U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SALONE SHEEDY and U.S. POSTAL SERVICE,
POST OFFICE, Miami, FL

Docket No. 02-2236; Submitted on the Record;
Issued March 26, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

On August 14, 1997 a privately owned motor vehicle struck appellant's postal vehicle. The Office accepted her claim for cervical, lumbar and thoracic sprain under case file No. 06-684965. The Office later amended the claim to accept temporary aggravation of depression and paid appropriate compensation and benefits.[1]

In a report dated June 4, 1997, Dr. Richard Rogachefsky, a Board-certified orthopedic surgeon, indicated that appellant was post right carpal tunnel syndrome, with possible right thoracic outlet syndrome. He noted that her symptoms had improved but she had increased her typing over the last week and her symptoms had increased. Dr. Rogachefsky's physical examination showed a positive Tinel's to the long and ring fingers and APB, first DI is five over five with mild swelling at the volar wrist and sensory was intact. He diagnosed right carpal tunnel syndrome. Dr. Rogachefsky advised appellant to continue conservative treatment and light duty.

In a report dated October 1, 1997, an Office medical adviser indicated that based on Dr. Rogachefsky's June 4, 1997 report, appellant's positive Tinel's sign was zero percent permanent impairment. He advised that the abductor pollici brevis muscle and first dorsal intravenous muscle were five over five which constituted a zero percent permanent impairment. Dr. Rogachefsky further added that sensory was intact and resulted in a zero percent impairment. The date of medical improvement was June 4, 1997.

[1] The record reflects that appellant had several accepted injuries indicating a dog bite of the lower left leg and animal phobia occurring on November 21, 1991. On May 17, 1995 the Office accepted appellant's claim for cervical strain. The Office also accepted her claim for right carpal tunnel syndrome on September 6, 1996.

By letter dated October 3, 1997, the Office requested that Dr. Rogachefsky provide an impairment rating.

By report dated October 21, 1997, Dr. Rogachefsky, opined that appellant was post right carpal tunnel syndrome and improving with conservative treatment. He noted findings on physical examination that her sensory was intact, the Semmes-Weinstein was blue, the APB, first DI were five over five and appellant had positive Tinel's. Dr. Rogachefsky diagnosed right carpal tunnel syndrome and advised that appellant was to receive emg/nerve conduction studies. He did not provide an impairment rating.

By decision dated December 16, 1997, the Office denied appellant's claim for a schedule award on the grounds that there was insufficient medical evidence to establish permanent impairment of the right wrist.

Subsequent to this decision, the Office continued to develop various aspects of appellant's claims.

By undated letter received by the Office on April 22, 2002, appellant requested reconsideration and provided additional information that included a return receipt dated January 12, 1998 and a copy of the December 16, 1997 decision, with reconsideration "circled."

Appellant also included a December 22, 1997 report from Dr Rogachefsky. The report stated that she had a total disability of six percent whole person impairment and was at maximum medical improvement as of December 22, 1997.

By letter dated July 30, 2002, appellant indicated that she never sent a letter in the year 2002 and that her original request was made timely. She added that she had a certified receipt indicating January 12, 1998 and had faxed everything to the Office.

By decision dated June 19, 2002, the Office denied appellant's reconsideration request as untimely and found that the statements appellant made in support of her request and the evidence submitted presented no clear evidence of error on the part of the Office.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[2] Because appellant filed her appeal on September 3, 2002, more than one year after the December 16, 1997 decision, the Board lacks jurisdiction to review the merits of her schedule award. The only decision before the Board is the Office's June 19, 2002 decision denying appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.

The Board finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

[2] Oel Noel Lovell, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[3] The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[4] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[5]

Section 8128(a) of the Federal Employees' Compensation Act[6] does not entitle a claimant to a review of an Office decision as a matter of right.[7] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[8] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[9] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[10]

The Board finds that as more than one year has elapsed from the date of issuance of the Office's December 16, 1997 merit decision, to the date that appellant's request for reconsideration was filed on April 22, 2002, the request for reconsideration is untimely.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For proper exercise of the discretionary authority granted under section 8128(a), when an application for review is not timely filed the Office must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[12] The evidence must be positive, precise and explicit and

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[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.138(b)(2); *see also Gregory Griffin,* 41 ECAB 186 (1989), *petition for recon. denied,* 41 ECAB 458 (1990).

[5] *Thankamma Mathews,* 44 ECAB 765 (1993); *Jesus D. Sanchez,* 41 ECAB 964 (1990).

[6] 5 U.S.C. § 8128(a).

[7] *Thankamma Mathews, supra* note 5.

[8] *Id.* at 768; *see also Jesus D. Sanchez, supra* note 5.

[9] 20 C.F.R. § 10.138(b)(2) or 20 C.F.R. § 10.607(a). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin, supra* note 4.

[10] *Thankamma Mathews, supra* note 5 at 769; *Jesus D. Sanchez, supra* note 5 at 967.

[11] 20 C.F.R. § 10.607(b) (1999).

[12] *See Dean D. Beets,* 43 ECAB 1153 (1992).

must manifest on its face that the Office committed an error.[13] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[15] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.[16] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[17]

The Board further finds that the evidence submitted by appellant in support of such request does not raise a substantial question as to the correctness of the Office's December 16, 1997 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of her claim. Appellant submitted a medical report from Dr. Rogachefsky, dated December 22, 1997. The Board notes that this report is of little evidentiary value as the physician merely stated that appellant had a six percent whole person impairment without explaining the basis for his stated conclusion.[18] Dr. Rogachefsky did not refer to any applicable tables in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[19] to show or explain how he derived at the assessment of a six percent whole person impairment. The Board finds that the evidence submitted on reconsideration did not raise a substantial question as to the correctness of the Office's December 16, 1997 decision is insufficient to establish clear evidence of error.

The June 19, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.[20]

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[13] *See Leona N. Travis*, 43 ECAB 227 (1991).

[14] *See Jesus D. Sanchez*, *supra* note 5.

[15] *See Fidel E. Perez*, 48 ECAB 663 (1997).

[16] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[17] *Thankamma Mathews*, *supra* note 5.

[18] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954).

[19] A.M.A., *Guides.*

[20] Appellant contends that the Office erred in its prior decision and not that her condition has progressed as a result of the employment-related condition entitling her to an additional schedule award. *See Paul R. Reedy*, 45 ECAB 488 (1994). A claimant may seek an increased schedule award if the evidence establishes that she sustained an increased impairment at a later date causally related to her employment injury; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.7(b)

Dated, Washington, DC
March 26, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

(March 1995).