

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

FRANCES S. SMITH-KIMBROUGH, Appellant	)	
	)	
and	)	<b>Docket No. 05-431</b>
	)	<b>Issued: May 4, 2005</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Detroit, MI, Employer	)	
	)	

*Appearances:*  
Steve Burt, for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On December 7, 2004 appellant filed a timely appeal from an October 22, 2004 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration on the grounds that it was untimely filed and did not establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated October 3, 2003 and the filing of this appeal on December 7, 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, the Board has jurisdiction to review the October 22, 2004 nonmerit decision.

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

**FACTUAL HISTORY**

On February 26, 2002 appellant, then a 48-year-old mail carrier, filed a traumatic injury claim alleging that she developed frostbite on her hands while delivering mail. The Office

accepted the claim for bilateral frostbite and Raynaud's phenomenon (hereinafter "Raynaud's").<sup>1</sup> On July 17, 2001 appellant filed a claim for a schedule award based on her accepted condition.

In order to ascertain data necessary to determine permanent partial impairment, the Office referred appellant to Dr. Lynne E. Howell, a Board-certified surgeon, for a second opinion examination. In a report dated October 30, 2001, Dr. Howell stated that he had no objective way of measuring loss of neurological function without exposing appellant's hands to cold temperatures, which he deemed to be inadvisable. He was, therefore, unable to document any impairment and provided no impairment rating.

On November 28, 2001 Dr. Nabil Angley, a Board-certified orthopedic surgeon, determined that, based upon Dr. Howell's October 30, 2001 medical report, appellant's total percent of impairment for her upper extremities was zero percent.

On December 5, 2001 the Office denied appellant's claim, advising her that her conditions were not ratable. Appellant requested a hearing and in support thereof submitted several medical reports. In a report dated April 30, 2002, Dr. Anthony Baron, a Board-certified internist, indicated that appellant suffered from chronic pain syndrome and carpal tunnel syndrome. In a May 20, 2002 report, Dr. Charles A. Murphy, a Board-certified osteopath specializing in family practice, stated that appellant had significant pain and tingling in her hands which kept her awake at night and that she suffered from mild carpal tunnel syndrome.<sup>2</sup> In a June 2, 2002 report, Dr. Howell provided a diagnosis of carpal tunnel syndrome and opined that appellant's symptoms related to Raynaud's would recur if she were exposed to ambient cold temperatures. In a note received by the Office on July 5, 2002, Dr. Baron stated that appellant had loss of use of her hands when exposed to cold temperatures and suffered from persistent pain in her hands without exposure to cold temperatures and that her Raynaud's exacerbated her chronic pain. In a letter dated July 10, 2002, Dr. Alan F. Green, a treating physician, opined that, if appellant's hands were exposed to temperatures of less than 32 degrees, she could risk amputation of her fingers and that she may otherwise have episodes of loss of strength and tactile sensation in both hands.<sup>3</sup>

By decision dated August 20, 2002, the Office hearing representative affirmed the denial of appellant's request for a schedule award, stating that there was no medical evidence of record to substantiate that she had sustained a permanent partial impairment to her upper extremities; that there was insufficient data to assess the percentage of impairment to her hands; and that there was no evidence of neurological impact.

By letter dated June 27, 2003, appellant requested reconsideration of the August 20, 2002 decision and in support thereof submitted a report dated April 17, 2003 signed by Dr. J. Matthew

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<sup>1</sup> Raynaud's phenomenon is defined in Dorland's *Illustrated Medical Dictionary* (30<sup>th</sup> ed. 2003) as "intermittent bilateral attacks of ischemia of the fingers or toes and sometimes of the ears or nose, marked by severe pallor, and often accompanied by paresthesia and pain; it is brought on characteristically by cold or emotional stimuli and relieved by heat, and is due to an underlying disease and anatomical abnormality."

<sup>2</sup> Dr. Murphy represents that he is a doctor of osteopathy. However, his credentials cannot be verified.

<sup>3</sup> Dr. Green's credentials cannot be verified.

Voci, a Board-certified neurologist, who opined that appellant suffered from an underlying peripheral neuropathy in the hands that was most likely trauma induced from frostbite. He stated that her symptoms were permanent and progressive in nature; that she had difficulty sorting through the mail and flipping through it with her fingers where she had little sensation; and that her grip strength was diminishing.

By decision dated October 3, 2003, the Office denied appellant's request for reconsideration on the grounds that she had failed to present medical evidence either establishing that her condition had reached a fixed state or giving a percentage evaluation of the impairment.

By letter dated October 4, 2004, appellant requested reconsideration of the Office's October 3, 2003 decision. In support of her request, appellant submitted a letter from her representative stating that the appeal was based on the submission of relevant new medical evidence, including a medical report from Dr. Voci and a medical report and notes from Dr. James J. Dietz, an orthopedic hand specialist. Appellant also submitted a September 30, 2004 report from Dr. Voci, in which he opined that appellant had a Class 2 (39 percent) impairment of her upper extremities.<sup>4</sup> He stated his belief that appellant had suffered permanent and irreversible damage to the peripheral nerves as a result of her frostbite, which was the trauma that led to the Raynaud's, peripheral neuropathy and carpal tunnel syndrome. He stated that the Raynaud's had progressed over time and was not improving.

By decision dated October 22, 2004, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

### **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.<sup>5</sup> 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.<sup>6</sup> 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

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<sup>4</sup> The record does not contain a report or notes from Dr. Dietz. The Office's October 22, 2004 decision reflects that it did not receive Dr. Dietz' report.

<sup>5</sup> *Linda T. Brown*, 51 ECAB 115, 116 (1999); *Paul R. Reedy*, 45 ECAB 488, 490 (1994).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7.b (August 2002).

deterioration of his condition or increased exposure. Such a request for increased impairment is not subject to the one-year time limitation for reconsideration.<sup>7</sup>

### ANALYSIS

On August 20, 2002 an Office hearing representative affirmed the Office's December 5, 2001 denial of a schedule award. Appellant's request for reconsideration was denied on October 3, 2003. On October 4, 2004 appellant submitted a letter to the Office (entitled request for reconsideration) seeking a schedule award, as well as new medical evidence in the form of a September 30, 2004 report from Dr. Voci wherein he opined that she had a Class 2 (39 percent) impairment of her upper extremities. The Board finds that appellant's October 4, 2004 letter constituted a request for an increased schedule award.<sup>8</sup>

Although appellant's representative used the term "reconsideration" in his October 4, 2004 letter, the request is clearly for a schedule award based on appellant's worsening condition, as reflected in the newly submitted medical evidence. The Office erroneously treated the October 4, 2004 letter as a request for reconsideration. As appellant made a claim for an increased schedule award,<sup>9</sup> including the submission of current medical evidence regarding her permanent impairment at a date subsequent to the prior request for a schedule award, 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 upper extremities. Therefore, the case must be remanded to the Office for further development, to be followed by an appropriate decision.<sup>10</sup>

### CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's claim for review of its October 3, 2003 decision on the grounds that her request for reconsideration was not timely filed and failed to demonstrate clear evidence of error. The Board finds appellant's October 4, 2004 letter constituted a request for an increased schedule award.

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<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, Reconsiderations, Chapter 2.1602.5.b (January 2004).

<sup>8</sup> See *Linda T. Brown*, *supra* note 5, (where the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error, the Board found that the Office improperly refused to reopen the claim for merit review, in that appellant had submitted medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision). *Id.* at 116.

<sup>9</sup> Since the Office previously denied appellant's request for a schedule award, any award obtained greater than zero percent would be an increased award.

<sup>10</sup> See *Linda T. Brown* and *Paul R. Reedy*, *supra* note 5.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 22, 2004 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: May 4, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member