



Office accepted his claim for low back strain, chronic pain syndrome and aggravation of arachnoiditis radiating into both lower extremities.<sup>1</sup>

On May 21, 1996 appellant filed a claim alleging that his cervical and lumbar stenosis with radiculopathy was a result of his federal employment. The Office accepted this claim for aggravation of cervical and lumbar stenosis. It approved an anterior cervical discectomy and fusion. The Office also approved a decompressive laminectomy at L3-5.<sup>2</sup>

Appellant claimed a recurrence of disability from April 26 to June 16, 2002. In a decision dated July 3, 2002, the Office denied his claim on the grounds that there was no medical evidence to support that he was disabled due to a work-related condition. On January 10, 2003 an Office hearing representative affirmed the denial. The hearing representative found that appellant failed to submit medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concluded that the alleged disabling condition for the period in question was causally related to the accepted employment injury and who supported that conclusion with sound medical reasoning. On March 26 and October 14, 2003 and again on March 31, 2004 the Office reviewed the merits of appellant's claim for wage loss and found that the submitted medical evidence did not establish disability causally related to his accepted conditions for the period in question.

The statement of appeal rights attached to the Office's March 31, 2004 decision notified appellant that he had one year from the date of the decision to request reconsideration:

"If you have additional evidence or legal argument that you believe will establish your claim, you may request, in writing, that [the Office] reconsider this decision. The request must be made within one-calendar year of the date of the decision, clearly state the grounds upon which reconsideration is being requested and be accompanied by relevant evidence not previously considered. This evidence might include medical reports, sworn statements, or a legal argument not previously made, which apply directly to the issue addressed by this decision."

On October 12, 2004 appellant requested reconsideration of the Office's March 31, 2004 merit decision.

In a decision dated November 24, 2004, the Office denied this request without reviewing the merits of appellant's case. It found that the evidence received after the March 31, 2004 denial of compensation either was not relevant to the issue of his disability from April 26 to June 16, 2002 or represented previously argued legal positions, which did not require further merit review.

On July 20, 2006 the Board found that appellant did not meet his burden of proof to establish any entitlement to an additional schedule award. The Board noted that appellant, who

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<sup>1</sup> OWCP File No. 09-0311584.

<sup>2</sup> OWCP File No. 09-0445451. The Office combined these cases under File No. 09-0311584.

was at the time represented by an attorney, did not appeal the Office's November 24, 2004 nonmerit decision denying reconsideration of his recurrence claim.<sup>3</sup>

Following the Board's decision, the Office undertook further development of the schedule award issue. It obtained a March 6, 2007 second opinion from an orthopedic surgeon and an April 24, 2007 supplemental report on the nature and extent of appellant's permanent impairment.<sup>4</sup>

On September 26, 2006 appellant noted that the Board had not reviewed the November 24, 2004 nonmerit decision and advised the Office that he "will be requesting reconsideration." On November 27, 2006 he wrote as the subject of his letter "Reconsideration for wage-loss period April 26, 2002 thru June 16, 2002," but stated: "What I am requesting is that when you schedule me to see the doctor [for a rating on permanent impairment], would you please note in the statement of accepted facts [SOAF] asking the doctor to give his medical opinion on the wage-loss period given the medical history and the degenerative nature of the disease/injury being careful to note my job while working for the postal service was medically unsuited for the type of injury/disease."

On May 23, 2007 appellant contended that no action was taken on his request for reconsideration of the wage-loss period April 26 through June 16, 2002:

"If you would go into the case file you will see that I included in the reconsideration of the increase in the increase in schedule award request. [sic] I also requested reconsideration of the wage loss period and no action was done and when I appeal to ECAB it was not acted on, so denying me the right of reconsideration is wrong since my claim was up at ECAB for over two years. I directed your attention to decision dated November 24, 2004 that decision clearly state that each one of those decision would be acted on separately and this was never done. Since I have undergone and new medical evidence has been submitted in the intervening period would suggest a through review of the medical evidence that clearly show a nexus to the wage loss under discussion, so I request that close scrutiny of the record so a credible decision can be rendered."

In a decision dated June 29, 2007, the Office denied appellant's request for reconsideration without reviewing the merits of his case. It found that his request was untimely and did not present clear evidence of error in its most recent merit decision of March 31, 2004.

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<sup>3</sup> See Docket No. 05-1125 (issued July 20, 2006). Even if appellant, through his attorney, had appealed the Office's November 24, 2004 nonmerit decision, the Board could not have addressed the merits of his recurrence claim as his appeal was not filed within one year of the Office's March 31, 2004 decision, which was the most recent merit decision on the issue.

<sup>4</sup> Appellant filed the present appeal before the Office issued any further decision on the schedule award issue. That issue is not before this Board. See 20 C.F.R. § 501.2(c).

## 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 request. 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.”<sup>5</sup>

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 a request 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 request only if the request demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The request must establish, on its face, that such decision was erroneous.<sup>6</sup>

The term “clear evidence of error” is intended to represent a difficult standard.<sup>7</sup> If clear evidence of error has not been presented, the Office should deny the request 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.<sup>8</sup>

## ANALYSIS

The Office's March 31, 2004 decision is the most recent merit decision on appellant's claim for a recurrence of disability from April 26 through June 16, 2002. The Office properly notified him that he had one-calendar year from the date of that decision, or until March 31, 2005, to request reconsideration. Appellant made a timely request on October 12, 2004, which the Office denied. He did not make another request for reconsideration on this issue until May 23, 2007.<sup>9</sup> The standard of review, therefore, is whether appellant's untimely request presents clear evidence of error in the Office's March 31, 2004 decision denying his recurrence claim.

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.607 (1999).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

<sup>8</sup> *Id.* at Chapter 2.1602.3.d(1).

<sup>9</sup> Appellant's November 27, 2006 letter is more accurately considered a request for the Office to further develop the medical evidence on the issue of recurrence, and not a request for the Office to reconsider its March 31, 2004 decision.

Nothing in appellant's May 23, 2007 request for reconsideration shows, on its face, that the Office's March 31, 2004 decision was clearly erroneous. Each time the Office denied his claim for wage loss from April 26 through June 16, 2002, it explained the deficiencies in the medical evidence he submitted. The Board notes that appellant did not submit any medical evidence in support of his May 23, 2007 request. Appellant contends that he sustained disability from April 26 through June 16, 2002 causally related to his accepted employment injuries. However, the issue of disability for work is an issue that must be resolved by competent medical evidence.<sup>10</sup> The Office's further development of the medical evidence on the issue of his permanent impairment has no bearing on his claim that he sustained a recurrence of disability for work beginning April 26, 2002. Appellant's contentions to the contrary, the Board finds that the evidence does not raise a substantial question concerning the correctness of the Office's decision.

Because appellant's May 23, 2007 request for reconsideration is untimely and fails to demonstrate clear evidence of error in the Office's March 31, 2004 decision, the Board will affirm the Office's June 29, 2007 decision.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's May 23, 2007 request for reconsideration. Appellant's request is untimely and does not establish clear evidence of error in the Office's denial of his claim of recurrence.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 29, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: June 3, 2008  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>10</sup> See *Maxine J. Sanders*, 46 ECAB 835 (1995).