

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

MARIE A. LENKOWSKI, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bellmawr, NJ, Employer**

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**Docket No. 05-51
Issued: December 8, 2005**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 30, 2004 appellant, through counsel, filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated June 20, 2004, which denied her request for reconsideration of her schedule award. Because more than one year has elapsed from the last merit decision dated August 20, 2002 and the filing of this appeal on September 30, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits of her claim on the grounds that it was untimely filed and failed to show clear evidence of error. Appellant's counsel argues that he was unable to file a timely appeal as the Office failed to provide a copy of an August 20, 2002 decision to counsel and sent appellant's copy to the wrong address.

FACTUAL HISTORY

The case was before the Board on a prior appeal. The issue presented was whether appellant had more than a 20 percent impairment of her right and left upper extremities for which she received schedule awards. In a decision issued September 1, 2000, the Board remanded the case for the Office to resolve a conflict in the medical opinion evidence between Dr. David Weiss, appellant's attending osteopath, and Drs. Bruce W. Wulfsberg and Joseph A.W. Kozielski, both Board-certified orthopedic surgeons and second opinion specialists, regarding the degree of appellant's impairment due to her accepted carpal tunnel syndrome.¹ The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.²

On January 5, 2001 the Office referred appellant to Dr. Gregory S. Maslow, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated January 25, 2001, Dr. Maslow concluded that appellant had a 10 percent impairment of both the left and right upper extremities using Table 16 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (A.M.A., *Guides*) due to her bilateral nerve dysfunction. In concluding, he found that pursuant to the Combined Values Chart appellant had a 19 percent bilateral upper extremity impairment.

By decision dated February 23, 2001, the Office determined that appellant was not entitled to an additional schedule award. In reaching this determination, the Office noted that appellant had previously been issued a schedule award for a 20 percent bilateral upper extremity impairment and Dr. Maslow concluded that she had a 19 percent bilateral upper extremity impairment.

In a letter dated February 28, 2001, appellant's counsel requested an oral hearing.

By decision dated July 6, 2001, the Office hearing representative vacated the February 23, 2001 decision as the Office failed to follow the Board's instructions to refer appellant for an impartial medical examination.

On August 10, 2001 the Office referred appellant to Dr. Stanly R. Askin, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence regarding the extent of permanent impairment. In an August 31, 2001 report, Dr. Askin, based upon a statement of accepted facts, review of the medical evidence and physical examination, concluded that appellant had a 10 percent impairment of each upper extremity based on the fifth edition of the A.M.A., *Guides*.

¹ Docket No. 98-2143 (issued September 1, 2000). Appellant, a distribution clerk/machine operator, filed an occupational disease claim which was accepted by the Office for bilateral carpal tunnel syndrome.

² Appellant retired in January 2000.

In a September 27, 2001 report, the Office medical adviser agreed with Dr. Askin's determination and noted that the results would be the same under the fourth edition of the A.M.A., *Guides*.³

By an "amended award of compensation" decision dated October 5, 2001, the Office determined that appellant had a 10 percent impairment of her left upper extremity and a 10 percent impairment of her right upper extremity. Therefore, she was not entitled to a schedule award as she had been previously granted 20 percent impairment for each upper extremity.

In a letter dated October 12, 2001, appellant's counsel requested a hearing before an Office hearing representative.

In a decision dated April 23, 2002, an Office hearing representative set aside the October 5, 2001 decision. The Office hearing representative instructed the Office on remand to determine whether Dr. Askin had been properly selected through the Physicians Directory System.

In a letter dated May 16, 2002, appellant's counsel requested to participate in the selection of the impartial medical examiner.

On July 1, 2002 the Office referred appellant to Dr. Robert Bachman, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence regarding the percentage of permanent impairment of her upper extremities. The mailing address used by the Office was 5 Hickory Place, Bellmawr, NJ 08031. In a subsequent letter, containing the same mailing address, dated July 16, 2002, the Office informed appellant that Dr. Bachman was selected to resolve the conflict in the medical opinion evidence regarding whether she has any continuing disability due to her accepted employment injury.

In a report dated August 1, 2002, Dr. Bachman, based upon a review of the medical evidence, statement of accepted facts and physical examination, concluded that appellant had a 9 percent impairment of her right upper extremity and a 12 percent impairment of the left hand. For appellant's right upper extremity impairment, Dr. Bachman found a 7 percent impairment using Tables 16-10 and 16-5 for her sensory deficit and Tables 16-11A and 16-15 to determine her motor deficit. He used the Combined Values Chart to determine that appellant had a nine percent impairment of her right upper extremity impairment. With regard to her left upper extremity, he noted:

"For the left hand the same process was used noting an 8 percent sensory impairment and a 12 percent motor impairment, which when combined in the chart on page 605, gives a value of 12 percent impairment."⁴

By decision dated August 20, 2002, the Office found that appellant was not entitled to an additional schedule award as the medical evidence did not establish greater than the 20 percent

³ Table 16 at page 57.

⁴ The Board notes that under the Combined Values Chart, combining 8 and 12 equals 19.

impairment of each upper extremity previously awarded. The mailing address used by the Office was 1 Swede Mine Rd, Apt 5b, Rockaway, NJ 07866 and her counsel was copied on the letter with his last known mailing address.

On September 16, 2002 the Office received a letter dated September 10, 2002 from appellant's counsel enclosing medical evidence, including a copy of a May 22, 2002 left shoulder replacement surgical report by Dr. Michael F. Harrer, a treating Board-certified orthopedic surgeon. Appellant's attorney requested that the surgery be authorized and stated "I further suggest that this does impact on the claimant's schedule award." Additionally, he stated that the letter and medical evidence was "a follow-up to the remand of the [Office's] Branch [of Hearings and Review] dated April 23, 2002."

In a letter dated November 8, 2002, appellant's counsel noted the September 10, 2002 letter and requested "a response in this matter at your earliest convenience."

In a letter dated March 29, 2004, appellant, through counsel, requested review of the August 20, 2002 decision. Appellant noted letters requesting a decision of the remand order dated May 16, June 24, July 22, July 31, September 10 and November 8, 2002 and April 24, 2003. Appellant's counsel stated neither he nor appellant received a copy of the August 20, 2002 decision as the decision was sent to the wrong address for appellant and added that he was advised of the decision by a congressman. Appellant's counsel argued that it was "my custom in these types of matters to request a hearing within 30 days" and as neither he nor appellant received a copy of the decision, appellant "was precluded from taking an appropriate and traditional appeal action." Appellant requested the Office reissue the August 20, 2002 decision. It was also contended that the fourth edition of the A.M.A., *Guides* should have been used as the initial schedule award was determined under that edition.

In a nonmerit decision dated June 30, 2004, the Office denied appellant's request for reconsideration of its August 20, 2002 decision on the basis that her request was untimely filed and did not present clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁵ vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Act does not entitle a claimant to a review of an Office decision as a matter of right.⁷

⁵ 5 U.S.C. § 8128(a) ("[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").

⁶ *Raj B. Thackurdeen*, 54 ECAB ____ (Docket No. 02-2392, issued February 13, 2003); *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁷ 20 C.F.R. § 10.608(a); see *Veletta C. Coleman*, *supra* note 6.

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.⁸ 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 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.¹⁰ The Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹¹ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹²

ANALYSIS

The only decision before the Board is the June 30, 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 she sustained an increased impairment at a later date causally related to an employment injury,¹³ such is not the case here. In a March 29, 2004 reconsideration request, appellant's counsel contended that neither he nor appellant received a copy of the August 20, 2002 decision. In support of this argument, appellant's attorney referred to his letters to the Office dated September 10 and November 8, 2002 and April 24, 2003 regarding the status of the remand order. Under the mailbox rule, evidence of a properly addressed letter together with evidence of proper mailing may be used to establish receipt.¹⁴ The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual.¹⁵ Presumption of receipt arises in

⁸ 5 U.S.C. §§ 8101-8193. The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB ____ (Docket No. 04-208, issued March 18, 2004).

⁹ 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

¹⁰ *Leon J. Modrowski*, 55 ECAB ____ (Docket No. 03-1702, issued January 2, 2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Linda T. Brown*, 51 ECAB 115 (1999).

¹⁴ *See Jeffrey M. Sagrecy*, 55 ECAB ____ (Docket No. 04-1189, issued September 28, 2004); *Larry L. Hill*, 42 ECAB 596 (1991).

¹⁵ *Joseph R. Giallanza*, 55 ECAB ____ (Docket No. 03-2024, issued December 23, 2003); *Cresenciano Martinez*, 51 ECAB 322, 325 (2000).

this case as the Office's August 20, 2002 decision was properly addressed to appellant's attorney's address. Although appellant's counsel references letters written subsequent to the August 20, 2002 decision, this does not alter the fact that there is no evidence to rebut the presumption of receipt by appellant under the mailbox rule. Therefore, the Board finds that it is presumed that appellant received the Office's August 20, 2002 decision.¹⁶

Appellant's counsel contends the September 10, 2002 letter and supporting May 22, 2002 left shoulder replacement surgical report by Dr. Harrer, a treating Board-certified orthopedic surgeon, should be construed as a request for reconsideration. The Board concludes that this contention is without merit. The September 10, 2002 letter references two claim numbers¹⁷ and the evidence submitted by appellant pertains to her shoulder injury and not to her carpal tunnel syndrome. The September 10, 2002 letter contains no written request for review, no identification of the August 20, 2002 decision and no arguments regarding the correctness of the decision. In order to be considered a request for reconsideration, the application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence consistent with regulatory criteria.¹⁸ As the September 10, 2002 letter met none of these requirements, it cannot be considered a request for reconsideration. As appellant filed her request more than one year after the Office's August 20, 2002 merit decision, she must demonstrate "clear evidence of error" on the part of the Office in its August 20, 2002 decision.

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office stated that it had reviewed the evidence submitted by appellant in support of her application for review, but found that it did not clearly show that the Office's prior decision was in error. The evidence appellant submitted in support of her request for reconsideration did not demonstrate clear evidence of error. The May 22, 2002 left shoulder replacement surgical report by Dr. Harrer cannot be considered as probative evidence in support of the underlying claim as it is not relevant to her bilateral carpal tunnel condition. This evidence was insufficient to show clear evidence of error in the Office's August 20, 2002 decision. The Office properly denied appellant's reconsideration request.

¹⁶ The Board notes that notification to either appellant or the representative will be considered notification to both. *Travis L. Chambers*, 55 ECAB ___ (Docket No. 02-1650, issued November 4, 2003).

¹⁷ The claim numbers referenced are 02-742316, with an April 20, 1998 date of injury, and 02-568501, with a March 9, 1981 date of injury. A consolidation of these two claims may be warranted as an impairment of the left shoulder would have an impact on an upper extremity impairment determination, which appellant has been awarded for her accepted bilateral carpal tunnel syndrome.

¹⁸ *Donna L. Shahin*, 55 ECAB ___ (Docket No. 02-1597, issued December 23, 2003); 20 C.F.R. § 10.606(b).

CONCLUSION

The Board finds that the Office properly determined that appellant's request for reconsideration dated March 29, 2004 was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 30, 2004 be affirmed.

Issued: December 8, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board