

**United States Department of Labor
Employees' Compensation Appeals Board**

LAURA R. RATNER, Appellant

and

**DEPARTMENT OF LABOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
New York, NY, Employer**

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**Docket No. 04-1589
Issued: December 1, 2004**

Appearances:
Laura R. Ratner, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On June 4, 2004 appellant filed an appeal of a May 17, 2004 Office of Workers' Compensation Programs' decision, which denied her request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed from the last merit decision dated July 17, 2002 to the filing of this appeal on June 4, 2004, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether the Office properly determined that appellant's April 29, 2004 request for review of a July 17, 2002 Office decision, finding that she was not entitled to a schedule award was untimely filed and failed to demonstrate clear evidence of error. On appeal appellant contended that the Office did not address her arguments.

FACTUAL HISTORY

On December 2, 1996 appellant, then a 23-year-old claims examiner,¹ filed an occupational disease claim, alleging that factors of employment caused right ulnar nerve entrapment. On January 3, 1997 she underwent surgical right ulnar nerve transposition and on February 7, 1997, the Office accepted that this condition and the subsequent surgery were employment related. On June 4, 1997 appellant filed a similar claim involving her left upper extremity and on June 13, 1997 underwent left nerve transposition. She returned to regular duty on July 7, 1997 and on July 11, 1997 the Office accepted that the left upper extremity condition was employment related.

Appellant continued to submit medical reports from her attending Board-certified orthopedic surgeon, Dr. William King. On July 28, 1997 she submitted a claim for a schedule award for her right upper extremity. By reports dated August 24 and October 27, 1997, an Office medical adviser stated that the medical evidence of record was insufficient to determine if appellant was entitled to a schedule award and on November 4, 1997 the Office referred appellant, along with the medical record and a statement of accepted facts, to Dr. Nate V. Bondi, Board-certified in orthopedic surgery, for an evaluation regarding her impairment under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.²

In a report dated November 19, 1997, Dr. Bondi advised that appellant had some hypesthesia of the fourth and fifth fingers and hypersensitivity of the elbow scar. In a report dated January 21, 1998, Dr. King advised that appellant was still symptomatic. Development of her schedule award claim was then stopped because maximum medical improvement had not been reached.

On December 6, 1999 appellant submitted a claim for a schedule award for both upper extremities and attached an October 20, 1999 report, in which Dr. King advised that maximum medical improvement had been reached bilaterally. In a report dated January 12, 2000, an Office medical adviser noted that appellant needed evaluation under the A.M.A., *Guides* and on February 2, 2000 she was referred to Dr. Barry S. Gloger, a Board-certified orthopedic surgeon, for an impairment evaluation. By report dated March 2, 2000, Dr. Gloger advised that appellant had no objective evidence of impairment that would entitle her to a rating under the A.M.A., *Guides*. In a March 29, 2000 report, an Office medical adviser reviewed Dr. Gloger's March 2, 2000 report and advised that, pursuant to the A.M.A., *Guides*, appellant had no ratable impairment of either upper extremity.

In a decision dated March 30, 2000, the Office found that appellant was not entitled to a schedule award as her impairment was not ratable. On April 3, 2000 she requested a hearing and thereafter submitted a May 26, 2000 report in which Dr. David Weiss, an attending Board-certified osteopath specializing in orthopedic surgery, opined that appellant had a 50 percent permanent impairment on the right and a 30 percent on the left. At the hearing, held on

¹ Appellant is now a supervisory claims examiner.

² A.M.A., *Guides* (4th ed. 1993).

September 21, 2000 appellant testified that she disagreed with Dr. Gloger's opinion. In a supplementary report dated October 10, 2000, Dr. Weiss provided further explanation regarding his opinion. Following an inquiry by the hearing representative, in a report dated December 1, 2000, an Office medical adviser stated that appellant needed a new evaluation and updated nerve conduction and electromyography studies. In a decision dated December 14, 2000 and finalized December 19, 2000, the Office hearing representative determined that a conflict in the medical evidence existed between the opinions of Drs. Gloger and Weiss and remanded the case to the Office for an impartial evaluation.

On February 22, 2001 the Office referred appellant, along with a statement of accepted facts and the medical record, to Dr. Ernest D. Abeles, Board-certified in orthopedic surgery, for an impartial evaluation. An electromyography (EMG) study of both upper extremities dated April 17, 2001 was read by Dr. Sanjay K. Jain, a Board-certified neurologist, as being an essentially normal study with no evidence of an existing focal ulnar neuropathy at the level of the elbows or otherwise. He noted post-surgical findings of the occasional presence of a chronic ulnar neuropathic process. In a report dated May 9, 2001, Dr. Abeles found full range of motion of both extremities with a minimal diminishment of sensation along the outer border of the right fifth finger with otherwise normal sensation. He characterized appellant's pain as not significant enough to be ratable under the A.M.A., *Guides*.

By decision dated September 12, 2001, the Office credited the opinion of Dr. Abeles and found that appellant was not entitled to a schedule award. On October 11, 2001 she filed an appeal with the Board that was docketed as 02-146. In an order dated March 12, 2002, the Board requested that the Office furnish the case record. The Office was given 30 days to comply. In an order dated May 20, 2002, the Board noted that the Office had not responded to the March 12, 2002 order and remanded the case to the Office for reconstruction and proper assemblage of the case record, to be followed by an appropriate decision. By letter dated July 9, 2002, the Board informed appellant that the case record had been received and her appeal would go forward.

In a decision dated July 17, 2002, the Office again credited Dr. Abeles' opinion and found that appellant was not entitled to a schedule award. In a letter dated March 5, 2004, the Board acknowledged receipt of correspondence from appellant requesting an appeal before the Board. The Board noted that as more than one year had elapsed from the date of the July 17, 2002 decision and appellant's correspondence, the correspondence was being returned without action. On April 29, 2004 she requested reconsideration with the Office and contended that the medical evidence relied upon by the Office contained errors. Appellant acknowledged receipt of the Board's May 20, 2002 order, but stated that after her receipt of the Board's July 9, 2002 letter, she assumed her appeal was going forward. She contended that she did not receive the July 17, 2002 Office decision and there was clear evidence that error occurred in her case.

By decision dated May 17, 2004, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error on the part of the Office in its July 17, 2002 decision. The Office noted that under the mailbox rule, it was presumed that appellant received the July 17, 2002 decision.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.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

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 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 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.⁶

ANALYSIS

The only decision before the Board is the May 17, 2004 decision, in which the Office denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error.

While a claimant retains the right to file a claim for an increased schedule award if the evidence establishes that he or she sustained an increased impairment at a later date causally related to an employment injury,⁷ such is not the case here. In her April 29, 2004 reconsideration request, appellant merely raised procedural issues and contended that the evidence relied upon by the Office contained errors. She did not submit medical evidence demonstrating that her employment-related conditions had worsened. The Board, therefore, finds that as more than one year had elapsed from the date of issuance of the July 17, 2002 Office decision, appellant's request for reconsideration dated April 29, 2004 was untimely filed.

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁶ *Nancy Marcano*, 50 ECAB 110 (1998).

⁷ *Linda T. Brown*, 51 ECAB 115 (1999).

While appellant contended that she did not receive the July 17, 2002 decision, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.⁸ The appearance of a properly addressed copy of a notice in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.⁹ In this case, appellant's address of record was 7208 Avenue M, 3rd floor, Brooklyn, NY 11234, and the record indicates that the July 17, 2002 decision was mailed to this address. The Board, therefore, finds that a presumption of receipt exists.

Appellant further contended in her reconsideration request that, based on its July 9, 2002 letter, she presumed the Board had jurisdiction over her case. The Board, however, finds that its order dated May 20, 2002 clearly remanded the case to the Office for reconstruction of the record and clearly stated that this was to be followed by an appropriate decision. While the Board may have issued the July 9, 2002 letter in error, appellant is a supervisory claims examiner with the Office and, as such, should be aware of the jurisdictional issues involved in the claims procedure. By issuing the May 20, 2002 order, the Board relinquished jurisdiction of appellant's case.¹⁰ The Board, therefore, concludes that the procedural errors alleged in this case are not sufficient to raise a substantial question as to the correctness of the Office's July 17, 2002 decision and are, therefore, insufficient to establish clear evidence of error.¹¹

Appellant also alleged that the medical evidence relied upon by the Office contained errors, specifically stating that Dr. Gloger referred to the third edition of the A.M.A., *Guides* and was incorrect in stating that pain could not provide an impairment rating. She further alleged that Dr. Abeles did not refer to a specific edition of the A.M.A., *Guides* and misrepresented her medical history. Lastly, appellant contended that the results of the April 17, 2001 EMG study were contradictory as Dr. Jain noted a chronic ulnar neuropathic process.

The Board likewise finds that these arguments regarding the medical evidence are insufficient to raise a substantial question as to the correctness of the July 17, 2002 decision.¹² While Dr. Gloger may have relied on an incorrect edition of the A.M.A., *Guides*, his report was reviewed by an Office medical adviser. It also appears that Dr. Abeles refers to the fourth edition of the A.M.A., *Guides* rather than the fifth edition which was in effect at the time of his examination,¹³ he, however found full range of motion of both extremities with only minimal

⁸ *Levi Drew, Jr.*, 52 ECAB 442 (2001).

⁹ *Id.*

¹⁰ See 20 C.F.R. § 10.501.6(d) (Board decisions are final upon the expiration of 30 days from the date of the order).

¹¹ *Nancy Marcano*, *supra* note 7.

¹² *Id.*

¹³ Office procedures direct the use of the fifth edition of the A.M.A., *Guides* for schedule awards determined on and after February 1, 2001. *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

diminishment of sensation along the outer border of the right fifth finger and otherwise normal sensation. Furthermore, his report was based on a complete review of the medical record. Lastly, Dr. Jain was clear in his opinion that the April 17, 2001 EMG study was essentially normal.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and failed to establish clear evidence of error. The Office, therefore, properly denied a merit review of her claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 17, 2004 be affirmed.

Issued: December 1, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member