

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LYNDA A. WHATLEY and U.S. POSTAL SERVICE,
DOTHAN POST OFFICE, Dothan, AL

*Docket No. 03-2163; Submitted on the Record;
Issued February 11, 2004*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

On February 16, 2000 appellant, then a 50-year-old postmaster, filed an occupational disease claim alleging that, on March 13, 1998, she first realized that her carpal tunnel syndrome was caused by factors of her federal employment. Appellant stated that she was engaged in constant repetitive motion in sorting and culling mail. She further stated that the pain became progressively worse by the end of each day of repetitive motion and it would wake her up at night.¹

By letter dated March 14, 2000, the Office accepted appellant's claim for carpal tunnel syndrome and disc disease with myelopathy and authorized carpal tunnel release.

On July 6, 2000 appellant filed a claim for a schedule award.

By letter dated July 21, 2000, the Office requested that Dr. David C. Rehak, a Board-certified orthopedic surgeon and appellant's treating physician, determine the extent of appellant's impairment based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Rehak submitted an August 15, 2000 report, finding a four percent impairment of the left arm and a two percent impairment of the right arm.

In an August 31, 2000 letter to Dr. Rehak, the Office noted that appellant had undergone surgery for her bilateral carpal tunnel syndrome and that she had returned to light-duty work on a

¹ An Office telephone memorandum dated September 27, 2000, revealed that appellant stopped working for the employing establishment and that she had applied for disability retirement benefits.

full-time basis. The Office asked Dr. Rehak to provide appellant's restrictions and whether they were permanent. The Office also asked him to indicate whether appellant had reached maximum medical improvement and the extent of her impairment based on the fourth edition of the A.M.A., *Guides*.

On September 14, 2000 Dr. Rehak responded that appellant had no restrictions and that she had reached maximum medical improvement. He submitted an August 15, 2000 report, finding that appellant had a four percent permanent impairment of the left upper extremity and a two percent permanent impairment of the right upper extremity, totaling a three percent permanent impairment of the whole person.

By decision dated September 27, 2000, the Office terminated appellant's compensation based on Dr. Rehak's September 14, 2000 letter. Appellant requested reconsideration and submitted medical evidence in support thereof.

In a decision dated November 13, 2000, the Office vacated the September 27, 2000 decision on the grounds that appellant's compensation was improperly terminated and her entitlement to a schedule award was not addressed. The Office noted that a decision regarding appellant's schedule award would be issued.

By decision dated December 19, 2000, the Office terminated appellant's compensation for wage-loss compensation on the grounds that Dr. Rehak had released appellant to return to work with no restrictions. The Office advised appellant that her case would remain open for medical treatment.

In a decision dated December 26, 2000, the Office granted appellant a schedule award for a four percent impairment of the left arm and a two percent impairment of the right arm. In a February 5, 2001 letter, appellant requested reconsideration accompanied by medical evidence, which addressed her cervical spine and carpal tunnel syndrome.

On May 3, 2001 an Office medical adviser reviewed the medical records and determined that appellant had a 20 percent impairment of each upper extremity based on the fourth edition of the A.M.A., *Guides*, which constituted an additional 16 percent impairment of the left arm and an 18 percent impairment of the right arm. The Office medical adviser also determined that appellant reached maximum medical improvement on January 17, 2001.

On June 8, 2001 a second Office medical adviser reviewed appellant's medical records and agreed with the findings of the first Office medical adviser.

By decision dated June 14, 2001, the Office granted appellant a schedule award for a 16 percent impairment of the left arm and an 18 percent permanent impairment of the right arm.

In a June 21, 2001 letter, appellant requested a lump sum payment of her schedule award. By letter dated August 17, 2001, the Office advised appellant that she would receive a lump sum payment in the amount of \$47,162.66 on August 31, 2001.

By letter dated April 7, 2003, appellant requested reconsideration of the Office's June 14, 2001 decision. Appellant stated that she was unable to work and her condition had deteriorated.

She also stated that “my impairment rating has changed drastically since Dr. Rehak’s evaluation, which the decision was based on. You have the up-to-date medical information in your files.” Appellant’s request was accompanied by copies of her previous requests for reconsideration and the Office’s previous decisions. Appellant did not submit any medical evidence with her request for reconsideration; however, the record contained such evidence that was submitted after the Office’s June 14, 2001 decision and prior to appellant’s April 7, 2003 request for reconsideration.

In a decision dated May 13, 2003, the Office denied appellant’s request for a merit review of the claim on the grounds that it was not timely filed within the one-year time limitation and failed to demonstrate clear evidence of error.²

The Board finds that the Office improperly found that appellant’s request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

The Board’s jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.³ As appellant filed her appeal with the Board on August 26, 2003 the only decision properly before the Board is the Office’s May 13, 2003 decision denying appellant’s request for reconsideration as untimely filed and failing to demonstrate clear evidence of error.

In this case, appellant used the term “reconsideration,” but the evidence submitted clearly concerns the worsening of appellant’s upper extremity conditions after the Office’s June 14, 2001 schedule award decision. The evidence does not address appellant’s condition in June 2001 or otherwise attempt to show error in the prior decision. A claimant may seek an increased schedule award if the evidence establishes that she sustained an increased impairment at a later date causally related to her employment injury.⁴

The medical treatment notes, reports and prescriptions of Dr. Robert F. Allen, a neurologist, noted appellant’s increased symptoms in her neck, right hand, forearm and her disability for work.

² The Board notes that, subsequent to the Office’s May 13, 2003 decision, the Office received additional evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952); 20 C.F.R. § 501.2(c).

³ 20 C.F.R. §§ 501.2(c); 501.3(d)(2); *see John Reese*, 49 ECAB 397, 399 (1998).

⁴ *Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reddy*, 45 ECAB 488 (1994); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.7(b) (March 1995). This section states that claims for increased schedule awards may be based on incorrect calculation of the original award or new exposure. To the extent that a claimant is asserting that the original award was erroneous based on her medical condition at that time, this would be a request for reconsideration. A claim for an increased schedule award may be based on new exposure or on the situation presented here: medical evidence indicating the progression of an employment-related condition, without new exposure to employment factors, resulting in a greater permanent impairment than previously calculated.

The December 20, 2001 report of Dr. Sibley N. Turner, a Board-certified radiologist, and the February 5, 2003 report of Dr. Ricardo Syklawer, a Board-certified radiologist, provided their findings on magnetic resonance imaging scan, which included multilevel disc desiccation and probable hemangioma at T10.

The reports of Dr. Edmund G. LaCour, a Board-certified internist, dated August 21, September 11 and October 3, 2001 and January 3, April 6 and September 11, 2002, indicated among other things, that appellant's hands ached; she had osteoarthritis of the hands and fibromyalgia.

Appellant has submitted medical evidence regarding an increased permanent impairment at a date subsequent to the prior schedule award decision. Thus, the case will be remanded to the Office for appropriate action.

The May 13, 2003 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
February 11, 2004

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member