

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CINDY L. LOPEZ and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Oakland, CA

*Docket No. 99-2202; Submitted on the Record;
Issued March 6, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly refused to review the written record.

On March 6, 1995 appellant, then a 31-year-old mail processor, filed a claim for carpal tunnel syndrome and arm, neck and shoulder pain. The Office accepted that appellant's employment duties resulted in right and left carpal tunnel syndrome, and right trigger finger, lateral epicondylitis and shoulder impingement. Appellant stopped work on August 16, 1995 and underwent right carpal tunnel release surgery on October 2, 1995. After a period of leave buy-back, the Office began payment of compensation for temporary total disability.

Under the Office's vocational rehabilitation program, appellant began training for the position of surgical technician on May 21, 1997. On May 21, 1997 appellant filed a claim for a schedule award. On February 2, 1998 the Office issued a schedule award for a 28 percent permanent loss of use of the right arm and a 2 percent permanent loss of use of the left arm. This entitled appellant to 93.6 weeks of compensation, with the award being paid from February 1, 1998 to November 18, 1999.

In a letter dated February 18, 1998, the Office advised:

"You are receiving payment in schedule award (beginning [February 1, 1998]) for a 30 percent permanent impairment of the arms. Apparently, you are also entitled to compensation for all or part of the period of the award while you complete vocational rehabilitation. In order to honor your entitlement to both the schedule award and payment in compensation, your award will be interrupted on [March 1, 1998] and you will be restored to the periodic roll. The initial payment in schedule award for the period [February 1 to 28, 1998] will be restored following the termination of compensation (when vocational rehabilitation is complete)."

Appellant's classes ended on April 10, 1998. She then served in an externship and began working in an on-call position as a surgical technician on July 24, 1998. On October 12, 1998 appellant obtained a full-time position as an operating room technician.

In a letter dated March 15, 1999, appellant contended that, pursuant to the Office's February 19, 1998 letter, her schedule award should have begun in August 1998 when she became employed and continued 93.6 weeks until February 2000. In a letter dated April 16, 1999, the Office stated:

"The claims examiner sent you a part of the procedure manual to explain how payments were made for injured workers who are in an OWCP rehabilitation program. The manual indicates payments need to be at the compensation rate for total disability. Since the compensation rate for total disability is the same as the compensation rate for the schedule award, this requirement is satisfied. The manual indicates that a schedule award need not be interrupted to pay temporary total disability. That is why there was no reason to change your payment status to temporary total disability while you were in a rehabilitation status.

"If you wish to appeal the schedule award you must follow the instructions attached to the schedule award letter and write directly to the Employees' Compensation Appeals Board at their address in Washington, D.C."

By letter dated May 10, 1999, appellant contended that she should have been paid compensation for disability during her rehabilitation program and that the schedule award should have started in August 1998 and run for 93.6 weeks ending about June 2000. Appellant requested a review of the written record.

By decision dated June 7, 1999, the Office found that appellant's request for a review of the written record was not timely filed within 30 days of the Office's decision on February 2, 1998 and that the issue in the case could equally well be addressed by requesting reconsideration "and submitting evidence not previously considered which establishes that you are entitled to receive your schedule award in a manner different than that which is outlined in the Feb[ruary] 2, 1998 letter."

The Board finds that the Office properly refused to review the written record.

Section 8124 of the Federal Employees' Compensation Act provides that a claimant is entitled to a hearing before an Office hearing representative if the request is made within 30 days after the issuance of the Office's decision.¹ By regulation the Office has determined that a claimant is entitled to a review of the written record by an Office hearing representative under the same circumstances, *i.e.*, if the request is made within 30 days of the Office's decision.²

¹ 5 U.S.C. § 8124.

² 20 C.F.R. §§ 10.615, 10.616.

Appellant's request for a review of the written record was made on March 15, 1999, which was more than 30 days after the Office issued its most recent final decision on February 2, 1998. Therefore, appellant was not entitled to a hearing as a matter of right. Although there is no right to a review of the written record if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.³ The Office exercised its discretion by finding that the issue could be equally well addressed by requesting reconsideration and submitting additional evidence.

On appeal appellant states that she did not request a review of the written record within 30 days of the Office's February 2, 1998 schedule award because the Office's February 19, 1998 letter advised her that her schedule award would begin after her vocational rehabilitation program ended. While appellant is correct in stating that the Office did not do what it stated it would in its February 19, 1998 letter, as evidenced by its April 16, 1999 letter, the only way that the Board could review the Office's action of not converting appellant's schedule award to temporary total disability during her rehabilitation program is by treating the Office's April 16, 1999 letter as a final decision of the Office.⁴ The Office's regulations state that a decision "shall contain findings of fact and a statement of reasons. It is accompanied by information about the claimant's appeal rights."⁵

The Office's April 16, 1999 letter was not accompanied by information on appellant's appeal rights and did not contain findings of fact. Nor did the letter explain how the Office exercised its discretion to choose the beginning date of the payment of the schedule award in a situation where converting payment for disability into that for a schedule award was disadvantageous to appellant.⁶ Under these circumstances, the Office's April 16, 1999 letter is not a final decision and is, therefore, not reviewable by the Board.⁷

³ *Cora L. Falcon*, 43 ECAB 915 (1992).

⁴ The Board's regulations provide that an appeal must be filed within one year of the Office's final decision. As appellant's appeal was filed on June 29, 1999, the only Office decision over which the Board has jurisdiction is the Office's June 7, 1999 decision, denying appellant's request for a review of the written record.

⁵ 20 C.F.R. § 10.126.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7a(1) (March 1995) states that a date subsequent to the date of maximum medical improvement "may be chosen to start the award, however, if the [date of maximum improvement] falls within a period of compensable disability such that converting disability payments into a schedule award would be disadvantageous to the claimant." See *Wayne K. Brauer*, 35 ECAB 496 (1984) (The Board granted the Office's request to remand the case so that the Office could issue an appropriate decision to pay temporary total disability during a vocational training program and establish dates of interruption and resumption of the employee's schedule award.)

⁷ See *Asline Johnson*, 41 ECAB 438 (1990).

The June 7, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 6, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member