United States Department of Labor
Employees' Compensation Appeals Board

G.W., Appellant	)	
and	)	**Docket No. 07-995**
	)	**Issued: September 20, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Lubbock, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 9, 2007 appellant filed a timely appeal from the December 22, 2006 nonmerit decision of the Office of Workers' Compensation Programs which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's denial of reconsideration. The Board has no jurisdiction to review appellant's April 7, 2003 schedule award or the Office's September 25, 2003 merit decision denying modification of that award, as more than one year has passed from the dates of those decisions to the filing of this appeal.

ISSUE

The issue is whether the Office properly denied appellant's October 2, 2006 request for reconsideration.

FACTUAL HISTORY

On October 10, 2001 appellant, then a modified letter carrier,[1] filed a claim alleging that his bilateral foot condition was a result of his federal employment: "Carrying mail for over 18

[1] Appellant worked limited duty since February 17, 1995 following other injuries.

years and walking and working on hard work floor for over 25 years at [the] [employing establishment]." Appellant first became aware of this condition on August 28, 2001. The Office accepted his claim for plantar fasciitis and neuroma.[2] Appellant underwent bilateral excision of the Morton's neuroma.

On April 7, 2003 the Office issued a schedule award for a 10 percent permanent impairment of each foot, based on cartilage intervals (arthritis) and pain and sensory deficits. In a decision dated September 25, 2003, it reviewed the merits of appellant's case and denied modification of this schedule award. The Office found that appellant was not entitled to an increased award for loss of motion due to tendinitis, as there can be no impairment for tendinitis unless some other factors were present and there can be no impairment for loss of motion due to compression or entrapment neuropathies unless a Complex Regional Pain Syndrome was present. In an attached statement of appeal rights, the Office notified appellant that any request for reconsideration must be made within one calendar year of the date of that decision.

On October 2, 2006 appellant requested reconsideration. He submitted page three of a medical report which he stated was from Dr. Veerinder Anand, showing ankle jerks at zero bilaterally. Appellant submitted the March 17, 2005 report of Dr. Willie E. Thompson who combined lower extremity impairments for dysesthesia related to appellant's neuroma and for sensory deficit of the S1 spinal nerve root. Appellant also submitted the May 24, 2006 report of Dr. Leonard A. Simpson who combined lower extremity impairments for appellant's plantar fibromatosis, for cartilage interval in the right knee and for residua of a pelvic fracture. Appellant argued that these reports established that he had additional impairment "to both lower extremities (feet)."

In a decision dated December 22, 2006, the Office denied appellant's October 2, 2006 request for reconsideration. It found that the request was untimely and failed to present clear evidence of error.

On appeal, appellant contends that the medical evidence establishes greater impairment to the lower extremities than he was awarded. Appellant explained that he did not submit this evidence earlier because the reports did not come into his possession until May and June 2006. He stated that he submitted them as soon as he could.

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] OWCP File No. 16-2026995.

(2) award compensation previously refused or discontinued."[3]

The Office, through regulations, has imposed limitations on the exercise of its discretion 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.[4]

The term "clear evidence of error" is intended to represent a difficult standard.[5] 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.[6]

ANALYSIS

The most recent merit decision in this matter is the Office's September 25, 2003 decision denying an increased schedule award for loss of motion due to tendinitis in the feet. The Office properly notified appellant that he had until September 25, 2004 to request reconsideration of this decision. Appellant's October 2, 2006 request for reconsideration is, therefore, untimely. To warrant a merit review of his case, his request must demonstrate clear evidence of error in the Office's September 25, 2003 decision.

The evidence appellant submitted does not demonstrate clear evidence of error. Page three of a medical report, ostensibly from Dr. Anand, shows ankle jerks zero bilaterally, but appellant has not shown how this finding entitles him, under any criteria in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), to more than the 10 percent impairment rating he received for each foot. This evidence does not show, on its face, that the Office's September 25, 2003 decision was erroneous.

The March 17, 2005 report from Dr. Thompson relates to a different injury.[7] He rated a three percent impairment of each lower extremity due to a sensory deficit of the S1 spinal nerve root in the low back. This has no bearing on the August 28, 2001 injury to appellant's feet which the Office accepted for plantar fasciitis and neuroma. Dr. Thompson did note that dysesthesia related to the excised interdigital neuroma contributed five percent to the impairment of each lower extremity but this does not show that the Office made a mistake in evaluating the impairment of each foot. Combining the impairment from the August 28, 2001 injury with impairments from other injuries does not demonstrate that the former was incorrect. Indeed,

---

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.607 (1999).

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

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

[7] OWCP File No. 16-0251780.

Dr. Simpson commented that the five percent Dr. Thompson rated for neuroma was already taken into account in the 10 percent rating appellant previously received.

Dr. Simpson performed a similar combination in his May 24, 2006 report. He combined the impairment from appellant's August 28, 2001 injury with impairments from other injuries, but he expressed no disagreement with these impairments. Dr. Simpson sought to determine how much impairment was due solely to knee pathology which is irrelevant to the August 28, 2001 injury to appellant's feet. He also mischaracterized the schedule award appellant received on April 7, 2003. Dr. Simpson stated that appellant had a prior 10 percent impairment of the right lower extremity due to the accepted plantar fibromatosis. In fact, the Office issued a schedule award for a 10 percent impairment of each foot, not each lower extremity.[8]

Because appellant's untimely request for reconsideration does not demonstrate clear evidence of error in the Office's September 25, 2003 decision denying modification of the schedule award for his feet, the Office properly denied appellant's request. He is not entitled to a reopening of his case.

CONCLUSION

The Board finds that the Office properly denied appellant's October 2, 2006 request for reconsideration. The request was untimely and did not establish on its face that the Office's September 25, 2003 decision was erroneous.

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 2007
Washington, DC

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

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

[8] The Act provides 288 weeks' compensation for the complete loss of a leg and 205 weeks' compensation for the complete loss of a foot, with partial losses compensated proportionately. 5 U.S.C. § 8107(c). Schedule awards for the feet are thereby distinguished from schedule awards for the legs or "lower extremities."