U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARMELITA R. De LONG and U.S. POSTAL SERVICE, POST OFFICE, Phoenix, AZ

Docket No. 02-400; Submitted on the Record;
Issued November 4, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's September 21, 2001 request for reconsideration.

On July 6, 1992 appellant, then a 44-year-old manual distribution clerk, filed a claim asserting that her bilateral elbow condition was a result of her federal employment. The Office accepted her claim for right cubital tunnel syndrome and overuse syndrome of the right hand and wrist.

On March 13, 1993 appellant filed a claim asserting that her left arm condition was a result of her federal employment. The Office accepted this claim for bilateral cubital tunnel syndrome and bilateral carpal tunnel syndrome. The Office approved surgical releases.

The Office subsequently approved her claim for left thumb carpometacarpal joint instability with an arthroplasty and ligament reconstruction performed on February 15, 1995. Appellant was released to limited duty as of April 7, 1995. She returned to work for eight hours a day effective May 19, 1995.

On April 28, 1995 appellant filed a claim asserting that her bilateral shoulder condition was a result of her federal employment. The Office accepted her claim for bilateral subacromial bursitis, bilateral rotator cuff tendinitis and bilateral shoulder strain.

On October 21, 1996 Dr. Richard K. Pearis, the Board-certified orthopedic surgeon who treated appellant for her bilateral shoulder condition, reported that appellant had reached maximum medical improvement on October 17, 1996. After reviewing the file and the October 17, 1996 report of Dr. Pearis, an Office medical consultant concurred that the date of maximum improvement was October 17, 1996.

On March 7, 1997 the Office issued a schedule award for a 20 percent impairment of use of the left arm and a 6 percent impairment of use of the right arm. The period of the award was October 17, 1996 to May 7, 1998.

On July 9, 1997 an Office hearing representative affirmed the Office's March 7, 1997 schedule award but modified the award to reflect compensation payable at the augmented rate of 75 percent as appellant had provided proof of her dependent daughter's full-time college enrollment.

On remand the Office issued a corrected schedule award reflecting the augmented compensation rate for the period October 17, 1996 to July 19, 1997.

On February 13, 1998 appellant filed a claim for an additional schedule award. She argued that her previous schedule award did not include a rating for the accepted elbow, wrist and thumb conditions.

On September 9, 1997 Dr. Steven H. Turkeltaub, the Board-certified hand surgeon who treated appellant for these conditions, reported that appellant had done extremely well and could be placed on supportive care at four visits per year for three years and anti-inflammatory medication as needed. He also recommended 20 visits per year for physical therapy.

On May 15, 1998 Dr. Turkeltaub reported the following:

> "[Appellant] has been treated by me in the past with several upper extremity surgical procedures. Presently she has obtained maximum medical improvement. The date that she was placed on supportive care was September 9, 1997.
>
> "She has undergone an extensive evaluation for impairment evaluation. I have used the figures to assess this in addition to my records, findings and factors. [Appellant] has a disability rating of the left hand of 40 percent and 32 percent of the right side with upper extremity disability of 36 percent on the left side and 29 percent on the right side. Again, these are permanent findings."

On June 12, 1998 Dr. Turkeltaub completed Office schedule award forms indicating that the date of maximum medical improvement for appellant's elbow, wrist and thumb conditions was September 9, 1997.

On June 29, 1998 appellant saw Dr. Leonard S. Bodell, a Board-certified hand surgeon. Appellant supplied Dr. Bodell with Office schedule award forms, which he signed on December 29, 1998. The forms indicated that appellant reached maximum medical improvement for her left elbow, wrist, hand and fingers and her right elbow and wrist on April 28, 1994. The forms also indicated that appellant reached maximum medical improvement for her right hand and fingers in February 1996.

On June 17, 1999 the Office medical consultant reviewed appellant's file, including Dr. Bodell's December 29, 1998 schedule award forms. Using Dr. Bodell's clinical measurements, the consultant determined that appellant had an additional 44 percent permanent impairment of the right arm and an additional 41 percent permanent impairment of the left arm

due to the accepted elbow, wrist and thumb conditions. The consultant reported that the date of maximum medical improvement was September 9, 1997.

On October 27, 1999 the Office issued an amended schedule award for an additional 44 percent permanent impairment to the right arm and an additional 41 percent permanent impairment to the left arm. Because the award represented additional compensation for the same scheduled members (the arms), the period of the award began on May 8, 1998, the day after the initial award expired. Because the Office received evidence that appellant's daughter graduated from school on May 31, 1999, compensation after that date was not payable at the augmented rate.

Appellant requested a hearing before an Office hearing representative. She did not dispute the percentages calculated but argued that the date of maximum medical improvement should have been April 28, 1994, placing the entire period of the award prior to her daughter's graduation and making the entire schedule award payable at the augmented rate. Appellant submitted an April 28, 1994 report from Dr. Turkeltaub, who stated:

> "[Appellant] will be placed on a medically stationary status today. Disability is 12 percent of each upper extremity. I have recommended 12 physician visits per year and physical therapy for 24 visits per year over the next two years."

Appellant also submitted an April 26, 2000 report from Dr. Bodell, who addressed the issue of maximum medical improvement:

> "Issue number two has to do with at what point in time [appellant] had reached maximum medical improvement. Now her problems date back to 1993, then 1994 regarding her right and left surgeries respectively. We did not get involved in [appellant's] care until the first visit which was June 29, 1998. However I did go through the records. At the time we saw her and after going through the records and getting a chance to know her a little bit better we did conclude that there really was [not] anything that we would be doing from a surgical standpoint and that she was on supportive care and that we would follow her on supportive care. That by its very definition and nature means that at least during the time we knew [appellant] had reached maximum medical improvement. Going retrospectively through the records however I see little if any treatment after 1995 and[,] therefore[,] it would be my assumption given the dates of her various surgeries and given the anticipation from Dr. Turkeltaub of the length of time it would take for her to recover from her last surgery which was involving the left thumb, that her time of maximum medical improvement should actually have been approximately December 1995 instead of what comes out on the memo[randum] of September 9, 1997. Again, I can[not] state this from the basis of my examination of [appellant] but rather it is a combination of my examination of [appellant] -- knowing that she was stationary when we saw her -- and going retrospective into the records, understanding the comments made by the treating surgeon and then how she actually did after the surgery."

Appellant also submitted an April 18, 1994 report from Dr. Victor Tseng, a Board-certified hand surgeon and Office referral physician, who reported:

> "I do not believe that any aggressive treatment is needed at this point. Rather, I feel [appellant's] case should be considered stationary by her treating doctor and given an impairment rating, if the doctor feels there is any. I would suggest follow-up supportive care with her treatment physician four times a year for two years. Anti-inflammatory medications, muscle relaxants, cortisone injections, x-rays and braces should be allowed as needed."

Dr. Tseng noted, however, that residual weakness and pain in the thenar eminence area would improve in time with a continuous, prolonged course of exercise and strengthening. He also recommended continued conservative treatment for her thumbs consisting of a strengthening exercise program, splinting as needed and Cortisone injections as needed. Dr. Tseng reported that follow-up treatment with the physical therapist, exceeding no more than 12 treatments a year, should be allowed for two years primarily for tight muscles and symptomatic relief.

In a decision dated September 13, 2000 and finalized on September 21, 2000, the Office hearing representative affirmed the decision of October 27, 1999. The hearing representative found that the date of maximum medical improvement selected by the Office, September 9, 1997, was appropriate.

On September 21, 2001 appellant requested reconsideration. In support thereof, she argued that she had reached maximum medical improvement from the surgeries to her elbows and wrists prior to September 9, 1997. She submitted Dr. Tseng's report of April 18, 1994; Dr. Turkeltaub's reports of April 28, September 16 and December 16, 1994 and December 21, 1999; copies of Office correspondence; Dr. Bodell's schedule award forms; an October 20, 1996 report from Dr. Ashley Lewis Park; and a September 18, 2001 report from Dr. Catherine S. O'Connell, who saw appellant for relaxation training and pain management skills.

In his December 21, 1999 report, Dr. Turkeltaub addressed the condition of appellant's thumb joints. He noted that her osteoarthritic changes might very well require addressing and that she might also require surgical release. Dr. Turkltaub added: "[w]ith regard to date of obtainment of maximal recovery, this can be placed at July 23, 1996."

In her September 18, 2001 report, Dr. O'Connell discussed appellant's difficulty performing certain tasks, her anxiety and flare-ups of pain.

In a decision dated October 4, 2001, the Office denied appellant's application for reconsideration on the grounds that the evidence submitted in support thereof was immaterial and insufficient to warrant a merit review of its prior decision. The Office noted that appellant had submitted multiple copies of documents already in the record and failed to provide new and relevant evidence or legal argument to support her request.

Appellant filed an appeal with the Board on November 27, 2001. Because her appeal is untimely with respect to the hearing representative's decision of September 21, 2000, the Board

has no jurisdiction to review that decision or the merits of appellant's case.[1] The only decision that the Board may review is the Office's October 4, 2001 decision denying appellant's September 21, 2001 application for reconsideration. The only issue before the Board is whether the Office properly denied that application.

The Board finds that the Office properly denied appellant's September 21, 2001 application for reconsideration.

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[2]

An employee seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[3]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[4]

Appellant's September 21, 2001 application for reconsideration meets none of the requirements for obtaining a merit review of her case. The application neither shows that the Office erroneously applied or interpreted a specific point of law nor advances a relevant legal argument not previously considered by the Office. The application is also unsupported by documents that constitute relevant and pertinent new evidence not previously considered by the Office.

Most of the evidence appellant submitted is not new. The April 18, 1994 report of Dr. Tseng; the April 28, September 16 and December 16, 1994 reports of Dr. Turkeltaub; the schedule award forms of Dr. Bodell; and the October 20, 1996 report of Dr. Park were previously submitted to the record and considered by the Office. Evidence that repeats or

[1] 20 C.F.R. §§ 501.3(d) and § 501.10(d)(2)

[2] 20 C.F.R. § 10.605 (1999).

[3] *Id*. § 10.606.

[4] *Id*. § 10.608.

duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.[5]

Only the December 21, 1999 report of Dr. Turkeltaub and the September 18, 2001 report of Dr. O'Connell constitute new evidence, but to warrant a review of the merits of her case this evidence must be relevant and pertinent to the issued in the claim.

In his December 21, 1999 report, Dr. Turkeltaub addressed appellant's thumb joints, tenderness over the A-1 pulleys and osteoarthritis of the distal interphalangeal joints. He stated: "[w]ith regard to date of obtainment of maximal recovery, this can be placed at July 23, 1996." Appellant submitted this evidence to show that she reached maximum medical improvement before September 9, 1997.

The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. Maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.[6] The determination of the date of maximum improvement is factual in nature and depends primarily on the medical evidence.[7]

In this case, the Office issued a schedule award for permanent impairment to the upper extremities. The period of the award began on October 17, 1996 because reports from Dr. Pearis and an Office medical consultant established October 17, 1996 as the date of maximum medical improvement. Appellant may have reached maximum medical improvement from her elbow and wrist surgeries by April 28, 1994, and she may have reached maximum medical improvement from her left thumb surgery by July 23, 1996, but these dates do not establish maximum medical improvement for the upper extremities because she continued to improve from her bilateral shoulder condition through October 17, 1996. Dr. Turkeltaub's December 21, 1999 report addresses only appellant's thumb condition and is immaterial, given her bilateral shoulder condition, to when her left or right arm reached maximum medical improvement.

Dr. O'Connell, whose medical qualifications are unclear, made no attempt to address the issue in her September 18, 2001 report. Evidence that does not address the particular issue involved constitutes no basis for reopening a case.[8]

Because appellant's September 21, 2001 application for reconsideration fails to meet at least one of the requirements for obtaining a merit review of her case, the Office properly denied the application.

[5] *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[6] *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

[7] *Franklin L. Armfield*, 28 ECAB 445 (1977).

[8] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

The October 4, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
November 4, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member