

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

S.K., Appellant

and

U.S. POSTAL SERVICE, MIDTOWN STATION,
New York, NY, Employer

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**Docket No. 08-2245
Issued: August 20, 2009**

Appearances:
Appellant, pro se
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 August 13, 2008 appellant filed a timely appeal of a June 27, 2008 nonmerit decision of the Office of Workers' Compensation Programs, denying his request for reconsideration because it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated December 29, 2004 and the filing of the appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. In an October 29, 2007 order, the Board dismissed appellant's appeal of an Office hearing representative's December 29, 2004 decision which affirmed as modified the Office's September 9, 2004 decision, denying his schedule

award claim.¹ It found that the record did not contain a final decision of the Office issued within one year of the filing of the appeal on March 20, 2007. The Board stated that the most recent decision was the December 29, 2004 decision. The facts and the history relevant to the present appeal are hereafter set forth.²

In the December 29, 2004 decision, the Office hearing representative denied appellant's schedule award claim because he had not yet reached maximum medical improvement based on a November 12, 2004 medical report of Dr. Andrew A. Merola, an attending Board-certified orthopedic surgeon, which stated that appellant was continuing to recover from his accepted employment-related back injury. The hearing representative found that it was premature to consider appellant's claim for a schedule award and, thus, he was not entitled to a schedule award.

By letter dated March 16, 2008, appellant requested reconsideration. In a February 8, 2008 report and an April 29, 2008 work capacity evaluation (Form OWCP-5c), Dr. Merola opined that appellant was permanently and totally disabled. In an April 11, 2008 report, he stated that appellant sustained lumbar spinal stenosis. Dr. Merola opined that appellant sustained a 75 percent impairment of both lower extremities based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides* 552, Table 17-37) (5th ed. 2001). In an April 29, 2008 form report, he stated that appellant's lumbar spinal stenosis was caused by the accepted April 19, 2002 employment-related incident.

By decision dated June 27, 2008, the Office found that appellant's March 16, 2008 letter requesting reconsideration was dated more than one year after the December 29, 2004 merit decision and was untimely. It further found that the evidence he submitted did not establish clear evidence of error in the Office's denial of his schedule award claim.³

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provide that an application for

¹ Docket No. 07-1136 (issued October 29, 2007) (Order Dismissing Appeal).

² On April 19, 2002 appellant, then a 48-year-old letter carrier, filed a traumatic injury claim alleging that on that date he sustained a lower back injury. While sitting in his truck another truck backed into him. By letter dated July 22, 2002, the Office accepted appellant's claim for back derangement and authorized a lumbar laminectomy and fusion which was performed on February 24, 2004. On April 2, 2004 appellant filed a claim for a schedule award.

³ On October 1, 2008 the Office issued a decision granting appellant a schedule award for a 51 percent impairment of both lower extremities, representing a 26 percent impairment of the right lower extremity and a 25 percent impairment of the left lower extremity. This decision is null and void because it was issued while the case was on appeal before the Board on the same issue, pursuant to appellant's August 13, 2008 request for an appeal. *See Douglas Billings*, 41 ECAB 880 (1990).

⁴ 5 U.S.C. § 8128(a).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁹ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹²

The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹³

ANALYSIS

The Board finds that appellant failed to file a timely application for review of the December 29, 2004 merit decision. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹⁴

The most recent merit decision was issued by the Office hearing representative on December 29, 2004, denying appellant's schedule award claim on the grounds that he had not reached maximum medical improvement. As his March 16, 2008 letter requesting reconsideration was made more than one year after the Office hearing representative's December 29, 2004 decision, it was not timely filed.

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.607(b); *see also Alberta Dukes*, 56 ECAB 247 (2005).

⁸ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁹ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹⁰ *Darletha Coleman*, 55 ECAB 143 (2003).

¹¹ *Leona N. Travis*, *supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁴ *Larry L. Litton*, 44 ECAB 243 (1992).

The underlying issue in this case is whether the Office properly denied appellant's schedule award claim, on the grounds that he had not reached maximum medical improvement regarding his accepted March 19, 2002 employment-related back condition. The Board finds that Dr. Merola's February 8, 2008 report and April 29, 2008 OWCP-5c form which found that appellant was permanently and totally disabled and his April 29, 2008 report which stated that appellant's lumbar spinal stenosis was caused by the accepted April 19, 2002 employment incident do not establish clear evidence of error. This evidence does not provide an opinion as to whether appellant had reached maximum medical improvement and, thus, sustained an employment-related permanent impairment entitling him to a schedule award.

Dr. Merola's April 11, 2008 report found that appellant suffered from lumbar spinal stenosis resulting in a 75 percent impairment of his bilateral lower extremities based on the A.M.A., *Guides*. The Board finds that this evidence does not establish clear evidence of error. It notes that appellant's schedule award claim was denied because there was no medical evidence establishing that he had reached maximum medical improvement. Dr. Merola did not address the date of appellant's maximum medical improvement. In order to be eligible for a schedule award, medical evidence must establish that maximum medical improvement had been reached.¹⁵ For the stated reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of the Office's prior decision.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 20, 2009
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

¹⁵ *James E. Earle*, 51 ECAB 567 (2000).