United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 08-1697**
	)	**Issued: March 11, 2009**
DEPARTMENT OF THE NAVY, NAVAL SUPPLY CENTER, Oakland, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 27, 2008 appellant filed a timely appeal from the April 30, 2008 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this denial.

ISSUE

The issue is whether the Office properly denied appellant's January 28, 2008 request for reconsideration.

FACTUAL HISTORY

On January 11, 1980 appellant, then a 32-year-old warehouseman, was driving a truck and changing gears when the stick shift jumped out of gear and struck him on the palm of his right hand and thumb. The Office accepted his claim for right carpal tunnel syndrome and authorized a surgical release on May 27, 1980. On November 26, 1982 it issued a schedule award for a 10 percent permanent impairment of the right upper extremity resulting from the

January 11, 1980 injury. After the schedule award expired,[1] compensation for periods of wage loss resumed.

In a decision dated March 4, 1987, the Office terminated appellant's compensation, effective March 15, 1987, on the grounds that the medical evidence established that he had no continuing disability or residuals causally related to the January 11, 1980 injury. The attending physician had released appellant to return to work. Multiple electrodiagnostic studies were normal. The treating physician and second opinion neurologist reported no objective findings. A second opinion orthopedic surgeon found a nonindustrial bone spur on the right thumb metacarpal but no residual condition or disability, other than a surgical scar. It was his impression that appellant's cooperation during physical examination was less than enthusiastic and his complaints exaggerated. Another second opinion neurologist reported a "feeble/partial" effort by appellant during grip strength testing. Neurologically appellant was found to be completely normal with no residual of the 1980 injury or surgery. The Office found as follows:

> "In the absence of any substantive medical reports from the claimant's treating physicians since late 1980 and no record of ongoing treatment, the reports of the above second opinion physicians constitutes the current medical evidence of record in this case. The second opinion physicians are well qualified, reviewed the case within the framework of a statement of accepted facts, and provided medical rationale to support their conclusions."

The Office last reviewed the merits of the termination on September 17, 1993. The Office found that the weight of the medical opinion evidence did not establish that appellant's ongoing complaints and disability were causally related to the residuals of the January 11, 1980 work injury.[2] The Office also found that appellant was not entitled to an increased schedule award. Appeal rights attached to the September 17, 1993 decision notified appellant that any request for reconsideration must be made within one year of the date of the decision.

On a prior appeal of this case,[3] the Board distinguished two remaining issues. First was the termination of appellant's compensation effective March 15, 1987. Appellant argued that he never had carpal tunnel syndrome. He believed he developed causalgia on May 27, 1980 when the operating surgeon "dissected the motor branch of the median nerve out of my muscle in my thumb." Appellant argued that, if he was evaluated with the correct nature of his injury in mind, the Office would not have terminated his compensation benefits. The second issue was his claim for an increased schedule award. The Office denied that claim on April 21, 1998 and August 10, 2000, and on March 6, 2002 the Board affirmed, finding no impairment rating from a qualified

[1] Although it compensates for permanent physical impairment, a schedule award does not provide compensation for the remainder of the employee's lifetime. All schedule awards expire after a certain number of weeks. A schedule award for a 10 percent impairment of the right upper extremity, for example, expires after 31.2 weeks. Once that compensation is paid, the employee is entitled to no further compensation for his physical impairment. Appellant's schedule award ran from July 16, 1982 to February 19, 1983.

[2] An Office medical consultant reported that appellant dislocated his right thumb in 1985 while playing with his nephew.

[3] Docket No. 03-1304 (issued July 7, 2003).

physician showing that appellant had more than a 10 percent permanent impairment of his right upper extremity. Whether appellant is entitled to an increased schedule award is presently before the Board on a separate appeal and will not be addressed here.[4] The facts of this case, as set forth in prior Board decisions, are hereby incorporated by reference.

In a decision dated September 11, 2003, the Office denied appellant's May 20, 2002 request for reconsideration of the termination of his compensation. It found that the request was untimely and failed to present clear evidence of error in the Office's September 17, 1993 decision, the most recent merit decision on the issue. The Board affirmed.[5]

On January 28, 2008 appellant again requested reconsideration of the termination of his compensation. He stated that the original operation report had a typographical error "through the sculature." Appellant alleged that the Office must have seen this error over and over again, yet used this inadequate report from 1980 to 1995 to keep him from reopening his compensation claim. He stated that the report was never signed by a physician, which he felt was very strange. Appellant argued that the use of this inadequate report had an adverse impact on a great deal of his earlier evaluations and examinations. "I firmly believe," he added, "that if my operating records were submitted correctly that my compensation would have continued to this day."

Appellant submitted, among other things, copies of the original and corrected operation reports together with a November 21, 1997 letter from his Health Plan explaining that his allegation of falsified records was unfounded:

> "There was a typographical error on the original report. Medical records are binding legal documents, original records are not changed but corrections are added to charts for clarification. The original record states, 'through the sculature,' and a corrected copy states, 'into the musculature.' Your medical chart contains both reports. This has been clarified to you in letters from Ms. Elizabeth Roy, Medical Secretary at the Oakland Medical Center, on May 4, 1995 and Ms. LaVerne James, Medical Secretary at the Richmond Medical Center, on May 8, 1995."

The Health Plan added that it had already clarified to the Office that appellant's diagnosis changed from "[c]arpal [t]unnel [s]yndrome" to "[r]ight hand pinched motor branch, right median nerve," a mild injury to the motor branch of the median nerve.

Appellant also submitted a copy of a January 17, 2000 report from an Office medical consultant, who stated that a review of appellant's records appeared to support a diagnosis of contusion with posttraumatic scarring of the distal motor branch of the right median nerve. The medical consultant reported no evidence of ongoing causalgia or reflex sympathetic dystrophy.

[4] Docket No. 07-1058 (wherein appellant seeks the Board's review of a February 22, 2007 Office decision denying an additional schedule award).

[5] Docket No. 04-87 (issued March 8, 2004).

On January 21, 2007 Dr. Louis P. Valli, an orthopedic surgeon, reported as follows:

> "[Appellant] underwent a carpal tunnel release on May 27, 1980 and his pain has persisted through the years. In my October 29, 2005 report, I concluded the long duration of these symptoms are indicative of the residual of the medial nerve contusion. Although not mentioned at that time, there was compression noted of the motor branch of the median nerve most likely the residual of the initial injury and nerve contusion.
>
> "[Appellant] continued to have symptoms in his hand, and because of the long duration of his symptoms, it is unlikely these symptoms will change significantly in the future."

In a decision dated April 30, 2008, the Office denied appellant's January 28, 2008 request for reconsideration. It found that the request was untimely and failed to present clear evidence of error in the Office's September 17, 1993 decision, the most recent merit decision on the issue. The Office emphasized that the decision to terminate appellant's compensation was premised on the weight of the medical opinion evidence, including examinations and opinion from a Board-certified orthopedist and a Board-certified neurosurgeon, which established that appellant no longer had residuals of his 1980 injury. "As such," it explained, "alleged typographical error and unsigned medical reports have no bearing on whether the claimant continued to have residuals of his carpal tunnel syndrome."

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) award compensation previously refused or discontinued."[6]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority 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.[7]

[6] 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.607 (1999).

The term "clear evidence of error" is intended to represent a difficult standard.[8] 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.[9]

ANALYSIS

Appellant made his January 28, 2008 request for reconsideration more than one year after the Office's September 17, 1993 decision, the last merit decision on the termination of his compensation. His request is therefore untimely. The question is whether appellant's request shows on its face that the termination of his compensation was erroneous.

Appellant has challenged the termination of his compensation, noting a typographical error in the operation report. It appears the report was originally typed: "The motor branch was carefully dissected out and a piece of fascia was removed from around it just before it went into the musculature." But "into the mu" was overwritten with "through the." The Board finds no significance in this wording. The only thing being described is the location of the scar tissue that was wrapped around the motor branch of the median nerve, possibly binding it. Whether this tissue was wrapped around the motor branch just before it went "into the musculature" or just before it went "through the musculature" or just before the nerve entered the musculature is not irrelevant to whether appellant was entitled to continuing compensation on or after March 15, 1987. The Office terminated his compensation because his attending physician had released him to return to work, because multiple electrodiagnostic tests were normal, and because Board-certified physicians could find no objective evidence of residuals or disability causally related to the January 11, 1980 incident.

To obtain a merit review of the termination, appellant must submit clear evidence of error. But that does not mean just any error, such as a typographical error on an operation report. The standard is significantly higher than that. Appellant must submit evidence that so clearly shows "on its face" that the Office erroneously terminated his compensation, no reasonable person looking at that evidence would disagree. This is intended to be a difficult standard.[10]

The documentation appellant submitted with his untimely request supports, at best, that his injury, accepted for carpal tunnel syndrome, is better described as a pinched motor branch of the right median nerve, a contusion that caused scar tissue to form around the motor branch just before the nerve entered the musculature. But this does not mean he continued to have objective residuals of the January 11, 1980 injury when the Office terminated his benefits effective March 15, 1987. Dr. Valli, the orthopedic surgeon, reported that the long duration of appellant's symptoms were indicative of the residual of the medial nerve contusion, but he did not address, much less convincingly explain away, the electrodiagnostic testing, the clinical findings and the medical opinions that led the Office to terminate compensation. Even if Dr. Valli's opinion were

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

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

[10] *See Joseph R. Santos*, 57 ECAB 554 (2006).

sufficiently convincing that it created a conflict with the existing medical opinion evidence, appellant would still be denied a merit review of the termination, because conflicting evidence raising a question about the termination does not resolve the matter of continuing compensation in his favor.[11]

The Board finds that appellant's January 28, 2008 request for reconsideration is untimely and fails to show clear evidence of error in the March 4, 1987 termination of his compensation. The Board will affirm the Office's April 30, 2008 decision denying that request.

CONCLUSION

The Board finds that the Office properly denied appellant's January 28, 2008 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 11, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[11] *See supra* note 8.