

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT R. CASCIATO and U.S. POSTAL SERVICE,  
POST OFFICE, Willoughby, OH

*Docket No. 03-1924; Submitted on the Record;  
Issued October 10, 2003*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error; and (2) whether appellant has shown that he is entitled to a schedule award for his accepted left Achilles tendinitis.

On October 14, 1999 appellant, then a 42-year-old letter carrier, filed a notice of occupational disease (Form CA-2) alleging that he developed left Achilles tendinitis as a result of walking his mail delivery route. Appellant indicated that he first became aware of his condition on March 15, 1999 and first became aware of its relationship to his employment on September 20, 1999.<sup>1</sup> His claim was accepted for aggravation of Achilles tendinitis. Appellant did not stop work, but was placed on limited duty. He returned to regular full duty on December 28, 2000. On January 2, 2001 appellant filed a claim for a schedule award.

In a decision dated January 25, 2001, the Office denied appellant's claim for a schedule award as the only medical evidence of record consisted of reports from appellant's treating Board-certified orthopedic surgeon, Dr. Kevin W. Lee, who opined that appellant would have no permanent disability as a result of his employment injury. Following an oral hearing held at appellant's request, by decision finalized November 14, 2001, an Office hearing representative affirmed the Office's prior decision. The Office noted that, while additional medical evidence from Dr. Lee had been received, he continued to opine that appellant would not have any permanent disability as a result of his work injury.

By letter dated March 2, 2003, appellant, through counsel, submitted a February 28, 2003 medical report from Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, and asked that

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<sup>1</sup> On his claim form appellant actually indicated that he first became aware of his condition on March 15, 1996. However, in a letter to the Office dated October 31, 1999, appellant explained that this was a mistake and he actually became aware of his condition on March 15, 1999.

the Office “please process schedule award with attached medical.” In a response dated March 11, 2003, the Office acknowledged the receipt of the new medical evidence and stated that appellant should exercise the appeal rights which accompanied the November 14, 2001 decision.

By letter dated April 17, 2003, appellant, through counsel, resubmitted Dr. Kaffen’s report and stated that the report justified a schedule award. In a response dated April 24, 2003, the Office again advised appellant to exercise the appeal rights attached to the November 14, 2001 decision.

By letter dated April 27, 2003, appellant, through counsel, requested reconsideration of the Office’s prior decision. In a decision dated July 1, 2003, the Office denied appellant’s request for reconsideration on the grounds that it was untimely filed and did not present clear evidence of error.

The Board has carefully reviewed the letters from counsel dated March 2, April 17 and 24, 2003 and finds that these letters are ambiguous as to their intent. While the final letter is clearly a request for reconsideration, the first two letters could also be interpreted as new requests for a schedule award based on appellant’s worsening condition.

To the extent that appellant requested reconsideration, the Board finds that the Office properly denied appellant’s request on the grounds that it was untimely filed and did not present clear evidence of error.

Section 8128(a) of the Federal Employees’ Compensation Act<sup>2</sup> vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may --

- (1) end, decrease or increase the compensation previously awarded; or
- (2) award compensation previously refused or discontinued.”<sup>3</sup>

The Office, through regulations, has imposed limitations on the exercise of its authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides:

“An application for reconsideration must be sent within one year of the date of the [Office] decision, for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8128.

evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits may be used to establish the mailing date.”<sup>4</sup>

The Board has approved the imposition of this one-year limitation.<sup>5</sup>

The last merit decision denying appellant’s request for a schedule award was issued by an Office hearing representative on November 14, 2001; accordingly, the time period for filing the request for reconsideration commenced the day after. The first indication in the file of appellant’s request for further consideration by the Office is the ambiguous March 2, 2003 letter, received by the Office on March 5, 2003, which provides new medical evidence and asks that a schedule award be processed. Clearly, this letter was not filed within the one-year period and accordingly, even if construed as a request for reconsideration, was untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of the Office decision upon presentation of new evidence that the decision was erroneous. In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows “clear evidence of error” on the part of the Office.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office. The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error. 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. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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 decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.<sup>7</sup>

In his February 28, 2003 report, Dr. Kaffen noted appellant’s employment history and stated that appellant presented complaining of left ankle pain, which began around March 15, 1996 and still continued, especially after a period of walking a full delivery route. On physical examination Dr. Kaffen noted that appellant had thickening and tenderness of the left Achilles tendon. Measuring appellant’s range of motion, Dr. Kaffen noted plantar flexion to 40 degrees,

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<sup>4</sup> 20 C.F.R. § 10.607(a) (1999).

<sup>5</sup> *Nancy Marcano*, 50 ECAB 110 (1998).

<sup>6</sup> *Steven J. Gundersen*, 53 ECAB \_\_\_\_ (Docket No. 00-625, issued December 5, 2001).

<sup>7</sup> *Id.*

dorsiflexion to 10 degrees and subtalar motion of eversion to 10 degrees and inversion to 30 degrees. The physician further noted there was no calf atrophy and appellant was able to walk on heels and toes without difficulty. Dr. Kaffen stated that, pursuant to the fifth edition of the A.M.A., *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*), appellant had a mild impairment of the left ankle due to abnormal range of motion, which equated to a seven percent impairment of the whole person, pursuant to page 537, Table 17-11, of the A.M.A., *Guides*. In addition, the physician noted that appellant had a mild hind foot impairment, which equated to a two percent impairment of the whole person, pursuant to page 537, Table 17-12, of the A.M.A., *Guides*. Dr. Kaffen concluded that appellant had reached maximum medical improvement and stated that, using the Combined Values Chart at page 604 of the A.M.A., *Guides*, appellant had sustained a combined impairment to the left lower extremity of nine percent due to his employment-related left ankle condition.<sup>8</sup>

Dr. Kaffen provided his findings and conclusions on physical examination and cited the most recent edition of the A.M.A., *Guides*. However, the term “clear evidence of error” is intended to represent a difficult standard.<sup>9</sup> Appellant must present evidence which on its face shows that the Office made an error. Evidence such as a well-rationalized medical report, which if submitted prior to the Office’s denial, would have created a conflict in medical opinion requiring further development is not clear evidence of error and would not require review of the case. Dr. Kaffen’s opinion is an example of an opinion that, although providing new findings and conclusions, is not sufficient to meet the “clear evidence of error” standard, for it does not show any blatant error by the Office in evaluating the evidence that was before it at the time it granted the schedule award.

To the extent that appellant’s request was for a schedule award, the Board finds that this case is not in posture for a decision.

A similar factual background was presented in the case of *Reedy*.<sup>10</sup> In *Reedy*, the Office had found that appellant did not have a ratable hearing loss. The claimant submitted letters stating that his hearing loss had deteriorated and requested a “reconsideration hearing.” He also submitted new medical evidence regarding his current condition. Although the Office determined that the claimant had submitted an untimely reconsideration request, the Board found that appellant was not seeking reconsideration of the prior decision, but was informing the Office of an increasing hearing loss and was seeking a new award. The case was remanded to the Office for a determination as to entitlement to a schedule award.

In this case, appellant used the term “reconsideration” in his final letter dated April 27, 2003, but the evidence submitted with his earlier letters dated March 2 and April 17, 2003, clearly concerns appellant’s condition as of February 28, 2003 and provides an opinion as to the permanent impairment at that time. As the Board noted in *Reedy*, a claimant may seek an

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<sup>8</sup> The Board notes that Dr. Kaffen alternately refers to appellant’s impairment as one of the whole person and one of the left lower extremity.

<sup>9</sup> *Jeanette Butler*, 47 ECAB 128 (1995).

<sup>10</sup> *Paul R. Reedy*, 45 ECAB 488 (1994).

increased schedule award if the evidence establishes that he sustained an increased impairment at a later date causally related to his employment injury.<sup>11</sup> In the instant case, by decisions dated January 25 and November 14, 2001, the Office denied appellant's claim for a schedule award on the grounds that the medical evidence of record showed that he did not have any permanent impairment. By letters dated March 2 and April 17, 2003, appellant submitted a report by Dr. Kaffen, who addressed permanent impairment: Dr. Kaffen applied the A.M.A., *Guides* and determined that appellant had a left lower extremity impairment of nine percent. The March 2 and April 17, 2003 letters, together with Dr. Kaffen's report, should have been considered as appellant's request for a schedule award. Accordingly, appellant is entitled to a *de novo* decision based on this medical evidence and the case will be remanded to the Office for appropriate consideration.

The decision of the Office of Workers' Compensation Programs dated July 1, 2003 is hereby affirmed in part as it denied the request for reconsideration. To the extent that the Office did not consider the new request for a schedule award, the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC  
October 10, 2003

Alec J. Koromilas  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>11</sup> See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.7(b) (March 1995). This section states that claims for increased schedule awards may be based on incorrect calculation of the original award or new exposure.