607 (2006).

[31] 5 U.S.C. §§ 8101-8193.

[32] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[33] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[34] *Tammy L. Meehan*, 53 ECAB 229 (2001).

of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedures for determining impairments of the upper extremities due to pain, discomfort, loss of sensation, or loss of strength.[35] Multiple impairments of one extremity are present, such as those of the hand, wrist, elbow and shoulder, are first expressed individually as upper extremity impairments and then combined to determine the total upper extremity impairment.[36] It is well established that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is included.[37]

ANALYSIS -- ISSUE 3

The Office accepted that appellant sustained a right arm contusion and aggravation of a right rotator cuff tear. Appellant claimed a schedule award on July 1, 2005. She submitted an August 21, 2006 schedule award evaluation from Dr. Nice, an attending Board-certified orthopedic surgeon, who opined on August 21, 2006 that, according to Table 16-43 of the A.M.A., *Guides*, appellant had a nine percent impairment of the right upper extremity due to restricted shoulder motion, four percent for limited abduction and an additional five percent for limited flexion. In a November 14, 2007 report, an Office medical adviser concurred with Dr. Nice's rating.

On January 14, 2008 the Office granted a schedule award for a nine percent impairment of the right upper extremity, based on Dr. Nice's findings as interpreted by the Office medical adviser. The Board finds that the schedule award was based on an accurate application of the appropriate tables and grading schemes of the A.M.A., *Guides* to Dr. Nice's clinical findings. Appellant did not submit medical evidence demonstrating a greater percentage of impairment or otherwise establish that the rating was in error. Therefore, she has not established that she sustained more than the nine percent impairment of the right upper extremity for which she received the schedule award.

CONCLUSION

The Board finds that the Office properly denied appellant's February 27, 2007 request for reconsideration. The Board further finds that appellant's November 10, 2007 request for reconsideration was untimely filed and failed to show clear evidence of error. The Board further finds that appellant has not established that she sustained more than a nine percent impairment of the right upper extremity, for which she received a schedule award.

[35] A.M.A. *Guides* 433-521, "The Upper Extremities," Chapter 16 (5th ed. 2001).

[36] *Id*. at 438, para. 16.1c at 481, 16.5b. *See also Cristeen Falls*, 55 ECAB 420 (2004).

[37] *Peter C. Belkind*, 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 14 and 2, 2008 and March 27, 2007 are affirmed.

Issued: January 5, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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