

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

R.P., Appellant)
and) Docket No. 10-1123
DEPARTMENT OF THE AIR FORCE,) Issued: January 25, 2011
LOGISTICS READINESS SQUAD,)
ROBINS AIR FORCE BASE, GA, Employer)

)

Appearances:

Thomas P. Deberry, 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 10, 2010 appellant, through counsel, filed a timely appeal of a January 12, 2010 decision of the Office of Workers' Compensation Programs denying his untimely request for reconsideration and finding that it failed to establish clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider and decide appeals from final decisions of the Office issued within one year of the filing of the appeal.¹ As the most recent merit decision was issued on September 15, 2008, the Board does not have jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error. On appeal, counsel contends the Office erred

¹ For final adverse decisions of the Office issued prior to November 19, 2008, a claimant had up to one year to file an appeal. 20 C.F.R. § 501.3(d)(2). An appeal of final adverse Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

in denying his reconsideration request as it failed to consider the newly submitted medical evidence establishing a ratable impairment.

FACTUAL HISTORY

On August 1, 2006 appellant, then a 61-year-old general supply specialist, filed an occupational disease claim alleging that on April 18, 2006 he first realized that his bilateral carpal tunnel syndrome (CTS) was employment related. The Office accepted the claim for bilateral carpal tunnel syndrome and bilateral hand and wrist tenosynovitis. It authorized left carpal ligament release surgery, which was performed on July 16, 2007 and right carpal tunnel ligament release surgery, which was performed on November 12, 2007.

On August 8, 2008 appellant filed a claim for a schedule award.

Following receipt of appellant's schedule award claim, the Office received reports dated July 1 and August 19, 2008 from Dr. J.W. Spivey, Jr., a treating Board-certified orthopedic surgeon, stating that appellant had no ratable disability or permanent impairment due to the bilateral carpal tunnel condition.

In a September 10, 2008 report, the Office medical adviser reviewed Dr. Spivey's reports and agreed with his conclusion that appellant had no ratable impairment due to the accepted bilateral carpal tunnel syndrome condition.

By decision dated September 15, 2008, the Office denied appellant's schedule award claim on the grounds that there was no employment-related impairment resulting from his accepted employment conditions.

On October 9, 2009 appellant again filed a claim for a schedule award.

In a letter dated October 19, 2009, the Office acknowledged receipt of appellant's schedule award claim and referred him to the appeal rights included with the September 15, 2008 decision denying his schedule award claim.

In support of his claim for a schedule award, appellant submitted a September 18, 2009 impairment rating by Wendy E. Salerno, an occupational therapist, registered, which was reviewed by Dr. Todd Kinnebrew, a Board-certified orthopedic surgeon, in October 2009. The report found a three percent right upper extremity impairment and a three percent left upper extremity impairment using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On December 18, 2009 appellant requested reconsideration of the September 15, 2008 decision denying his entitlement to a schedule award.

By decision dated January 12, 2010, the Office denied appellant's request finding that it was untimely filed and failed to establish clear evidence of error in the denial of his claim for a schedule award.

LEGAL PRECEDENT

A claimant may seek an increased schedule award if the evidence establishes that he sustained increased impairment at a later date causally related to the accepted employment injury.² Even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award which is not subject to time limitations.³ A proper claim for an increase in permanent impairment is not subject to time limitations or to the clear evidence of error standard.

ANALYSIS

On September 15, 2008 the Office previously denied appellant's claim for a schedule award, noting that the medical evidence found no permanent impairment to his right and left upper extremities due to his accepted claim for bilateral carpal tunnel syndrome and bilateral hand and wrist tenosynovitis. On October 19, 2009 appellant filed a schedule award claim and submitted a September 18, 2009 impairment rating by Ms. Salerno which was reviewed by Dr. Kinnebrew in October 2009, which described an impairment of both upper extremities using the A.M.A., *Guides* (6th ed. 2009). However, on October 19, 2009, the Office erroneously advised appellant to follow the appeal rights noted in the September 15, 2008 decision. Following his request of December 18, 2009, it denied reconsideration on the grounds that his request was untimely and did not establish clear evidence of error.

This case is substantially similar to that of *Linda T. Brown*.⁴ In *Brown*, the Office denied the employee's claim for a schedule award for impairment of her arms and legs in an August 2, 1995 decision. It found that the extent of her impairment was not ratable. By letter dated September 2, 1997, appellant requested reconsideration and submitted a new medical report from an attending physician who noted that her condition had stabilized and who estimated 25 percent impairment to her arms and legs. The Office denied reconsideration, finding the request to be untimely and failing to show clear evidence of error. On appeal, the Board set aside the Office's decision and remanded the case for a *de novo* decision which addressed the medical evidence submitted in support of the employee's claim of permanent impairment. It noted that a claimant may seek a schedule award if the evidence establishes an increased impairment at a later date causally related to the employment injury. For this reason, the January 10, 2010 decision of the Office will be set aside. Appellant has clearly submitted new medical evidence in support of his claim of increased impairment, from zero to three percent, due to his accepted bilateral carpal tunnel syndrome and bilateral hand and wrist tenosynovitis injuries. The case will be remanded for appropriate adjudication.

² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b) (January 2010).

³ See *B.K.*, 59 ECAB 228 (2007); *Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reedy*, 45 ECAB 488 (1994).

⁴ 51 ECAB 115 (1999).

CONCLUSION

The Board finds that the Office improperly adjudicated appellant's claim for an increased schedule award as a request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action in conformance with this decision.

Issued: January 25, 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