United States Department of Labor
Employees' Compensation Appeals Board

R.L., Appellant	)	
and	)	**Docket No. 10-1237**
	)	**Issued: February 4, 2011**
DEPARTMENT OF THE NAVY, NAVAL AIR STATION, NORTH ISLAND, San Diego, CA, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 31, 2010 appellant, through his representative, filed a timely appeal from the March 11, 2010 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. As the most recent merit decision in this case (July 3, 2006) was issued more than one year prior to the filing of this appeal, the Board does not have jurisdiction over the merits of this case. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's denial.[1]

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration.

[1] For final adverse Office decisions issued prior to November 19, 2008 a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on or after November 19, 2008 a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On March 22, 1996 appellant, a 39-year-old aircraft worker, sustained an injury in the performance of duty while pushing a flap up to install the flap lock device. The Office accepted his claim for cervical strain, herniated discs at C4-5 and C5-6 and bilateral carpal tunnel syndrome. It approved an anterior cervical discectomy at C4-5 and C5-6. Appellant received a schedule award for a 10 percent impairment of the right upper extremity.

Appellant thereafter underwent a series of additional surgeries, including an anterior cervical discectomy at C4-5 and C5-6 with fusion and plate fixation, a release of the right transverse carpal tunnel ligament, a release of the left transverse carpal tunnel ligament and transposition of the right ulnar nerve.

On July 3, 2006 the Office issued a schedule award for an additional 21 percent impairment of the right upper extremity (31 percent total) and for a 27 percent impairment of the left upper extremity.

On November 16, 2009 appellant's representative requested reconsideration of the 2006 schedule award. He argued that an Office medical consultant had rated a 34 percent impairment for each upper extremity in 2003 and that the Office erred in not providing appellant with a schedule award at that time, which resulted in a lower schedule award in 2006. Appellant's representative cited Office procedures stating that a schedule award should not be lowered if a subsequent calculation results in a percentage "which is less than the original award." He argued that appellant was entitled to an additional three percent impairment for his right upper extremity and an additional seven percent for his left.

In a decision dated March 11, 2010, the Office denied appellant's request for reconsideration. It found that the request was untimely and failed to present clear evidence of error in the July 3, 2006 schedule award.

On appeal, appellant's representative argues that the July 3, 2006 schedule award is clearly erroneous because appellant had received a higher impairment rating in 2003, which was never paid. He makes the same argument he made in the request for reconsideration: "The Office erred in not providing [appellant] with a schedule award in 2003 and that error resulted in the issuing of a lower award in the July 3, 2006 decision." Appellant's representative adds that there was a conflict in medical evidence requiring a referee examination to determine the correct award.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[2]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[3]

The term "clear evidence of error" is intended to represent a difficult standard.[4] If clear evidence of error has not been presented, the Office should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.[5]

ANALYSIS

Appellant had one year from the July 3, 2006 schedule award, or until July 3, 2007, to request reconsideration. His November 16, 2009 request is therefore timely. The question becomes whether this request establishes on its face that the July 3, 2006 schedule award was erroneous.

The untimely request for reconsideration alleged no internal error with the July 3, 2006 schedule award. It did not show a misreading of the attending physician's clinical findings in 2005 or a misapplication of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) or a miscalculation of the pay rate or number of weeks of compensation due. Instead, appellant's representative notes that the Office had obtained an evaluation as to appellant's permanent impairment in 2003, and alleged an error by the Office in not issuing a schedule award at that time.

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[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607.

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

[5] *Id*. at Chapter 2.1602.3.d(1).

Appellant's complaint of earlier administrative misfeasance or nonfeasance in no way shows error in the July 3, 2006 award.[6] Indeed, if appellant's physical condition improved after 2003, it might suggest that he was not truly at maximum medical improvement in 2003.[7] Further, if Office procedures state that a schedule award should not be lowered by a subsequent calculation resulting in a percentage that is less than the original award, appellant would need to establish that the Office did issue a schedule award in 2003. But no such schedule award exists. Appellant received a schedule award for a 10 percent impairment of the right upper extremity following his initial cervical surgery, but that award does not make his argument. The Office procedure, as expressed, is inapplicable to this situation.

Appellant's dissatisfaction with how the Office handled his case prior to the July 3, 2006 schedule award demonstrates no error in the award itself. Because his untimely request for reconsideration does not meet the standard of review, the Board will affirm the Office's March 11, 2010 decision.

On appeal, appellant's representative makes the same arguments he made in the untimely request and adds that there was a conflict in medical opinion. The Board notes that the 2003 and 2006 calculations derived from examinations by the same physician and there can be no conflict between the Office medical consultant who reviewed findings in 2003 and the Office medical adviser who reviewed findings in 2006. The Act requires disagreement between appellant's physician and an Office physician.[8] Moreover, given the lapse of time, it is not easily stated that the calculations are in conflict. Appellant's condition may have simply improved slightly in the intervening years.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration. The request was untimely and failed to show clear evidence of error in the Office's July 3, 2006 schedule award.

[6] The record reflects that the Office had obtained an evaluation as to appellant's permanent impairment in 2003, but there was no claim for schedule award at that time.

[7] *Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until maximum improvement of the claimant's condition has been reached, meaning that the physical condition of the injured member of the body has stabilized and will not improve further).

[8] If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a).

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 4, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board