United States Department of Labor
Employees' Compensation Appeals Board

GEORGE E. WILLIAMS, Appellant	)	
and	)	**Docket No. 04-1232**
	)	**Issued: April 18, 2005**
DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, New York City, NY, Employer	)	

Appearances:
George E. Williams, 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
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 7, 2004 appellant filed a timely appeal from the August 14, 2003 merit decision of the Office of Workers' Compensation Programs granting him a schedule award for a seven percent permanent impairment for loss of use of each leg. Appellant also appealed Office decisions dated September 30, 2003 denying his request for review of the merits of his schedule award claim, and a January 9, 2004 decision denying his untimely request for review of his request for authorization of surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit schedule award decision and the nonmerit decisions in this case. Because more than one year has elapsed between the Office's merit decision on June 20, 2001 and the filing of this appeal on April 7, 2004, the Board lacks jurisdiction to review the merits of appellant's request for surgery.

ISSUES

The issues are: (1) whether appellant has more than a seven percent impairment of each leg for which he had received a schedule award; (2) whether the Office properly refused to reopen appellant's claim for further review as untimely filed and lacking clear evidence of error;

and (3) whether the Office properly refused to reopen appellant's claim for further review of the merits of his schedule award.

FACTUAL HISTORY

The Office accepted appellant's August 6, 1981 claim for a lumbosacral strain and subsequent recurrences including a herniated disc pulposus at L4-5. It also accepted his February 22, 1996 bilateral shoulder sprains and authorized left shoulder arthroscopy. Appellant stopped work on August 31, 1996 and was placed on disability retirement in May 1999.

On February 3, 2000 appellant's treating physician and a Board-certified neurological surgeon, Dr. Anthony M. Alberico, requested authorization for an anterior cervical decompression and arthrodesis at C5-6 which the Office denied in a decision dated August 17, 2000. On January 8, 2001 appellant requested reconsideration and, on May 4, 2001 the Office referred appellant, his records, a statement of accepted facts and a list of specific questions to Dr. Basil Yates, a Board-certified neurologist, for a second opinion evaluation. In a report dated June 7, 2001, Dr. Yates stated that there were no objective findings of a neurological impairment of the cervical or lumbosacral spine although he noted appellant's subjective complaints at C4-5 and C5-6.

In a June 20, 2001 decision, the Office again denied appellant's request for surgery based on the opinion of Dr. Yates, the second opinion physician.

On September 28, 2001 appellant filed a second request for reconsideration. In a nonmerit decision dated January 4, 2002, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted failed to establish a causal relationship between his cervical condition, and thus his need for surgery, and his employment.

On March 21, 2003 appellant filed a claim for a schedule award. On June 13, 2003 the Office asked Dr. Anthony T. Schiuma, appellant's Board-certified orthopedic surgeon, to determine the extent of appellant's lower extremity impairment based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001). In a July 1, 2003 report, Dr. Schiuma stated that appellant had spasms of the paravertebral muscles and pain on range of motion. He noted pain on forward flexion beyond 60 degrees, tenderness in both sciatic notches, positive bilateral knee jerks, decreased sensation of the right foot, positive left and right pain in straight leg raises, right-sided pain on left leg lifting, and weakness of the right leg with atrophy of the right calf. Dr. Schiuma stated that appellant had three abnormal discs which resulted in an eight percent permanent disability with an additional three percent attributable to loss of function and decreased strength. In a July 1, 2003 worksheet, Dr. Schiuma noted appellant's affected discs at L3, L4 and L5, that he had an eight percent impairment of the lower extremity based on sensory deficit and an additional three percent impairment based on loss of strength. He noted that the date of maximum medical improvement was July 1, 2003.

On July 29, 2003 the Office medical adviser reviewed the medical evidence and determined that appellant had a seven percent permanent impairment of each lower extremity. On August 14, 2003 the Office awarded appellant a seven percent schedule award for each leg as a result of the February 22, 1996 work-related injury. On September 3, 2003 appellant requested

reconsideration of the Office's August 14, 2003 decision. In support of his request, appellant submitted an August 1, 1996 magnetic resonance imaging (MRI) scan of the left shoulder, an October 11, 1996 report from Dr. Douglas R. Stringham, a Board-certified orthopedic surgeon, regarding appellant's low back and neck conditions, an October 30, 2000 report from Dr. Schiuma requesting authorization for surgery, an August 20, 2001 report from Dr. Alberico regarding appellant's C5-6 defect, and a September 3, 2003 report from Dr. Schiuma opining that appellant injured his neck in the February 22, 1996 work-related injury.

The Office denied appellant's request on September 17, 2003 on the grounds that appellant's evidence was insufficient to warrant reconsideration of its August 14, 2003 schedule award.

On October 13, 2003 appellant's representative forwarded to the Office appellant's request for reconsideration dated September 25, 2003 regarding the request for surgery. Appellant stated that he had sustained work-related injuries to his neck, shoulder, elbows, back and nose and that he had "included medical evidence supporting this." Appellant resubmitted copies of his claim record with respect to his request for surgery.

By decision dated January 9, 2004, the Office denied further review of appellant's request for surgery on the grounds that the reconsideration request was untimely filed and did not establish clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* (5th ed. 2001) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[3]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for lumbosacral strain, a herniated nucleus pulposus at L4-5, bilateral shoulder sprains and authorized left shoulder arthroscopy. The Board initially notes that, although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404.

[3] *Willie C. Howard*, 55 ECAB ___ (Docket No. 04-342 & 04-464, issued May 27, 2004).

spine.[4] However, amendments to the Act in 1960 modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[5]

Section 15.12 of the fifth edition of the A.M.A., *Guides* describes the method to be used for evaluation of impairment due to sensory and motor loss of the extremities as follows. The nerves involved are to be first identified. Then, under Tables 15-15 and 15-16, the extent of any sensory and/or motor loss due to nerve impairment is to be determined, to be followed by determination of maximum impairment due to nerve dysfunction in Table 15-17 for the upper extremity and Table 15-18 for the lower extremity.[6] The severity of the sensory or motor deficit is to be multiplied by the maximum value of the relevant nerve.[7]

Although Dr. Schiuma, appellant's treating physician, did not indicate that he used the A.M.A., *Guides* in his impairment evaluation, his clinical data may be extrapolated and evaluated within the tables and guidelines as presented.[8] In such cases, it is appropriate for an Office medical adviser to review the clinical findings of the treating physician to determine the permanent impairment.[9] In this case, the Office medical adviser relied on Dr. Schiuma's data in his July 29, 2003 report recommending a seven percent schedule award for each lower extremity. However, the Board finds that, although the Office medical adviser extrapolated Dr. Schiuma's data, he did not adequately explain his calculations in arriving at seven percent impairment for each lower extremity. In his July 29, 2003 report, he noted the treating physician's recommendation of 8 percent sensory and three percent motor impairment, and listed spinal nerves at L3, L4 and L5. The Office medical adviser then indicated that he relied on Table 15-18 of the A.M.A., *Guides* to find a four percent sensory loss in each lower extremity. He then listed one percent impairment for sensory loss based on Table 15-18 at L3, L4 and L5. But these calculations do not appear to follow the grading scheme in the A.M.A., *Guides* and it is not apparent from the A.M.A., *Guides* how the physician calculated motor loss impairment. The maximum loss of function due to strength for L3, L4 and L5 nerve roots are 20, 34 and 37 percent respectively.[10] The medical adviser apparently selected Grade 4, 25 percent, by which to multiply the nerve values under the grading scheme set for at Table 15-16.[11] Yet multiplying 25

[4] *James E. Mills*, 43 ECAB 215 (1991).

[5] *See George E. Williams*, 44 ECAB 530 (1993).

[6] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[7] A.M.A., *Guides* 423.

[8] *Michael D. Nielsen*, 49 ECAB 453 (1996).

[9] *See generally Charles A. Sciulli*, 50 ECAB 488 (1999).

[10] *See supra* note 7; A.M.A., *Guides* 424, Table 15-18.

[11] A.M.A., *Guides* 424.

percent times the maximum value for the involved nerves, noted above, does not yield the numbers calculated by the Office medical adviser. Furthermore, the medical adviser did not attempt to otherwise explain his calculations pursuant to the A.M.A., *Guides*.

Because the Office relied on incorrect calculations with regard to appellant's schedule impairments, its decisions regarding the schedule awards will be set aside and the case remanded to the Office for referral to an Office medical adviser, or for such other medical development as is necessary, and for a recalculation of appellant's schedule award for his lower extremities.[12]

LEGAL PRECEDENT -- ISSUE 2

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.[13] 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.[14] 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. The application must establish, on its face, that such a decision was erroneous.[15]

To show clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[16] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[17] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.

To show clear evidence of error, 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's decision.[18]

[12] In view of the Board's disposition of the merits, the issue of whether the Office in its September 17, 2003 decision properly denied appellant's request for reconsideration of its August 14, 2003 schedule award is moot.

[13] 5 U.S.C. § 8128(a).

[14] 20 C.F.R. § 10.607; *see also Gregory Griffin,* 41 ECAB 186 (1989), *petition for recon. denied,* 41 ECAB 48 (1990).

[15] 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, 44 ECAB 765 (1983); *Jesus D. Sanchez,* 41 ECAB 964 (1990).

[16] *Pete F. Dorso,* 52 ECAB 424, 427 (2001).

[17] *Id*., *Leona N. Travis,* 43 ECAB 227 (1991).

[18] *George C. Vernon,* 54 ECAB ____ (Docket No. 02-1954, issued January 6, 2003).

ANALYSIS -- ISSUE 2

The Office properly determined in this case that appellant failed to file a timely application for review.[19] In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[20] The last merit decision with respect to appellant's request for surgery in this case was the Office's June 20, 2001 decision which denied appellant's request for surgery. As appellant's September 25, 2003 letter requesting reconsideration was submitted more than one year after the last merit decision of record, the Office's June 20, 2001 decision, it was untimely. Accordingly, appellant's petition for reconsideration was not timely filed.

Further, the Board has reviewed appellant's September 25, 2003 reconsideration request and concludes that appellant has not established clear evidence of error in this case. Appellant's reconsideration request noted his contentions about the claim and asserted that his multiple work-related injuries continued. He also resubmitted copies of reports the Office had previously considered. However, he did not submit medical evidence relevant to the issue of causal relationship between his need for surgery and his work-related injury, nor did he submit evidence or argument that was positive, precise and explicit in establishing that the Office erred in its June 20, 2001 merit decision denying his request for authorization for surgery. The record contains no evidence which would *prima facie* shift the weight of the evidence in appellant's favor regarding a causal relationship of his work-related injuries and his need for surgery. A review of the record and appellant's assertions on reconsideration fail to raise a substantial question as to the correctness of the Office's decision. Consequently appellant failed to show clear evidence of error in the Office's decision.

Accordingly, the Board finds that the arguments and evidence submitted by appellant in support of his application for review do not raise a substantial question as to the correctness of the Office's January 9, 2004 decision and, thus, are insufficient to demonstrate clear evidence of error.

CONCLUSION

The case will be remanded for the Office to recalculate appellant's lower extremity impairments. On remand, the Office should further develop the medical evidence as appropriate and have an Office medical adviser set forth calculations for appellant's lower extremity impairment based on correct application of the A.M.A., *Guides*. The Board also finds that the Office properly denied appellant's September 25, 2003 request for reconsideration as untimely and failing to establish clear evidence of error.

[19] This reconsideration may be distinguished from a case requesting an additional schedule award because appellant did not submit new evidence. *See Linda T. Brown*, 51 ECAB 115 (1999).

[20] *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2004 decision of the Office of Workers' Compensation Programs is affirmed on the grounds that the reconsideration request was untimely filed and did not establish clear evidence of error, and that the decisions dated September 17 and August 14, 2003 are set aside and the case remanded for further development consistent with this decision of the Board.

Issued: April 18, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member