

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

V.C., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
MacDILL AIR FORCE BASE, MacDill, FL,)
Employer)

Docket No. 07-212
Issued: May 4, 2007

Appearances:

Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 31, 2006 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated August 23, 2006, denying his reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated May 27, 2004 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been on appeal before the Board.¹ In a March 21, 2006 decision, the Board affirmed the September 22, 2005 decision of the Office, finding that the evidence was insufficient to warrant further merit review of the prior decision. The facts and the history contained in the prior appeal are incorporated by reference.

By letter dated July 10, 2006, which was addressed to the Office, appellant requested reconsideration and advised that he was now enclosing new evidence. While appellant reiterated his previous arguments, he provided a current report and examination findings showing an increase in his impairment from a new physician, Dr. Paul M. Morin, Board-certified in emergency medicine.

In a June 26, 2006 report, Dr. Morin utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (A.M.A., *Guides*). He found that appellant had impairment of 31 percent to his right upper extremity.

By decision dated August 23, 2006, the Office advised appellant that he was not entitled to reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

A claimant may seek an increased schedule award if the evidence establishes that he sustained an increased impairment at a later date causally related to the employment injury. 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.² The Office should issue a merit decision on the schedule award claim, rather than adjudicate a request for reconsideration.³

ANALYSIS

Appellant disagreed with the denial of his claim for an increased schedule award and requested reconsideration on March 21, 2006. The August 23, 2006 Office decision made a

¹ Docket No. 06-88 (issued March 21, 2006). On June 8, 2001 appellant sustained injury to his right arm, accepted for a right shoulder strain, ruptured right biceps tendon and aggravation of cervical degenerative disease. On June 18, 2003 he received a schedule award for eight percent impairment of the right upper extremity. On May 27, 2004 the schedule award was amended to reflect 15 percent impairment.

² *Linda T. Brown*, 51 ECAB 115 (1999). In *Brown* the Office issued a 1995 decision denying entitlement to a schedule award as no ratable impairment was established. Appellant requested that the Office reconsider in 1997, submitting a current report with an opinion that appellant had a 25 percent permanent impairment to the arms and legs. The Office determined that appellant submitted an untimely request for reconsideration that did not show clear evidence of error and the Board remanded the case for a merit decision.

³ *Id.*; see also *Paul R. Reedy*, 45 ECAB 488 (1994).

determination that denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

Although appellant's representative used the term reconsideration in the March 21, 2006 request, he clearly indicated that he was providing new medical evidence and wanted further review of the schedule award issue. He submitted a June 26, 2006 report from Dr. Morin, Board-certified in emergency medicine, who provided an opinion that appellant had 31 percent permanent right upper extremity impairment. The Office, based on this new evidence, should have conducted a merit review.

CONCLUSION

The Office should have issued a merit decision on the request for an increased schedule award rather than adjudicate the request for reconsideration. The case will be remanded for an appropriate merit decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' dated August 23, 2006 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: May 4, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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