

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUNE B. TUCKER and DEPARTMENT OF THE AIR FORCE,
AIR LOGISTICS CENTER, TINKER AIR FORCE BASE, Okla.

*Docket No. 97-1275; Submitted on the Record;
Issued July 13, 1999*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration.

On December 14, 1994 appellant, then a 50-year-old aircraft mechanic, filed an occupational disease claim alleging that she sustained an injury to her hands causally related to repetitive motion in the use of hand tools. She indicated that she first realized that her condition was caused or aggravated by her employment on March 20, 1994. The Office subsequently accepted that appellant sustained bilateral tenosynovitis and bilateral carpal tunnel syndrome which was causally related to her employment. Appellant underwent surgery on her right upper extremity and left upper extremity on May 9 and June 27, 1995, respectively.

On September 20, 1995 appellant filed a claim for a schedule award. By decision dated October 26, 1995, the Office granted appellant a schedule award for 34.32 weeks of compensation based on a 10 percent permanent impairment of the left upper extremity and a 1 percent permanent impairment of the right upper extremity.

In a memorandum of a telephone conference dated November 2, 1995, an Office claims examiner noted that appellant had stated that she had a 10 percent permanent impairment of the left upper extremity and an 11 percent permanent impairment of the right upper extremity and wanted to know why she was only receiving a 1 percent permanent impairment of the right upper extremity.

In a second November 2, 1995 memorandum of a telephone conference, the same Office claims examiner noted that appellant had telephoned with a question regarding her schedule award for her right hand. The claims examiner noted that she had been informed that if she disagreed with the schedule award decision she must follow her appeal rights.

In an updated memorandum of a telephone conference, placed in appellant's file on some date between November 29, 1995 and February 21, 1996, an Office claims examiner noted that

an individual from the employing establishment had telephoned to ask about the schedule award for appellant's right upper extremity and that he told her that he would return the file to the district medical adviser with a question regarding additional impairment.

In a letter dated February 21, 1996, claims examiner Hurley Perry advised appellant that an employee of the employing establishment stated that she would fax a copy of appellant's letter requesting reconsideration of the impairment rating to her right upper extremity. He stated:

"I did not find this letter in the case file. However, I will proceed to refer the case file to the district medical advis[e]r ... and ask that they review the information in [the] file and determine if the original percentages are correct, or should be revised. I will advise you on this matter as soon as the case file is returned [from] the [district medical adviser]."

In an undated letter received by the Office on September 25, 1996, appellant stated that she had been waiting two years for the Office to "finish" her schedule award. She stated that on August 17, 1995 she had submitted documentation supporting impairment of both arms and both hands from her physician and then spoke to a compensation specialist at the employing establishment who telephoned Mr. Perry and was advised by him that her file had been sent to the district medical adviser. Appellant stated that she heard nothing further. She noted that on July 12, 1996 another employing establishment compensation specialist had sent a memorandum requesting the status of her claim but there was no response from the Office. Appellant asked the Office to resolve the matter.

By letter dated October 22, 1996, an Office claims manager stated that on February 21, 1996 appellant had been advised as to the status of her claim by her assigned claims examiner, Mr. Perry and that the status remained the same as stated in that letter except for the fact that her claim was not forwarded to the district medical adviser as stated. He stated that the reason for this delay was that Mr. Perry was waiting for the faxed copy of appellant's letter requesting reconsideration of the schedule award. The claims manager stated that, based upon appellant's recent inquiry and Mr. Perry's February 21, 1996 letter, her case file had been forwarded to a senior claims examiner for the purpose of reviewing her request for reconsideration of the schedule award decision and that she would be advised in writing when a decision had been made on her request for reconsideration. He stated that appellant had mentioned that a memorandum had been sent on July 12, 1996 from her employing establishment but the Office had not received this memorandum.

By letter dated October 25, 1996, an Office senior claims examiner stated that appellant needed to submit a written statement specifying which of her appeal rights she wished to pursue.

In a memorandum dated November 4, 1996, employing establishment representative Jan Calhoun stated that appellant had written a request for reconsideration on November 28, 1995 and on February 21, 1996 the employing establishment resubmitted the request by faxing it to the Office. She stated that on October 22, 1996 Mr. Perry stated that he was still waiting for the faxed request for reconsideration. Ms. Calhoun enclosed another copy of appellant's request for reconsideration, in which appellant stated that the Office had erred in its schedule award decision

because her physician had found an 11 percent permanent impairment of the right upper extremity, rather than the 1 percent granted in the schedule award, along with a copy of the February 21, 1996 fax cover sheet and a copy of the physician's impairment rating report.

By decision dated February 27, 1997, the Office denied appellant's request for reconsideration on the grounds that her November 28, 1995 letter, requesting reconsideration neither raised substantive legal questions nor included new and relevant evidence and was insufficient to warrant a review of the Office's prior decision.

The Board finds that this case is not in posture for a decision.

The Board notes that the Office issued a decision on appellant's request for reconsideration on February 27, 1997 but, in a letter dated February 21, 1996, Mr. Perry, the Office claims examiner assigned to appellant's case, indicated that he had not found a copy of appellant's request for reconsideration in the file but that he would proceed to refer the file to the Office's district medical adviser to determine whether there was an error in the Office's determination of appellant's percentage of permanent impairment. He indicated that he would advise appellant and the employing establishment when the file was returned from the district medical adviser. Mr. Perry did not state that the referral of the file to the district medical adviser would not take place until appellant's written request for reconsideration was received. The Board notes that even before Mr. Perry advised that appellant's file would be referred to the district medical adviser to check for an error in the calculation of appellant's schedule award, in an undated memorandum placed in the file between November 29, 1995 and Mr. Perry's February 21, 1996 letter, another claims examiner advised the employing establishment that appellant's file was being returned to the district medical adviser to check for correctness of the schedule award. In an October 22, 1996 letter, an Office claims manager noted that appellant's file had not been forwarded to the district medical adviser as appellant had been advised. The claims manager stated that the faxed copy of her request for reconsideration had not been received but that, based upon her recent inquiry and Mr. Perry's February 21, 1996 letter, her file had been referred to a senior claims examiner for a decision on her request for reconsideration. However, in an October 25, 1996 letter, a senior claims examiner advised appellant that she needed to submit a written request for reconsideration.

In a letter dated November 4, 1996, received by the Office on November 29, 1996 the employing establishment enclosed a written request for reconsideration from appellant dated November 28, 1995 and stated that a copy had been faxed to the Office on February 21, 1996. By decision dated February 27, 1997, the Office denied appellant's request for reconsideration.

The Board finds that the Office's actions in this case caused at least a one year delay in the handling of appellant's request for review of her case. The Office advised appellant on February 21, 1996, and even earlier, that her file would be referred to the Office's district medical adviser to determine whether the Office had erred in calculating the schedule award for her right upper extremity. The Office did not advise appellant until October 22, 1996, that it had not followed through on its referral of appellant's file to the district medical adviser, as promised to appellant in late 1995 or early 1996. It was not until October 25, 1996, that the Office indicated that, despite its earlier communications to the contrary, it would not ask the district medical adviser to review appellant's schedule award for error until she submitted a written

request for reconsideration.¹ Although the record reflects that the Office had received a copy of appellant's written request for reconsideration by November 1996, if not earlier, the Office did not issue a decision on the request for reconsideration until February 27, 1997, one year after Mr. Perry advised appellant that her file would be referred to the district medical adviser. The Office is responsible for the delay in the handling of appellant's request for review of the schedule award decision because it advised appellant several times that her file either had been, or would be, referred to the district medical adviser to check for correctness of the calculation of the award but it did not advise appellant until many months later that it never referred the file to the district medical adviser as promised and review of the schedule award would not take place until a written request for reconsideration was received. The Office's actions and resulting delay effectively thwarted appellant's ability to file a timely appeal on the merits of this case to the Board.² Therefore, the case is remanded for a *de novo* decision on the merits of the case in order to preserve appellant's appeal rights.

The decision of the Office of Workers' Compensation Programs dated February 27, 1997 is set aside and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
July 13, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski

¹ The Board notes that the case record contains a written request for reconsideration from appellant dated November 28, 1995, which the employing establishment stated that it had faxed to the Office on February 21, 1996 and the record contains a photocopy of the fax cover sheet dated February 21, 1996. However, the only copy of appellant's request for reconsideration which is of record is stamped as received by the Office on November 29, 1996. There is no explanation as to what happened to the copy of appellant's request for reconsideration which the employing establishment faxed to the Office in February 1996.

² The merit decision in this case was issued on October 26, 1995 and appellant filed her appeal with the Board on March 10, 1997. As her appeal to the Board was not filed within one year of the October 26, 1995 merit decision, the Board lacks jurisdiction to review that decision. 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

Alternate Member