

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim.

FACTUAL HISTORY

This is the fourth appeal in this case. In the first appeal, the Board issued a decision and order⁴ on October 1, 1999 which set aside the September 24, 1997 decision of the Office on the grounds that the Office improperly refused to reopen appellant's claim for a merit review regarding the issue of a schedule award.⁵ The Board noted that 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. The Board found that appellant had submitted medical evidence regarding permanent impairment at a date subsequent to the prior schedule award decision and remanded the case to the Office for further review. In the second appeal, the Board issued a decision and order⁶ on March 1, 2001 which affirmed the November 16, 1999 decision of the Office on the grounds that appellant had not established that she was entitled to a schedule award for permanent impairment of her extremities.

In the third appeal, the Board issued a decision⁷ on September 17, 2003 which affirmed the October 24, 2002, January 16 and March 7 2003 decisions of the Office.⁸ The Board found that the Office met its burden of proof to rescind a portion of a schedule award which had been granted for a 12 percent permanent impairment of her left lower extremity, as she had only a 5 percent impairment of that member. The Board also found that appellant was not entitled to a schedule award for more than a 25 percent permanent impairment of her right lower extremity and that she did not meet her burden of proof to establish that she sustained a recurrence of disability on November 15, 1993 causally related to her August 20, 1992 employment injury.

⁴ Docket No. 98-498 (issued October 1, 1999).

⁵ On August 23, 1992 appellant, then a 46-year-old food service worker, filed a traumatic injury claim alleging that on August 20, 1992 she injured her back while picking up a large mixing bowl. The Office accepted that she sustained sciatica in the performance of duty on August 20, 1992. Appellant then claimed that she was entitled to a schedule award for permanent impairment of her extremities.

⁶ Docket No. 00-845 (issued March 1, 2001).

⁷ Docket Nos. 03-1068 and 03-1342 (issued September 17, 2003).

⁸ In a report dated November 30, 2001, Dr. Jeff N. Gheraibeh, an attending Board-certified orthopedic surgeon, determined that appellant had a 5 percent impairment of her left lower extremity (based on sensory loss associated with the S1 nerve) and a 25 percent impairment of her right lower extremity (based on motor loss associated with the L5 and S1 nerves). An Office medical adviser determined that appellant had a 12 percent impairment of her left lower extremity and a 25 percent impairment of her right lower extremity. By award of compensation dated May 21, 2002, the Office granted appellant a schedule award for a 12 percent impairment of her left lower extremity; by award of compensation dated January 16, 2003, the Office granted her a schedule award for a 25 percent impairment of her right lower extremity. By decision dated March 7, 2003, the Office determined that the Office medical adviser improperly calculated appellant's left lower extremity impairment and rescinded a portion of the schedule award for her left lower extremity such that she would receive a schedule award totaling five percent for that member.

The facts and the circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.

After the Board's September 17, 2003 decision, appellant submitted a January 20, 2004 letter to the Office which bore the heading, "Requesting for Reconsideration for Additional Schedule Award." She requested that the Office "reconsider" whether she was eligible for "an increase or additional schedule award." She asserted that her condition had worsened and indicated that Dr. Gheraibeh, an attending Board-certified orthopedic surgeon whose opinion provided the basis for her original lower extremity schedule awards, had "given me an addition[al] schedule award." In connection with her January 20, 2004 letter, appellant submitted a December 8, 2003 report in which Dr. Gheraibeh indicated that she was last seen on November 4, 2003 and reached maximum medical improvement around August 28, 2003. He described various findings on examination in her lower extremities and diagnosed an L4-5 disc herniation affecting the S1 nerve root in both legs and spinal stenosis affecting the lower extremities. Dr. Gheraibeh concluded that appellant had a lower extremity impairment of 10 percent.⁹

By decision dated January 30, 2004, the Office refused to reopen appellant's case for merit review. It characterized appellant's January 20, 2004 letter and accompanying evidence as a request for reconsideration of its March 7, 2003 decision. The Office stated that the evidence submitted by appellant was "immaterial" and did not provide a basis for reopening her case on the merits.

LEGAL PRECEDENT

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.¹⁰ Moreover, Office procedure provides that a claim for an increased schedule award may be based on an incorrect calculation of the original award or an increased impairment at a later date which is due to work-related factors. In such a situation, an increased schedule award may be payable if supported by the medical evidence.¹¹

ANALYSIS

In its January 30, 2004 decision, the Office treated appellant's claim that he sustained an increased percentage of permanent impairment of her extremities as a request for reconsideration

⁹ He also diagnosed right carpal tunnel syndrome and indicated that appellant had an upper extremity impairment of 10 percent.

¹⁰ *Linda T. Brown*, 51 ECAB 115, 116 (1999); *Paul R. Reedy*, 45 ECAB 488, 490 (1994).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7.b (August 2002). In addition, Office procedure provides that a request for reconsideration of a schedule award based on a disagreement with the percentage awarded must be distinguished from a situation where a claimant who previously received an award is filing for an increased impairment due to a worsening of the claimant's medical condition due to deterioration of his condition or increased exposure. Such a request for increased impairment is not subject to the one-year time limitation for reconsideration. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.b (January 2004).

of its March 7, 2003 decision.¹² This was improper as appellant claimed an increased impairment due to work factors which occurred during a period after the original granting of her schedule awards; she did not claim an incorrect calculation of the original award. Although appellant used the terms “reconsider” and “reconsideration” in her January 20, 2004 letter, she clearly expressed her request for an increased schedule award due to a claimed worsening of her permanent impairment. For example, she titled her letter, “[r]equesting for [r]econsideration for [a]dditional [s]chedule [a]ward,” indicated that her condition had worsened, and noted that Dr. Gheraibeh had produced a recent report which she felt entitled her to an additional schedule award.

In connection with her January 20, 2004 letter, appellant submitted a December 8, 2003 report in which Dr. Gheraibeh indicated that she was last seen on November 4, 2003 and reached maximum medical improvement around August 28, 2003. He described various findings on examination in her lower extremities and concluded that she had a lower extremity impairment of 10 percent.¹³ This evidence clearly concerns appellant’s condition in late 2003 and provides an opinion as to her permanent impairment at that time. The evidence does not address appellant’s condition prior to the time her original schedule awards were granted.

As appellant has made a claim for an increased schedule award for her lower extremities, including the submission of medical evidence regarding her permanent impairment at a date subsequent to the prior schedule award decisions, she is entitled to a merit decision on the medical evidence in connection with this claim. The Office has not determined appellant’s entitlement to a schedule award for such claimed increased impairment of her lower extremities. The case will be remanded to the Office for further development to be followed by an appropriate decision.¹⁴

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant’s case for further review of the merits of her claim. The case is remanded to the Office for further development to include an appropriate merit decision regarding appellant’s claim for an increased lower extremity schedule award.

¹² By award of compensation dated May 21, 2002, the Office granted appellant a schedule award for a 12 percent impairment of her left lower extremity; by award of compensation dated January 16, 2003, the Office granted her a schedule award for a 25 percent impairment of her right lower extremity. By decision dated March 7, 2003, the Office rescinded a portion of the schedule award for her left lower extremity such that she would receive a schedule award totaling five percent for that member.

¹³ He also indicated that appellant had an upper extremity impairment of 10 percent. The Office has not accepted any employment-related condition which would affect appellant’s upper extremities and this matter is not presently before the Board on appeal.

¹⁴ See *Brown and Reedy*, *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: July 16, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member