

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

T.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Salt Lake City, UT, Employer**

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**Docket No. 10-405
Issued: August 18, 2010**

Appearances:

Jane E. Engelman, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 30, 2009 appellant filed a timely appeal of a September 8, 2009 nonmerit decision of the Office of Workers' Compensation Programs, finding that his request for reconsideration was untimely and failed to show clear evidence of error.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision in this case was the Office's December 12, 2007 decision denying his claim for an additional schedule award. The Board lacks jurisdiction to review the merits of the claim.²

¹ The Board notes that on appeal appellant submitted medical records. Pursuant to 20 C.F.R. § 501.2(c), the Board is precluded from reviewing new evidence for the first time on appeal.

² For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

ISSUE

The issue is whether the Office properly determined that appellant was requesting reconsideration of a December 12, 2007 decision and that the request was untimely and failed to show clear evidence of error.

FACTUAL HISTORY

On March 20, 2003 appellant, then a 49-year-old letter carrier, filed a traumatic injury claim alleging that he sustained injuries to his neck and back when his postal vehicle was rear-ended. The Office accepted his claim for cervical strain, left L5 radiculopathy, L4-5 disc herniation and L4-5 spinal stenosis.

By decision dated May 26, 2006, the Office granted a schedule award for a four percent permanent impairment of the left lower extremity. The date of maximum medical improvement was determined to be March, 1, 2006. The period of the award was from March 1 through May 20, 2006.

On February 12, 2007 appellant underwent approved lumbar laminectomy and discectomy.

Appellant submitted a report dated September 13, 2007 from Dr. Thomas W. Harris, a Board-certified anesthesiologist, who provided examination findings and an impairment rating based on the involved L5 nerve root, as well as diagnosis-based estimates, noting the history of the two lumbar spinal procedures and lumbar radiculopathy. He opined that appellant had a 20 percent left lower extremity impairment.

In a merit decision dated December 12, 2007, the Office denied appellant's request for an additional schedule award.

In a January 9, 2008 report, Dr. Harris noted: appellant's complaints of constant sharp, stabbing pain; continuing numbness and tingling throughout his lower extremities; and difficulty sleeping, secondary to pain. There was tenderness to palpation of the lumbar paraspinal region and reduced range of motion.

On March 19, 2008 appellant filed a claim for a schedule award. In a March 27, 2008 letter, the Office informed him that "the filing of a CA-7 accomplishes nothing." He was advised to refer to the appeal rights attached to the December 12, 2007 decision denying his request for an increase schedule award.

Appellant submitted reports of examinations dated December 5, 2007 through August 20, 2008 from Dr. Sam Maywood, a Board-certified anesthesiologist, who treated him for chronic low back pain related to his accepted conditions. On March 6, 2008 Dr. Maywood stated that the low back pain was constant, with radiation into the bilateral paraspinal muscles, left hip and lateral thigh. He noted: tenderness at the left greater trochanteric and lateral thigh; limited range of motion with flexion, extension, lateral bending and rotation; and decreased sensation in the feet bilaterally.

On April 3, 2008 Dr. Maywood stated that there was an increase in neuropathic pain in appellant's lower extremities. On May 28, 2008 he noted that appellant was experiencing sciatic pain radiating from the mid-left buttock down his left leg. Consideration was given to a sciatic nerve block. On August 20, 2008 Dr. Maywood reported increased neuropathic pain in the lower extremities.

Appellant submitted a January 10, 2008 report from Dr. Harris, who revised his opinion as to degree of permanent impairment to the left lower extremity. Pursuant to the 5th edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Harris opined that appellant had a 15 percent left lower extremity impairment. The final impairment rating, included a 10 percent lower extremity impairment rating due to radiculopathy and a 5 percent lower extremity impairment rating using a diagnosis-based analysis, which equated to a 15 percent lower extremity impairment under the Combined Values Chart.

In a September 13, 2008 letter, Jane E. Engelman appellant's representative, reiterated his request for reconsideration. She stated that appellant's condition had worsened and that he was experiencing additional pain and numbness in his lower extremities.

By decision dated September 26, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant merit review.

On February 23, 2009 Ms. Engelman referenced appellant's request for reconsideration. She contended that medical reports from treating physicians indicated that his condition had worsened, as they reflected that he was experiencing additional pain and numbness in his lower extremities. Counsel asked the Office to "proceed to have the matter set for a hearing."

Appellant submitted monthly reports from Dr. Maywood for the period September 17, 2008 through August 18, 2009. On October 17, 2008 Dr. Maywood noted appellant's complaints of increased burning pain in his feet. On February 3, 2009 he stated that the neuropathic pain in appellant's lower extremities had been increasing in frequency. Dr. Maywood's March 31, 2009 report reflected complaints of increased radicular pain in both extremities.

In an August 21, 2009 letter, counsel requested information regarding the status of the "twice requested appeal of the rating in this matter." Ms. Engelman noted that she was filing a claim to formally add a back condition to appellant's claim.³

By decision dated September 8, 2009, the Office determined that appellant's August 21, 2009 application for reconsideration was untimely with respect to the December 12, 2007

³ On August 20, 2009 appellant filed an occupational disease claim alleging that he developed a back condition as a result of the accepted January 25, 2005 motor vehicle accident. The Board notes that the Office accepted appellant's claim for cervical strain, left L5 radiculopathy, L4-5 disc herniation and L4-5 spinal stenosis. Therefore, his CA-2 form is moot.

decision. It denied the request for reconsideration on the grounds that appellant failed to establish clear evidence of error.

LEGAL PRECEDENT

As the Board explained in *Linda T. Brown*,⁴ a claimant may seek a schedule award if the evidence establishes that she sustained an impairment 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, the claim should be considered a claim for an increased schedule award. It should issue a merit decision on the schedule award claim, rather than adjudicate an application for reconsideration.⁵

ANALYSIS

The Board finds that the Office improperly evaluated the August 21, 2009 letter as a request for reconsideration of the December 12, 2007 schedule award decision, rather than as a request for an increased schedule award. Accordingly, the case must be remanded for consideration of the evidence of record as it bears on appellant’s request.

On March 19, 2008 appellant requested reconsideration of the Office’s December 12, 2007 decision denying his claim for an increased schedule award, contending that he had experienced a worsening of his accepted condition. On September 26, 2008 the Office denied appellant’s request on the grounds that the evidence was insufficient to warrant merit review.

On February 29, 2009 Ms. Engelman referenced appellant’s request for reconsideration, again contending that medical reports from treating physicians reflected that his condition had worsened and that he was experiencing additional pain and numbness in his lower extremities. Counsel asked the Office to “proceed to have the matter set for a hearing.” On August 21, 2009 counsel requested information regarding the status of the “twice requested appeal of the rating in this matter.” Appellant submitted numerous medical reports subsequent to the December 12, 2007 decision, including reports from Dr. Harris, who provided a revised impairment rating and Dr. Maywood, who documented appellant’s chronic radicular pain, which he opined had worsened. Although counsel used the term “reconsideration” in her request, it is evident that appellant was not seeking reconsideration of the December 12, 2007 decision, but was seeking an increased schedule award based on new and current medical evidence.⁶

⁴ 51 ECAB 115 (1999). In *Linda T. Brown*, the Office issued a 1995 decision denying entitlement to a schedule award as no ratable impairment was established. Appellant requested that it reconsider in 1997, submitting a current report with an opinion that she 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. The Board remanded the case for a merit decision.

⁵ *Id.*; see also *Paul R. Reedy*, 45 ECAB 488 (1994).

⁶ See *supra* note 5 and accompanying text.

Accordingly, the Office should have issued a merit decision with respect to the claim for an additional schedule award, rather than a decision applying the clear evidence of error standard for an untimely application for reconsideration. The case will be remanded to the Office for a merit decision with respect to an additional schedule award.

CONCLUSION

Appellant submitted new medical evidence with respect to a permanent impairment and was entitled to a merit decision on the issue.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 8, 2009 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: August 18, 2010
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