

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

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**L.F., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Baltimore, MD, Employer**

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**Docket No. 07-1599  
Issued: December 12, 2007**

*Appearances:*  
*Scott B. Baron, Esq., for the appellant*  
*No appearance, for the Director*

Oral Argument November 7, 2007

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 30 2007 appellant filed a timely appeal of a May 3, 2007 decision of the Office of Workers' Compensation Programs which denied her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider and decide appeals from final decisions of the Office issued within one year of the filing of the appeal. As the most recent merit decision was issued on November 19, 2004, the Board does not have jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

**FACTUAL HISTORY**

The Office accepted that appellant sustained right shoulder impingement syndrome due to repetitive activities in her federal employment.<sup>1</sup> Appropriate compensation benefits were

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<sup>1</sup> Appellant, then a 52 year-old distribution clerk, filed an occupational disease claim on November 22, 2001.

paid. On July 29, 2004 appellant filed a claim for a schedule award but did not submit any medical evidence addressing permanent impairment to her right upper extremity. By decision dated November 19, 2004, the Office denied appellant's schedule award claim.

In an undated form received on November 20, 2006, appellant filed another claim for a schedule award for permanent impairment to her right shoulder. In an October 25, 2006 report, the Dr. G. Howard Bathon, an attending orthopedic surgeon, provided a review of appellant's right shoulder condition and findings on physical examination. He advised that appellant had reached maximum medical improvement and that she had 12 percent impairment of the right upper extremity, based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>2</sup> Dr. Bathon stated that the rating was derived based on loss of range of motion to her right shoulder of 12 percent and on 3 percent impairment for pain caused by the impingement syndrome, or a combined total of 15 percent impairment.

By letter dated December 6, 2006, the Office advised appellant that it had received her November 30, 2006 schedule award claim. It noted that her case was previously denied in the November 19, 2004 decision and that she had not exercised her appeal rights. By letter postmarked January 17, 2007, appellant requested reconsideration of the November 19, 2004 decision.

In a May 3, 2007 decision, the Office denied appellant's request finding that it was untimely filed and failed to establish clear evidence of error in the denial of her claim for a schedule award.

### **LEGAL PRECEDENT**

A claimant may seek an increased schedule award if the evidence establishes that she sustained increased impairment at a later date causally related to the accepted employment injury.<sup>3</sup> Even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award which is not subject to time limitations.<sup>4</sup> A proper claim for an increase in permanent impairment is not subject to time limitations or to the clear evidence of error standard.

### **ANALYSIS**

On November 19, 2004 the Office previously denied appellant's claim for a schedule award, noting that she did not submit any medical evidence addressing permanent impairment to her right shoulder due to her accepted claim for impingement syndrome. On November 20, 2006 appellant filed a schedule award claim and submitted the October 25, 2006 report of Dr. Bathon,

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<sup>2</sup> A.M.A. *Guides* (5<sup>th</sup> ed. 2001).

<sup>3</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7b (August 2002).

<sup>4</sup> See *Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reedy*, 45 ECAB 488 (1994).

who described impairment of the right upper extremity based on loss of range of motion to the shoulder and pain. However, on December 6, 2006, the Office erroneously advised appellant that she had not exercised her appeal rights following the November 19, 2004 decision. Following her request of January 17, 2007, the Office denied reconsideration on the grounds that her request was untimely and did not establish clear evidence of error.

This case is substantially similar to that of *Linda T. Brown*.<sup>5</sup> In *Brown*, the Office denied the employee's claim for a schedule award for impairment of her arms and legs in an August 2, 1995 decision. It found that the extent of her impairment was not ratable. By letter dated September 2, 1997, she requested reconsideration and submitted a new medical report from an attending physician who noted that her condition had stabilized and who estimated 25 percent impairment to her arms and legs. The Office denied reconsideration, finding the request to be untimely and failing to show clear evidence of error. On appeal, the Board set aside the Office's decision and remanded the case for a *de novo* decision which addressed the medical evidence submitted in support of the employee's claim of permanent impairment. It was noted that a claimant may seek a schedule award if the evidence establishes an increased impairment at a later date causally related to the employment injury. For this reason, the May 3, 2007 decision of the Office will be set aside. Appellant has clearly submitted new medical evidence in support of her claim of increased impairment due to her accepted right shoulder injury. The claim will be remanded for appropriate adjudication.

#### CONCLUSION

The Board finds that the Office improperly adjudicated appellant's claim for an increased schedule award as a request for reconsideration.

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<sup>5</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 3, 2007 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further action in conformance with this decision.

Issued: December 12, 2007  
Washington, DC

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

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

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