United States Department of Labor
Employees' Compensation Appeals Board

STEPHEN J. VESCELUS, Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Carol Stream, IL, Employer**	**Docket No. 04-262** **Issued: May 21, 2004**

Appearances:
Stephen J. Vescelus, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 3, 2003 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated August 8, 2003 denying appellant's reconsideration request of a schedule award decision on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit schedule award decision of April 2, 2001 and the filing of this appeal, the Board lacks jurisdiction to review the merits of that claim. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the August 8, 2003 decision.[1]

ISSUES

The issue is whether the Office properly considered appellant's May 31, 2003 request as an untimely request for reconsideration.

[1] Appellant is only appealing the August 8, 2003 decision denying his request for an "adjustment" of an April 17, 2000 and April 2, 2001 schedule award. Appellant is not appealing the August 8, 2003 decision denying disability commencing in 1995.

FACTUAL HISTORY

On October 26, 1993 appellant, then a 48-year-old custodial laborer, filed a traumatic injury claim alleging that he injured his right shoulder while in the performance of his duties on July 20, 1993.[2] Appellant did not stop work; but began working with restrictions.

In a September 14, 1993 report, Dr. Jeffrey Williamson-Link, Board-certified in occupational medicine and an employing establishment physician, diagnosed right shoulder strain with trapezius pain. Dr. Williamson-Link continued to treat appellant and indicated that he could only do limited duty and left hand work. Appellant was also seen by Dr. Leonard W. Labelle, a Board-certified orthopedic surgeon, who indicated that appellant could only do left hand work and recommended a electromyography (EMG) examination. Dr. Theodore Suchy, a physician of unknown specialty,[3] recommended trigger point injections and an EMG.

On September 27, 1995 the Office accepted the claim for right shoulder strain.[4]

Appellant thereafter came under the care of Dr. Jeffrey Garske, a Board-certified orthopedic surgeon, who in an October 15, 1999 report, noted appellant's history of injury and opined that appellant had a snapping scapula, possibly secondary to osteochondroma and advanced multiple level degenerative cervical disc disease and osteoarthritis. The physician indicated that appellant was unable to do repetitive work, overhead or heavy lifting.

On October 22, 1999 appellant filed a Form CA-7 claim for a schedule award. In a December 17, 1999 report, Dr. Garske indicated that appellant could only perform light duty. In a January 6, 2000 report, Dr. Garske reported that on examination of the right shoulder appellant had 10 degrees of internal rotation, 80 degrees of external rotation, 120 degrees of abduction, 130 degrees of forward flexion, 30 degrees of extension and 20 degrees of abduction. He indicated that there was popping, crepitation and snapping throughout the area of the shoulder with alternate internal and external rotation. The physician stated that there was no obvious atrophy or deformity, although there was weakness of abduction and forward flexion. He opined that appellant had a snapping scapula, chronic cervical pain and neuritis. In a January 6, 2000 Office form report, Dr. Garske again noted the range of motion measurements and indicated that there was no atrophy or deformity. However, he did not provide an impairment rating. The Office medical adviser reviewed Dr. Garske's measurements and determined that appellant was entitled to a 15 percent impairment of the right upper extremity.

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[2] The record reflects that several claim forms were filed for traumatic injury, occupational disease and recurrence of disability. The Office noted these forms and subsequently determined that the July 20, 1993 traumatic injury claim was the appropriate claim.

[3] No listing was available in the Board certification directories.

[4] The record reflects that appellant returned to work with restrictions after the work injury, but eventually resigned on October 25, 1994. His claim was eventually closed and by letter dated June 25, 1999, appellant requested that his claim be reopened.

By decision dated April 17, 2000, the Office awarded appellant compensation for a 15 permanent impairment of the right upper extremity, for 46.80 weeks, to run from January 20 to December 13, 1994.

In a letter dated May 14, 2000, appellant requested a hearing. By decision dated December 21, 2000, the Office hearing representative remanded the case for additional clarification from Dr. Garske regarding his findings on examination.

On January 27, 2001 appellant submitted a Form CA-7 claim requesting wage-loss compensation for disability for the period of 1995 to the present.

In response to the Office's request for clarification, in a February 23, 2001 report, Dr. Garske explained that the measurements taken in his January 6, 2000 visit would be most accurate. On March 26, 2001 the Office medical adviser reviewed Dr. Garske's report again and determined that appellant was entitled to a 15 percent impairment of the right upper extremity.

On April 2, 2001 the Office issued a *de novo* decision entitling appellant to a schedule award for 15 permanent impairment of the right upper extremity.[5]

By letter dated April 11, 2001, appellant requested a hearing, which was scheduled for September 26, 2001. The hearing representative advised that on September 26, 2001 they met prior to the hearing and appellant's representative advised the Office that appellant was satisfied with the schedule award decision; however, he wanted a formal decision on his claim for total disability. An agreement was made that a hearing on the schedule award was not necessary and a final decision would be made on appellant's claim for total disability.

By decision dated December 7, 2001, the Office denied the claim for compensation as the medical evidence failed to show that appellant was disabled for work commencing in 1995, as a result of the accepted work injury of July 20, 1993.

By letter dated December 27, 2001, appellant's representative requested a hearing, which was held on April 24, 2002.[6] Appellant's attorney submitted a copy of appellant's disability application, a Social Security Administration decision, duty status reports, medical treatment notes, hospital records, x-ray reports, diagnostic, clinical test results, a copy of the employing establishment's limited-duty job offer and medical reports from July 1993 to February 2001.

By decision dated August 9, 2002, the Office hearing representative affirmed the Office's prior decision because the medical evidence failed to establish total disability during the period claimed. The Office hearing representative noted, however, that the recommended EMG was

[5] The Office determined after remand, that appellant was entitled to no more than a 15 percent schedule award to his right upper extremity, which appellant was awarded in its April 17, 2000 decision and which was subsequently remanded for further development.

[6] During the hearing, appellant's attorney noted that the Social Security Administration determined that appellant was totally disabled as a result of the work injury and awarded disability benefits. Appellant indicated that he left work in October 1994, because he felt that he was passed over for a promotion due to his injury.

never authorized and advised the Office that this should be done in order to determine whether appellant sustained a more acute injury on July 20, 1993.

After the Office authorized an EMG, Dr. Dominic Cardelli, a Board-certified neurologist, in a December 3, 2002 report, concluded that appellant had "moderate right median neuropathy at the wrist as in carpal tunnel syndrome." In a December 5, 2002 report, Dr. R. Wynn Kearney, a Board-certified orthopedic surgeon, diagnosed carpal tunnel syndrome of the right shoulder and opined that the persistent right shoulder symptoms were possibly related to the rotator cuff injury. The physician requested a magnetic resonance imaging (MRI) scan. In a report of work ability of the same date, Dr. Kearney noted that appellant had been unable to work since 1995.[7]

A January 28, 2003 MRI scan read by Dr. Sarah Clauss, a Board-certified diagnostic radiologist, revealed type 2 acromian with inferior spurring at the acromioclavicular (AC) joint and inferolateral acromion, tendinosis/tendinitis of supraspinatus. The physician also reported tendinisis of bicipital tendon, possibly medially subluxed at the superior aspect of the humerus and a possible partial tear at the anterior bicipital labral complex, a tear at the posterior aspect of the superior glenoid labrum and a possible tear at the anterior glenoid labrum as well. Additionally, a subchondral cyst formation at the anterior superior glenoid labrum, proximal humerus and AC joint along with mild glenohumeral joint effusion and subacromial/subdeltoid bursitis was noted.

In a report dated February 4, 2003, Dr. Kearney reviewed the MRI scan results and recommended subacromial injection with cortisone, which appellant declined. The physician noted that an arthroscopic procedure of the right shoulder was also discussed with appellant. In a February 13, 2003 chart note, Dr. Kearney opined that he "could only recount the history that has been provided to me, which is plausible and reasonable."

In a March 27, 2003 report, Dr. Kearney advised that he did not believe that appellant's carpal tunnel syndrome was related to his shoulder injury and that appellant's shoulder symptoms and neck complaints were not related to neck arthritis as they were related to specific findings in the shoulder demonstrated by the MRI scan.

By letter dated May 31, 2003, appellant requested reconsideration of the August 9, 2002 decision. He also requested that an adjustment be made to his schedule award claim.

In a June 19, 2003 report, Dr. Kearney indicated that appellant contacted him stating that the tingling paresthesias of the right hand had not subsided. The physician noted changes in the rotator cuff but no specific tearing, although the glenoid labrum had some changes. He also provided reports dated February 4 and March 27, 2003, regarding "work ability" that appear to indicate appellant was not working as he was retired.

[7] In a December 20, 2002 report, Dr. Link noted that appellant had moved and was no longer located near his clinic. He indicated that appellant was subsequently treating with Dr. Kearney. Dr. Link requested authorization for an MRI scan.

On August 8, 2003 the Office expanded appellant's claim to include right shoulder tendinitis By decision dated August 8, 2003, the Office denied modification of the August 8, 2002 decision denying disability from 1995 to the present. The Office found that there was no rationalized medical evidence in support of appellant's contention that his disability for the period beginning in 1995 and continuing was causally related to the accepted work injuries.

In a separate decision also dated August 8, 2003, the Office also denied appellant's May 31, 2003 request for reconsideration of the schedule award on the grounds that it was untimely filed and did not present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.[8] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[9] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[10] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.[11]

However, a claimant may seek an increased schedule award if the evidence establishes that progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated.[12]

ANALYSIS

Appellant stated that he wanted an "adjustment" to his schedule award as he had recent evidence to show that his impairment had worsened. He also submitted a report dated December 5, 2002 from Dr. Kearney, who opined that the persistent shoulder symptoms were possibly related to the rotator cuff injury. In a June 19, 2003 report, Dr. Kearney indicated that the tingling and paresthesias of the right hand had not subsided and noted changes in the rotator cuff. Although appellant used the term "reconsideration," the evidence submitted clearly concerns appellant's condition after the schedule award was made. The Office improperly proceeded to treat this as an untimely reconsideration request, as opposed to a request for an increased schedule award. A claimant may seek an increased schedule award if the evidence establishes that he sustained an increased impairment at a later date causally related to his

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[8] 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.,* 41 ECAB 104 (1989).

[9] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.607 (1999).

[11] 20 C.F.R. § 10.607(a) (1999).

[12] *Linda T. Brown*, 51 ECAB 115 (1999).

employment injury.[13] In this case, appellant has submitted medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision. He is entitled to a *de novo* decision on the medical evidence and the case will be remanded to the Office for appropriate action.[14]

CONCLUSION

The Board finds that the Office improperly considered appellant's May 31, 2003 request for an increased schedule award as an untimely request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the August 8, 2003 decision of the Office of Workers' Compensation Programs that denied appellant's request for reconsideration of a schedule award is vacated and the case remanded to the Office for proceedings consistent with this opinion.

Issued: May 21, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

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[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.7(b) (August 2002). This section states that claims for increased schedule awards may be based on incorrect calculation of the original award or new exposure. To the extent that a claimant is asserting that the original award was erroneous based on his medical condition at that time, this would be a request for reconsideration. A claim for an increased schedule award may be based on new exposure or on the situation presented here: medical evidence indicating the progression of an employment-related condition, without new exposure to employment factors, resulting in a greater permanent impairment than previously calculated. *See also, Paul R. Reedy*, 45 ECAB 488 (1994).

[14] *See Linda T. Brown*, *supra* note 12.