

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

ANDREA L. WINCHESTER, Appellant)
)
and)
)
U.S. POSTAL SERVICE, MODESTO REMOTE)
ENCODING CENTER, Modesto, CA, Employer)

**Docket No. 04-1221
Issued: November 2, 2004**

Appearances:
Andrea L. Winchester, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 6, 2004 appellant filed an appeal of a January 21, 2004 Office of Workers' Compensation Programs decision which denied her request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed from the last merit decision dated December 22, 2001 to the filing of this appeal on April 6, 2004, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether the Office properly determined that appellant's October 22, 2003 request for review of a November 28, 2001 loss of wage-earning capacity determination and a December 22, 2001 schedule award was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On November 21, 1995 the Office accepted that appellant, then a 27-year-old data conversion operator, sustained an employment-related tenosynovitis of the left index and middle fingers. On July 24, 1996 it accepted that she sustained employment-related right de Quervain's disease. She stopped work on May 9, 1996 and on May 17, 1996 was terminated by the employing establishment. Appellant was placed on the periodic rolls and referred to vocational rehabilitation. On August 19, 1997 she was going to an appointment with the rehabilitation counselor when she was involved in a motor vehicle accident and sustained injuries to her mouth. Thereafter, fractured teeth were accepted as employment related and dental care was authorized. In 1998 appellant began training in the computer field.

On March 6, 2000 the Office proposed to reduce appellant's compensation based on her ability to earn wages in the selected position of user support analyst. She disagreed with the proposed reduction, noting that she continued to have problems with her teeth. On June 29, 2000 appellant underwent authorized surgery on her right wrist.

On July 20, 2000 the Office began developing the record regarding appellant's entitlement to a schedule award. Dr. Aubrey A. Swartz, an attending Board-certified orthopedic surgeon, provided reports dated September 13, 2000 regarding appellant's right wrist and left hand.

In a November 8, 2000 report, an Office medical adviser provided findings and advised that under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),¹ appellant had a 17 percent impairment of the right upper extremity. In a report dated December 13, 2000, Dr. Swartz advised that appellant had secondary overuse of the left elbow, caused by the right wrist employment injury. In a report dated August 30, 2001, the physician noted physical findings regarding both upper extremities.

On October 19, 2001 the Office obtained updated pay rate information regarding the selected position of user support analyst. By letter dated October 22, 2001, it again proposed to reduce appellant's compensation based on her ability to earn wages in the selected position. Appellant did not respond. On November 28, 2001 the Office finalized the wage-earning capacity determination.

In a report dated October 25, 2001, an Office medical adviser reviewed Dr. Swartz' August 30, 2001 report and, utilizing Table 16-34 of the fifth edition of the A.M.A., *Guides*,² determined that appellant had a 10 percent impairment of the left upper extremity due to loss of grip strength. She advised that maximum medical improvement had been reached on August 30, 2001.

¹ A.M.A., *Guides* (fourth edition 1993).

² It is noted that effective February 1, 2001 the fifth edition of the A.M.A., *Guides* is to be used to calculate schedule awards. FECA Bulletin No. 01-05 (issued January 29, 2001).

On December 22, 2001 appellant was granted a schedule award for a 17 percent impairment of the right upper extremity and a 10 percent impairment of the left upper extremity, for a total of 84.24 weeks of compensation, to run from December 20, 2001 to August 11, 2003.

In a report dated January 3, 2002, Dwight Jennings, D.D.S., advised that appellant was under his care for facial pain. He noted her complaints of severe headaches and occasional ear, neck and back pain for which she required medication, advised that he had realigned her mandible and referred her to pain management. Dr. Swartz continued to submit reports in which he noted findings of tenderness on examination. On February 7, 2003 appellant underwent an authorized partial fasciectomy and partial lateral epicondylectomy of the left elbow. In a report dated August 19, 2003, Dr. Swartz advised that on April 10, 2003 appellant was capable of employment as a user support analyst.

Following the cessation of appellant's schedule award, she was returned to the periodic roll, based on the November 28, 2001 wage-earning capacity determination. She was subsequently granted an additional 72 days of total disability compensation due to the February 7, 2003 surgery.

On October 22, 2003 appellant requested reconsideration, stating that the schedule award was issued in error because she still required medical treatment. She also requested modification of the wage-earning capacity determination. Appellant submitted an October 2, 2003 report in which Dr. Jennings noted that he had treated appellant for jaw orthopedic therapy and temporomandibular joint complaints since October 1997 for symptoms caused by the September 1995 motor vehicle accident. He opined that appellant was not "permanent, stationary, nor completed with her treatment," advising that she continued to have headaches and chronic neck and arm pain for which she needed daily medication. Dr. Jennings concluded:

"[Appellant] continues to have severe daily musculoskeletal pain with episodic severe headaches that would prevent her from being able to maintain employment. She is in need of referral for a pain specialist to manage her pain."

In a January 21, 2004 decision, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error on the part of the Office in its November 28 and December 22, 2001 decisions.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.³ 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.⁴ When an application for review is

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.607(b); see *Gladys Mercado*, 52 ECAB 255 (2001).

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.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office. To show clear evidence of error, the evidence submitted 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. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.⁶

ANALYSIS

The only decision before the Board is the January 21, 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.

The Board finds that, as more than one year had elapsed from the date of issuance of the December 22, 2001 schedule award decision, appellant's request for reconsideration dated October 22, 2003 was untimely filed.

Regarding the schedule award decision, the Board finds that the evidence is insufficient to establish clear evidence of error in the Office's decision.

While a claimant retains the right to file a claim for an increased schedule award if the evidence establishes that he or she sustained an increased impairment at a later date causally related to an employment injury,⁷ such is not the case here. In her October 22, 2003 request appellant contended that the schedule award was issued in error because she was still receiving treatment. Schedule awards, however, commence on the date that the medical evidence establishes that the employee has reached maximum medical improvement from the residuals of the employment injury, *i.e.*, that the injured member of the body has stabilized and will not improve further⁸ and in this case it was determined that maximum medical improvement had been reached. Furthermore, neither the Act, the implementing regulations or Board precedent require a claimant to stop receiving medical treatment in order to be considered at maximum

⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁶ *Nancy Marcano*, 50 ECAB 110 (1998).

⁷ *Linda T. Brown*, 51 ECAB 115 (1999).

⁸ *See James E. Earle*, 51 ECAB 567 (2000).

medical improvement.⁹ Thus, appellant's contention on reconsideration, regarding the schedule award, are of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant.

Appellant also submitted an October 2, 2003 report in which Dr. Dwight Jennings, a dentist, advised that she needed additional dental care and he stated that she still had daily musculoskeletal pain with episodic severe headaches which prevented gainful employment. He opined that she should be referred for pain management. However, Dr. Jennings did not purport to provide a schedule award evaluation regarding a schedule member of the body.¹⁰ His report, therefore, is not relevant to whether she is entitled to an increased schedule award for her upper extremities and is, therefore, insufficient to establish clear evidence of error.

The record also contains reports submitted by Dr. Swartz, subsequent to the December 22, 2001 schedule award and prior to appellant's October 22, 2003 request. In none of these reports, however, did he provide findings on which to base an increased schedule award. For the reasons stated above, the Board also finds that appellant failed to establish clear evidence of error regarding her schedule award.

To the degree that appellant is requesting modification of the November 28, 2001 loss of wage-earning capacity decision, in its January 21, 2004 decision, the Office considered appellant's October 22, 2003 correspondence as a request for reconsideration pursuant to section 8128(a) of the Act and found that she did not submit new, relevant evidence or raise legal contentions not previously considered. The Board finds that the Office improperly characterized this segment of appellant's October 22, 2003 correspondence as a request for reconsideration subject to the limited review set forth in Office regulations¹¹ as appellant contended that she was totally disabled from work and was thus, requesting modification of the Office's November 28, 2001 wage-earning capacity determination.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact, erroneous.¹² The burden of proof is on the party attempting to show modification.¹³ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.¹⁴

⁹ *Id.*

¹⁰ The term "physician" under the Act includes dentists "within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2). However, the opinion of a dentist would be of little probative value regarding permanent impairment of the upper extremities. See *Bertha Parker*, 32 ECAB 328, 332 (1980) (a report of a physician whose specialty is not in a germane area of medicine is entitled to lesser weight).

¹¹ 20 C.F.R. §§ 10.605-10.610.

¹² *Stanley B. Plotkin*, 51 ECAB 700 (2000).

¹³ *Id.*

¹⁴ See *Gary L. Moreland*, 54 ECAB ____ (Docket No. 03-1063, June 20, 2003).

Regarding the evidence submitted subsequent to the November 28, 2001 wage-earning capacity determination, while Dr. Swartz advised in an April 10, 2003 report, that appellant was capable of employment as a user support analyst, with her October 22, 2003 request she also submitted the October 2, 2003 report in which Dr. Jennings advised that appellant was not capable of working due to her pain. Fractured teeth have been accepted as employment related and Dr. Jennings' report is of sufficient relevancy for the Office to make a determination if there has been a material change in the nature and extent of appellant's injury-related condition such that the wage-earning capacity decision should be modified.¹⁵ In that regard, the case must be remanded to the Office to address the merits of appellant's request for modification of the November 28, 2001 wage-earning capacity decision. On remand the Office should develop the record as necessary and issue an appropriate decision on the merits of her modification request.

CONCLUSION

The Board finds that appellant's October 22, 2003 request was untimely filed with regard to requesting reconsideration of the December 22, 2001 schedule award and that she failed to establish clear evidence of error in that regard. Thus, the Office properly denied a merit review of her December 22, 2001 schedule award. The Board, however, finds that, as appellant requested modification of the November 28, 2001 wage-earning capacity decision, she is entitled to a merit review of that decision.

¹⁵ *Stanley B. Plotkin, supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 21, 2004 be affirmed in part and vacated in part and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: November 2, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member