

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MILLIE TONEY CLIFTON and U.S. POSTAL SERVICE,
POST OFFICE, Columbus, OH

*Docket No. 98-2137; Submitted on the Record;
Issued May 15, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant is entitled to a greater than 14 percent permanent impairment of the right upper extremity; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an examination of the written record by a hearing representative as there had been a prior review of the written record as requested by appellant.

On February 8, 1995 appellant filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that her tendinitis in her left thumb and palm was due to her employment.¹ The Office accepted the claim for left trigger thumb/release. The Office subsequently accepted appellant's claim for bilateral carpal tunnel syndrome and authorized surgery for the left trigger thumb and bilateral carpal tunnel syndrome.

On March 6, 1995 appellant's occupational disease claim alleging that her tendinitis in her right wrist and hand was due to factors of her employment.² The Office accepted the claim for right wrist tendinitis.

On April 14, 1997 the Office issued appellant a 15 percent permanent impairment of the left thumb³ for the period of 11.25 weeks.

Appellant requested a written review of the April 14, 1997 schedule award in a letter dated April 19, 1997.

¹ This was assigned claim number A9-400705.

² This was assigned claim number A9-401995. On September 20, 1995 the Office merged the two claims under the claim number A9-400705.

³ On April 18, 1997 this was amended to say "left upper extremity."

By decision dated June 11, 1997, the Office hearing representative affirmed the Office's determination that appellant had a 15 percent impairment of the left thumb. The Office hearing representative also noted that there was an outstanding claim for a schedule award for appellant's right upper extremity for which the Office should issue a decision.

On August 29, 1997 the Office granted appellant a schedule award for 14 percent permanent impairment of the right upper extremity for a period of 43.68 weeks of compensation.

By letter dated April 10, 1998, appellant requested a review of the written record regarding the permanent impairment due to her accepted employment injury of both her left thumb and right upper extremity.

By letter dated June 5, 1998, the Office denied appellant's request for written review of the April 14, 1997 left thumb schedule award on the grounds that the request was untimely and the Office, in the exercise of its discretion, found that the issues of appellant's claim could be equally addressed by requesting reconsideration and submitting additional evidence. The Office also noted that a prior review of the schedule award had been completed and decision issued by an Office hearing representative on June 11, 1997. The Office Branch of Hearings and Review did not address appellant's request for review of the August 29, 1997 schedule award for her right upper extremity.⁴

The Board finds that the Office properly denied appellant's request for an examination of the written record by a hearing representative the schedule award for left thumb pursuant to section 8124(b) of the Federal Employees' Compensation Act.

The Act⁵ is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to a hearing before a representative of the Office.⁶ The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.⁷ Because subsection (b)(1) is unequivocal on the time limitation for requesting a hearing, a claimant is not entitled to such hearing as a matter of right unless his or her request is made within the requisite 30 days.⁸

The Office's procedures implementing this section of the Act are found in Chapter 2.1601 of the Federal (FECA) Procedure Manual. The manual provides for a preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely

⁴ The Board notes that the Office erroneously notes the date of the hearing representative's decision as April 14, 1997 when the correct date of the hearing representative's decision is June 11, 1997. On April 14, 1997 the Office had issue a schedule award for appellant's left thumb.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB 411 (1997); *Coral Falcon*, 43 ECAB 915, 917 (1992).

⁷ *Eileen A. Nelson*, 46 ECAB 377, 379 (1994); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (March 1997).

⁸ *William F. Osborne*, 46 ECAB 198, 202 (1994).

and, if not, whether a discretionary hearing should be granted; if the Office declines to grant a discretionary hearing, the claimant will be advised of the reasons.⁹ The Board has held that the only limitation on the Office's authority is reasonableness¹⁰ and that abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken, which are contrary to both logic and probable deductions from known facts.¹¹

When a hearing request is not timely, the Office has the discretion to grant a hearing and must exercise that discretion.¹² The Office found in the June 5, 1998 decision that it had considered the matter in relation to the issue involved and denied her request for written review on the basis that additional evidence on whether appellant was entitled to a greater than 15 percent schedule award for her left thumb could be fully considered through a request for reconsideration.

While the Office has the discretionary power to grant an examination of the written record when a claimant is not entitled to an examination of the written record as a matter of right, the Office, in its June 5, 1998 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for an examination of the written record on the basis that the issue of increasing her schedule award could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown, in this case the evidence of record does not establish that the Office abused its discretion in its denial of appellant's request for review of the written record. Furthermore, the Board notes that appellant had previously requested a written review of the April 14, 1997 left thumb schedule award and an Office hearing representative issued a decision affirming that decision on June 11, 1997.

The Board finds that the case is not in posture for a decision with regard to the right upper extremity schedule award.

As discussed above in this decision, section 8124(b) states that appellant is entitled to a review of the written record or a hearing before a representative of the Office if the request is made within 30 days of the Office's decision. If appellant fails to make a timely hearing request, the Office has the authority whether or not to grant a discretionary hearing; if the Office declines to grant a discretionary hearing, the claimant will be advised of the reasons.¹³ In the instant case, appellant also requested a written review of the Office's August 29, 1997 right upper extremity schedule award in her letter dated April 10, 1998. On June 5, 1998 the Office denied appellant's

⁹ *Belinda J. Lewis*, 43 ECAB 552, 558 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4.b(3) (October 1992).

¹⁰ *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

¹¹ *Wilson L. Clow, Jr.*, 44 ECAB 157, 175 (1992).

¹² *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

¹³ *Belinda J. Lewis*, *supra* note 9; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4.b(3) (October 1992).

request for a review of the April 14, 1997 schedule award, but failed to address appellant's request for review of the Office's August 29, 1997 schedule award. Thus, the Board finds that the case is not in posture for a decision on the issue of whether appellant is entitled to a greater than 14 percent impairment of the right upper extremity as the Office failed to consider her request for written review. The case will be remanded to the Office Branch of Hearings and Review for an appropriate action on appellant's outstanding request for review of the written record on the August 29, 1997 right upper extremity schedule award.

The June 5, 1998 decision of the Office of Workers' Compensation Programs is affirmed regarding the denial of further written review of the April 14, 1997 schedule award for her left thumb. The case is remanded to the Office Branch of Hearings and Review for further proceedings consistent with this opinion regarding appellant's schedule award for her right upper extremity.

Dated, Washington, D.C.
May 15, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member