United States Department of Labor
Employees' Compensation Appeals Board

E.A., Appellant	)	
and	)	**Docket No. 10-762**
	)	**Issued: November 23, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Biloxi, MS, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 27, 2010 appellant filed a timely appeal from an October 29, 2009 Office of Workers' Compensation Programs' nonmerit decision denying her request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision. Because more than one year has elapsed from the most recent merit decision of June 6, 2007 to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.[1]

ISSUE

The issue is whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

[1] For final adverse Office decisions issued prior to November 19, 2008, a claimant has up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2) (2008). For final adverse decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e) (2009).

FACTUAL HISTORY

On January 27, 2006 appellant, then a 58-year-old physician's assistant, filed a traumatic injury claim for his low back and left leg after positioning a patient in the performance of duty. On March 28, 2006 the Office accepted the claim for a herniated disc at L5-S1. It authorized spinal surgery on November 1, 2006. Appellant received compensation benefits.

On April 12, 2007 appellant filed a claim for a schedule award. He submitted a November 25, 2006 report from Dr. Terry C. Smith, a neurosurgeon, who advised that appellant had 10 percent whole person impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (4th ed. 2001).

By decision dated June 6, 2007, the Office denied appellant's claim for a schedule award. It found that there was insufficient medical evidence to support impairment.

On June 10, 2007 appellant requested a hearing. In an undated letter, also received on June 14, 2007, he advised the Office of requesting medical documentation from his physician, which arrived one day late and his claim was denied. Appellant requested that his appeal be granted so that his case could be reviewed and a decision made based on the medical evidence.

In a September 7, 2007 telephone memorandum, the Office noted that appellant inquired about stopping the appeal process. In a letter dated September 21, 2007, appellant advised the Office that he wished to withdraw his appeal as he continued to have problems with numbness, weakness and neuropathic pain in his left leg. He noted that he would file an appeal when his discomfort had resolved and he had reached maximum medical improvement.

On May 6, 2009 appellant submitted a Form CA-7 request for a schedule award. He enclosed a May 5, 2009 report from Dr. Smith, who opined that appellant reached maximum medical improvement on November 22, 2006. Dr. Smith advised that appellant had 10 percent whole person impairment pursuant to the A.M.A., *Guides* (4th ed. 2001).

By letter dated May 14, 2009, the Office advised appellant that his schedule award determination had previously been issued on June 6, 2007. Appellant was advised that he should follow his appeal rights if he remained in disagreement with the decision.

In an undated letter received by the Office on July 13, 2008, appellant noted that he had refiled his CA-7 form and updated report. He indicated that the previous schedule award process was halted at his request. Appellant noted that he was now at maximum medical improvement and wished to proceed to a schedule award determination.

On July 8, 2009 appellant completed an appeal request form and requested a hearing regarding the June 6, 2007 decision.

In a decision dated October 29, 2009, the Office found that appellant was not entitled to a hearing for the reason that his request was not made within 30 days of the issuance of the June 6, 2007 decision. It noted that, while appellant initially filed a timely request for a hearing on July 11, 2007, he subsequently withdrew that request. The Office found that the new request dated July 8, 2009 was not made within 30 days. It exercised its discretion and determined that it

would not grant a hearing for the reason that the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence not previously considered pertaining to his claim for a schedule award.

LEGAL PRECEDENT

Section 8124 of the Federal Employees' Compensation Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision.[2]

Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."[3]

Section 10.616(a) of Title 20 of the Code of Federal Regulations further provides, "A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[4]

The Office's regulations provide that a request received more than 30 days after the Office's decision is subject to its discretion[5] and the Board has held that the Office must exercise this discretion when a hearing request is untimely.[6]

ANALYSIS

Appellant requested a hearing on July 8, 2009. Although he initially requested a hearing on June 11, 2007, he withdrew this request. The Board notes that the current request for a hearing was more than 30 days after the Office issued the June 6, 2007 decision. Appellant was not entitled to a hearing as a matter of right.

The Office properly exercised its discretion in denying a hearing upon appellant's untimely request by determining that the issue could be equally well addressed by requesting reconsideration and submitting new evidence.

The only limitation on the Office's authority is reasonableness. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to logic and deductions from known facts.[7] There is no

[2] 5 U.S.C. § 8124(b)(1).

[3] 20 C.F.R. § 10.615.

[4] *Id*. at § 10.616(a).

[5] *Id*. at § 10.616(b).

[6] *Samuel R. Johnson*, 51 ECAB 612 (2000).

[7] *See Daniel J. Perea*, 42 ECAB 214 (1990).

evidence of record that the Office abused its discretion in denying appellant's requests for a hearing under these circumstances.

On appeal, appellant submitted additional evidence and requested that the Board address his schedule award claim. The Board notes that it only has jurisdiction over the Office's October 29, 2009 decision which denied his request for a hearing.[8] Appellant is not precluded from pursuing his claim for a schedule award before the Office.[9] He is not entitled to an oral hearing with regard to the June 6, 2007 decision because it was not timely filed.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 29, 2009 is affirmed.

Issued: November 23, 2010
Washington, DC

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

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

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

[8] The Board also has no jurisdiction to review the evidence submitted after the Office's June 6, 2007 decision as such evidence was not reviewed by the Office in reaching a final decision. *See* 20 C.F.R. § 501.2(c)(1).

[9] *See Linda T. Brown*, 51 ECAB 115 (1999). *See also A.A.*, 59 ECAB 726 (2008).