United States Department of Labor
Employees' Compensation Appeals Board

GLORIA A. SMITH, Appellant	)	
and	)	**Docket No. 05-1661**
	)	**Issued: April 4, 2006**
DEPARTMENT OF THE NAVY, NAVAL AIR DEPOT, Jacksonville, FL, Employer	)	

Appearances:
Gloria A. Smith, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 8, 2005 appellant filed a timely appeal of the May 12, 2005 merit decision of the Office of Workers' Compensation Programs, which denied an additional schedule award and two nonmerit decisions dated June 24, 2005. In one decision, the Office denied reconsideration of the May 12, 2005 schedule award decision. The other decision denied merit review on the issue of whether appellant's wage-loss compensation was properly reduced because of her failure to fully participate in vocational rehabilitation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's schedule award claim. However, the Board does not have jurisdiction over the reduction of her wage-loss compensation.

ISSUES

The issues are: (1) whether the Office properly denied reconsideration of the reduction of appellant's wage-loss compensation on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error; (2) whether she is entitled to an additional schedule award for impairment of her upper extremities; and (3) whether the Office properly denied appellant's request for a review of the merits of her claim for a schedule award pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a 55-year-old aircraft production controller, has an accepted claim for right shoulder strain, right rotator cuff tear and bilateral carpal tunnel syndrome, with right carpal tunnel release performed May 1, 1996. Her accepted conditions arose on or about April 9, 1996. The Office authorized right shoulder arthroscopic debridement and decompression, which appellant underwent on July 10, 1998. The Office placed appellant on the periodic compensation rolls effective July 19, 1998.

On April 27, 2000 the Office granted a schedule award for 18 percent impairment of the right upper extremity. This included a combined impairment of 10 percent for right carpal tunnel syndrome and 9 percent impairment for the right shoulder. The award covered a period of 56.16 weeks from April 6, 2000 to May 5, 2001.[1] Upon the expiration of her schedule award, the Office resumed payment of wage-loss compensation for total disability.

In January 2003, the Office referred appellant for vocational rehabilitation after an impartial medical examiner determined that she was medically capable of performing full-time, modified employment. The Office approved a training program as a customer service clerk. Appellant's participation in the vocational rehabilitation effort was erratic and on more than one occasion the Office advised her that she was at risk of having her wage-loss compensation reduced in accordance with 5 U.S.C. § 8113(b).[2] Despite the Office's May 20, 2003 admonition, appellant continued to be irregular in her attendance and offered no explanation for her repeated absences.

In a decision dated September 25, 2003, the Office reduced appellant's wage-loss compensation in accordance with 5 U.S.C. § 8113(b), based on what would have been her wage-earning capacity as a customer service clerk had she not failed to undergo vocational rehabilitation. The reduction of compensation was effective October 5, 2003. By decision dated May 26, 2004, an Office hearing representative affirmed the September 25, 2003 decision.[3]

On October 20, 2004 appellant requested an additional schedule award. In a report dated January 6, 2005, Dr. Carlos A. Leon-Barth, an attending Board-certified neurologist, estimated

[1] On April 6, 2000 appellant elected to receive an annuity from the Office of Personnel Management in lieu of continued wage-loss compensation.

[2] The Federal Employees' Compensation Act and the implementing regulations provide for sanctions if an employee, without good cause, fails or refuses to apply for, undergo, participate or continue to participate in a vocational rehabilitation effort when so directed. 5 U.S.C. § 8113(b); 20 C.F.R. § 10.519 (1999). These sanctions remain in effect until the employee in good faith complies with the Office's directives.

[3] The record before the hearing representative indicated that appellant had a stroke on January 2, 2004, with right-side paralysis. While the hearing representative affirmed the earlier reduction of compensation, he advised that attention should be directed to appellant's ability to undergo vocational rehabilitation in light of her recent stroke. He also indicated that further medical evaluation was warranted.

20 percent impairment of both upper extremities due to sensory and motor deficits resulting from carpal tunnel syndrome.[4] The Office referred the record to the medical consultant, Dr. James W. Dyer, a Board-certified orthopedic surgeon. In a report dated March 3, 2005, he found 18 percent impairment of the right upper extremity and 0 percent impairment of the left upper extremity. Dr. Dyer stated that Dr. Leon-Barth's impairment rating was incorrect and there was no additional impairment of the upper extremities.[5]

By decision dated May 12, 2005, the Office denied appellant's claim for an additional schedule award. The Office explained that its medical adviser reviewed the record and determined that her impairment was no greater than what had previously been awarded.

On June 14, 2005 appellant requested reconsideration of the hearing representative's May 26, 2004 decision regarding the reduction of her wage-loss compensation. In a June 24, 2005 decision, the Office found that appellant's request was untimely filed and failed to demonstrate clear evidence of error on the part of the Office. The Office also considered appellant's June 14, 2005 correspondence as a request for reconsideration of the May 12, 2005 schedule award decision. In a separate decision also dated June 24, 2005, the Office denied reconsideration of the May 12, 2005 decision.

LEGAL PRECEDENT -- ISSUE 1

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.[6] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[7] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[8] 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.[9] In those instances, when a request for reconsideration is not timely filed, the Office

[4] Although Dr. Leon-Barth noted ongoing right shoulder problems and recommended an orthopedic evaluation, he did not provided an impairment rating with respect to appellant's right shoulder condition. He explained that as a neurologist he did not do "ratings of joints." In addition to the impairment for bilateral carpal tunnel syndrome, Dr. Leon-Barth found eight percent whole person impairment for multi-level cervical degenerative disc disease. He also found 15 percent whole person impairment for right-side station and gait impairments due to a January 2, 2004 cerebral vascular accident.

[5] The Office medical adviser also noted that the whole person impairments that Dr. Leon-Barth attributed to appellant's cervical disc disease and January 2004 stroke were not associated with the accepted employment conditions.

[6] 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[7] 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).

[8] 20 C.F.R. § 10.607 (1999).

[9] 20 C.F.R. § 10.607(a) (1999).

will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office in its "most recent merit decision."[10]

ANALYSIS -- ISSUE 1

The one-year time limitation began to run the day after the Office issued the hearing representative's May 26, 2004 decision, upholding the reduction of appellant's wage-loss compensation.[11] Her request for reconsideration was dated June 14, 2005. Because appellant filed her request more than one year after the Office's May 26, 2004 merit decision, she must demonstrate "clear evidence of error" on the part of the Office in reducing her wage-loss compensation pursuant to 5 U.S.C. § 8113(b).[12]

Appellant's June 14, 2005 request for reconsideration is a copy of an Office letter dated April 6, 2005, where she merely placed an "X" on a line indicating her desire to pursue reconsideration of the May 26, 2004 decision. She did not submit any evidence or argument relevant to the issue of whether the Office properly reduced her wage-loss compensation for failure to undergo vocational rehabilitation.[13] As such, the June 14, 2005 request for reconsideration failed to demonstrate clear evidence of error on the part of the Office. Accordingly, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

LEGAL PRECEDENT -- ISSUE 2

A claim for an increased schedule award may be based on new employment exposure; however, additional occupational exposure is not a prerequisite.[14] Absent additional employment exposure, an increased schedule award may also be based on evidence

[10] 20 C.F.R. § 10.607(b) (1999). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but 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. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[11] *See Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

[12] 20 C.F.R. § 10.607(b) (1999).

[13] Appellant previously wrote to the Office requesting reinstatement of full wage-loss compensation benefits in light of her January 2004 stroke. However, her prior correspondence did not specifically allege error on the part of the Office in reducing appellant's compensation effective October 5, 2003.

[14] A claim for an increased schedule award based on additional exposure constitutes a new claim. *Paul Fierstein*, 51 ECAB 381, 385 (2000).

demonstrating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.[15]

Section 8107 of the Act sets forth the number of weeks of compensation to be paid for the permanent loss of use, of specified members, functions and organs of the body.[16] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the appropriate standard for evaluating schedule losses.[17] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[18]

ANALYSIS -- ISSUE 2

In a January 6, 2005 report, Dr. Leon-Barth indicated that appellant had 20 percent impairment of both upper extremities due to sensory and motor deficits under Table 16-15, A.M.A., *Guides* 492. He identified median nerve deficits involving the radial palmar and ulnar palmar digitals of the thumb and also the radial palmar digital of the index fingers. However, in order to properly rate impairment under Table 16-15, the evaluator must also grade the severity of the motor and sensory deficits in accordance with Tables 16-10 and 16-11, A.M.A., *Guides* 482 and 484. Dr. Leon-Barth did not indicate the grade classification or percentage of sensory and motor deficit he assigned appellant under Tables 16-10 and 16-11. Therefore, his impairment rating of 20 percent bilaterally to the upper extremities does not conform with the protocols of the A.M.A., *Guides* and is of diminished probative value.

The Office medical adviser noted that Dr. Leon-Barth's impairment rating was incorrect and found 18 percent impairment of the right upper extremity and 0 percent impairment of the left upper extremity. He correctly noted that the impairments attributed to appellant's cervical disc disease and her January 2004 stroke were not related to the accepted employment conditions and should not be included in the impairment rating. Because Dr. Leon-Barth failed to provide an impairment rating in conformance with the A.M.A., *Guides* (5th ed. 2001), appellant has not met her burden of establishing entitlement to an additional schedule award.[19]

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

[16] The Act provides that for a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks compensation. 5 U.S.C. § 8107(c)(1).

[17] 20 C.F.R. § 10.404 (1999).

[18] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003); FECA Bulletin No. 01-05 (issued January 29, 2001).

[19] *Edward W. Spohr*, 54 ECAB 806, 810 (2003).

LEGAL PRECEDENT -- ISSUE 3

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits.[20] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[21] Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[22]

ANALYSIS -- ISSUE 3

Appellant's June 14, 2005 request for reconsideration did not specifically reference the recent schedule award decision. The Office nonetheless treated this correspondence as a request for reconsideration of the May 12, 2005 denial of an additional award. Appellant neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law in denying her an additional schedule award. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, she is not entitled to a review of the merits of her schedule award claim based on the first and second above-noted requirements under section 10.606(b)(2).[23] Appellant also failed to satisfy the third requirement under section 10.606(b)(2). She did not submit any evidence with her June 14, 2005 request for reconsideration. As there was no new and relevant evidence for the Office to consider, appellant is not entitled to a review of the merits based on the third requirement under section 10.606(b)(2).[24] Because she was not entitled to a review of the merits of her schedule award claim pursuant to any of the three requirements under section 10.606(b)(2), the Office properly denied the June 14, 2005 request for reconsideration.

CONCLUSION

The Board finds that the Office correctly refused to reopen appellant's claim for reconsideration of the merits concerning the Office's reduction of wage-loss compensation pursuant to 5 U.S.C. § 8113(b). Her June 14, 2005 request was untimely filed and failed to demonstrate clear evidence of error. The Board also finds that appellant failed to establish entitlement to an additional schedule award. Furthermore, the Office properly denied merit review of the May 12, 2005 schedule award decision.

[20] 5 U.S.C. § 8128(a).

[21] 20 C.F.R. § 10.606(b)(2) (1999).

[22] 20 C.F.R. § 10.608(b) (1999).

[23] 20 C.F.R. §§ 10.606(b)(2)(i) and (ii) (1999).

[24] 20 C.F.R. § 10.606(b)(2)(iii) (1999).

ORDER

IT IS HEREBY ORDERED THAT the May 12 and June 24, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 4, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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