U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT W. BOYD and DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, U.S. PENITENTIARY, Marion, IL

Docket No. 00-2096; Submitted on the Record;
Issued July 7, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's November 19, 1999 request for reconsideration.

On April 25, 1984 appellant, then a 29-year-old guard, sustained an injury in the performance of his duties when an inmate assaulted him. The Office accepted his claim for mandibular fracture with a perforated meniscus of the right temporomandibular joint (TMJ), chronic malocclusion, multiple surgeries and a seventh nerve deficiency with right eyebrow ptosis. Appellant received compensation for wage-loss and medical benefits.

On May 31, 1997 appellant filed a claim for a schedule award. To support his claim, he submitted the October 13, 1997 report of Dr. Kenneth S. Rotskoff, a Board-certified oral maxillofacial and cosmetic surgeon, who reported maximum medical improvement and concluded that appellant's "percentage of impairment from the right [TMJ] is approximately five percent of his total body impairment." He explained: "This figure is determined by the percentage of function of the single [TMJ] with mobility and ability to masticate a near normal diet." Dr. Rotskoff added that appellant had TMJ arthritis as a result of the August 1994 injury.

The Office forwarded the case file to the district medical adviser for review. On November 17, 1997 Dr. David H. Garelick reported as follows:

> "Dr. Rotskoff's letter dated October 13, 1997 was reviewed and states that the claimant has regained the ability to close his eye, and the protective corneal reflex and normal blinking have returned that were a result of the facial nerve injury. Therefore, as there has been no loss of sight, no PPI [permanent partial impairment] for the eye is awarded. The claimant also has reportedly normal taste (the facial nerve supplies taste to the anterior two-thirds of the tongue) and thus, no PPI is awarded for the tongue. Dr. Rotskoff's letter is quite complete stating the claimant has residual deficits including a ptosis of the right eye (droopy eyelid), pain in the TMJ joint exacerbated with chewing, restricted mouth

opening, and decreased sensation of the lower lip and over the surgical scar. However, according to the FECA [Federal Employees' Compensation Act], PPI must be awarded for organ impairment, and these deficits including the ptosis and pain with chewing do not qualify for PPI.

"Therefore, no PPI is awarded for impairment of the eye or tongue."

In a decision dated December 18, 1997, the Office denied appellant's claim for a schedule award. The Office found that the evidence failed to demonstrate that he sustained a compensable permanent impairment as a result of his accepted employment injury.

Appellant requested an oral hearing before an Office hearing representative. He submitted a June 17, 1998 report from Dr. Rotskoff, who stated as follows:

"I am writing in regards to my patient.… My letter of October 24, 1997 detailed [appellant's] history and my surgical treatment very well. I have recently seen [appellant] on May 17, 1998. He was having recurrent pain in the reconstructed right temporomandibular joint when chewing and eating. He is having increased muscle spasms. This pain started approximately three months prior to the May 27[, 1998] visit. Based on my reevaluation, I feel that [appellant's] total disability should be increased from 5 percent total body to 10 percent total body. Again, this is based on the same parameters but I have rechecked those parameters. Also, in view of the fact that he has had recurrent symptoms and may continue to experience these. These symptoms lead me to increase by disability rating."

On September 15, 1998 Dr. Rotskoff completed a report describing appellant's disfigurement: "Loss of vertical height of the mandible, loss of the angle of the mandible." His description of appellant's scars is not fully intelligible.

On September 16, 1998 Dr. Rotskoff reported the following:

"I am writing in support of [appellant's] petition for reevaluation through [f]ederal [w]orkers' [c]ompensation. [Appellant's] history is well known to you from previous letters. I would like to emphasize that [appellant] still has persistent pain in his temporomandibular joint with clicking and popping in the left temporomandibular joint. His mandibular opening is less than normal at 38 mm [millimeter]. As a result of his surgical reconstruction and previous trauma, he suffered permanent injuries of the left temporomandibular joint. Specifically, he has a persistent deformity of the glenoid fossa, some limitation of motion of the left mandibular condyle, persistent clicking of the left TM joint, residual pain in both temporomandibular joints, five nerve injury of the auricular temporal nerve and of the skin overlying the temporomandibular joint, seventh nerve injury to the frontalis branch of the seventh nerve with an inability to raise the eye brow and lastly, persistent disfigurement of the lower jaw as a result of loss of vertical height of the ramus of the mandible.

> "[Appellant] also has permanent scars in the preauricular and submandibular area of the temporomandibular joint extending up into the scalp of the temple. I feel that [appellant's] risk of injury if he is again struck in the jaw, is considerable. I am supporting his application to change jobs. After reviewing [appellant's] total disability and postoperative status, I feel that his disability rating should be 10 percent of the whole body."

An oral hearing was held on September 23, 1998.

In a decision dated November 19, 1998, the hearing representative affirmed the denial of appellant's claim for a schedule award. The hearing representative found that the only possible schedule award to which appellant could be entitled was for loss of use of an eye or his tongue. As the medical record failed to establish either a loss of visual acuity or any loss of use of the tongue, the hearing representative was unable to find that appellant had sustained a permanent impairment of a covered member.

On November 19, 1999 appellant requested reconsideration.[1] He agreed with the hearing representative that the only possible schedule award applicable in his case would be for loss of use of an eye or tongue, but he argued that Dr. Rotskoff's September 16, 1998 letter, a copy of which he attached, specifically catalogued his residual disabilities. Appellant argued that, notwithstanding visual acuity, his ability to see was effectively impaired because part of his eye was covered by a droopy eyelid and he suffered loss of muscle control of the region of his right eye. He also argued that he had suffered a loss of use of his tongue because he had difficulty eating solid foods, suffered from frequent tongue biting and had lost the ability to protect the tongue from injury. Appellant attached a copy of Dr. Rotskoff's September 15, 1998 disfigurement report, argued that his disfigurement was serious and noted that, although there was no testimony on record concerning its effect on his employment, it was much more probable than not that his disfigurement fell within the intent of the statute.

In a decision dated February 18, 2000, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support thereof was repetitious and cumulative and therefore insufficient to warrant a review of the prior decision. The Office noted that appellant appeared to be claiming a disfigurement award and that such awards involved different procedures. Appellant did not initially file his claim as one for disfigurement; therefore, the Office handled it as a schedule award for a covered member. If appellant wished to claim a disfigurement award, the Office advised, he must make that distinction in writing.

On May 18, 2000 appellant filed an appeal with the Board seeking review of the Office's November 19, 1998 and February 22, [sic] 2000 decisions. An appeal to the Board, however, must be mailed no later than one year from the date of the Office's final decision.[2] Because

[1] An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits may be used to establish the mailing date. 20 C.F.R. § 10.607(a) (1999). In this case, a certificate of service establishes the date of mailing as November 19, 1999, one year after the Office's November 19, 1998 decision.

[2] 20 C.F.R. § 501.3(d) (time for filing); *see id.* § 501.10(d)(2) (computation of time).

appellant mailed his appeal more than one year after the Office's November 19, 1998 decision, the Board has no jurisdiction to review the denial of appellant's claim for a schedule award. The only decision that the Board may review is the Office's February 18, 2000 decision denying appellant's November 19, 1999 request for reconsideration. The only issue before the Board, therefore, is whether the Office properly denied that request.[3]

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[4]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[5]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[6]

Appellant's November 19, 1999 request for reconsideration fails to meet at least one of the standards for obtaining a merit review of his claim. The arguments he presented in support of his request fail to show that the Office erroneously applied or interpreted a specific point of law and fail to advance a relevant legal argument not previously considered by the Office. He is not entitled to a merit review of his claim, therefore, under the first or second standard above. In this regard, appellant made no reference to any table or chart in the applicable edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, and he made no attempt to show how the findings reported by his attending surgeon, Dr. Rotskoff, in particular the findings reported on September 16, 1998, satisfied the A.M.A., *Guides*' criteria for evaluating permanent impairment of an eye or tongue. The evidence appellant submitted to support his request, copies of reports previously submitted, are not new and do not entitle

[3] In its February 18, 2000 decision, the Office acknowledged that appellant might be entitled to a disfigurement award and advised appellant how to pursue such a claim, but the Office did not decide that issue. Because the Office has issued no final decision on appellant's entitlement to a disfigurement award, the Board has no jurisdiction on this appeal to consider the issue. *Id.* § 501.2(c) (the Board has jurisdiction to consider and decide appeals from the final decision of the Office in any case arising under the Act).

[4] *Id*. § 10.605 (1999).

[5] *Id*. § 10.606.

[6] *Id*. § 10.608.

appellant to a merit review of his claim under the third standard above. Evidence that repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.[7]

Because appellant's November 19, 1999 request for reconsideration fails to meet at least one of the standards for obtaining a merit review of his claim, the Office properly denied the request.

The February 18, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 7, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984). The Office hearing representative stated that he had considered all of the evidence and testimony of record.