United States Department of Labor
Employees' Compensation Appeals Board

M.J., Appellant	)	
and	)	**Docket No. 10-1484**
	)	**Issued: February 17, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Tchula, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 10, 2010 appellant timely appealed the April 16, 2010 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. The last merit decision was issued on September 18, 2009, which is more than 180 days prior to filing of the instant appeal. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board's jurisdiction extends only to the Office's April 16, 2010 nonmerit decision.[1]

ISSUE

The issue is whether the Office properly denied appellant's April 1, 2010 request for reconsideration under 5 U.S.C. § 8128(a).

[1] Appellant submitted additional evidence with his May 10, 2010 appeal. The Board's review of a case is limited to the evidence in the record that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c)(1) (2010). Consequently, the Board is precluded from reviewing any evidence submitted after the April 16, 2010 decision.

FACTUAL HISTORY

Appellant, a 59-year-old former rural carrier, has an accepted traumatic injury claim for lumbosacral strain, which occurred on June 14, 2002.[2] The Office paid wage-loss compensation. Appellant reported that he had been receiving a disability annuity from the Office of Personnel Management dating back to late 2003 or early 2004. On May 1, 2009 he filed a claim for a schedule award (Form CA-7). However, appellant did not submit any recent medical evidence in support of his claim for an employment-related permanent impairment. From the end of 2004 through May 2009, there was virtually no activity with respect to his claim.

The latest medical evidence of record was a December 1, 2003 examination report from Dr. Michael H. Winkelmann, a Board-certified physiatrist, who noted that appellant continued to have significant low back pain and was currently unable to work. Dr. Winkelmann indicated that appellant's condition had not really changed since May when he initially ordered epidural steroid and facet injections. He commented that nothing had been done or approved and expressed concern that appellant's condition would continue to worsen absent appropriate treatment intervention. Dr. Winkelmann refilled appellant's pain medication and advised him to return in a couple months.

In an undated "affidavit" received on January 30, 2004, Dr. Winkelmann indicated that appellant continued to have significant low back pain, which precluded him from working. He cautioned that appellant's condition would continue to worsen if he was unable to receive the previously recommended epidural steroid and facet injections. Dr. Winkelmann attributed appellant's then-current back condition to the employment-related mailbag lifting/twisting incident. He further indicated that, while appellant was unable to perform his date-of-injury duties, he might be able to perform sedentary work for a short period of time if allowed to change positions frequently.

By letter dated June 23, 2009, the Office acknowledged receipt of appellant's schedule award claim and advised him that there was no evidence of record that supported any lower extremity impairment due to his accepted lumbosacral strain. Appellant was instructed to arrange for the submission of a narrative medical opinion that clearly identified the residual damage caused to the lower extremities as a result of his June 14, 2002 employment injury. The Office further indicated that the requested report must be developed in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008).[3]

On July 14, 2009 the Office received an undated letter from appellant explaining that he filed for a schedule award because he continued to experience pain from his employment injury. The pain reportedly was getting worse and moving down his legs to his feet. Appellant also

[2] Appellant reported that he twisted his back when he lifted a sack of box holders and turned to put the sack in a gurney.

[3] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008). Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Example 1 (January 2010).

explained that the reason he had not submitted any medical evidence was because he thought the Office would refer him to a physician of its choice. He asked the Office to advise him of its preferred doctor.

The Office replied on July 16, 2009 advising appellant that he could choose which physician he wanted for purposes of preparing a report concerning the extent of any permanent impairment affecting the lower extremities. It also provided a copy of its earlier correspondence dated June 23, 2009.

On August 11, 2009 appellant filed another Form CA-7 for a schedule award. Once again, he did not submit any medical evidence in support of his claim.

By decision dated September 18, 2009, the Office denied appellant's claim for a schedule award. It noted that there was no medical evidence in the file to support that appellant had any residual impairment of the legs as a result of his June 14, 2002 employment injury.

Appellant filed another claim for a schedule award on December 2, 2009, but did not submit any additional medical evidence. On December 10, 2009 the Office returned the December 2, 2009 Form CA-7 to him because he had not submitted it to his former employer for completion. It further noted that appellant had previously filed several schedule award claims, which were formally denied by decision dated September 18, 2009. To the extent that he wished to pursue his previously denied claim(s) for a schedule award, the Office directed his attention to the appeal rights that accompanied the September 18, 2009 decision.

On April 1, 2010 appellant filed a request for reconsideration of the September 18, 2009 decision. He also filed another Form CA-7 claiming entitlement to a schedule award.[4] Appellant did not submit any additional evidence. His April 1, 2010 request for reconsideration consisted of the appeal request form that accompanied the Office's September 18, 2009 decision.

In a decision dated April 16, 2010, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT

The Office has the discretion to reopen a case for review on the merits.[5] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[6] When an application for reconsideration does not meet at least one of the three requirements

[4] Unlike the three previously filed schedule award claims, this latest Form CA-7 was signed and dated (April 2, 2010) by an employing establishment representative.

[5] 5 U.S.C. § 8128(a) (2006).

[6] 20 C.F.R. § 10.606(b)(2).

enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[7]

ANALYSIS

Appellant's April 1, 2010 request for reconsideration consisted of the appeal request form attached to the September 18, 2009 decision. He simply placed a check mark indicating his intent to pursue reconsideration. Appellant's request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Therefore, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[8] The Board further notes he did not submit any evidence with his April 1, 2010 request for reconsideration. The Office denied appellant's claim for a schedule award because he had not submitted any medical evidence of permanent impairment attributable to the June 14, 2002 employment injury. In fact, the record available to the Office at the time was devoid of any medical evidence covering the more than six-year period dating back to December 2003. Appellant did not submit any "relevant and pertinent new evidence" with his April 1, 2010 request for reconsideration, therefore, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[9]

Because appellant's application for reconsideration did not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office properly denied the April 1, 2010 request for reconsideration without reopening the case for a review on the merits.

CONCLUSION

The Office properly denied appellant's April 1, 2010 request for reconsideration.

[7] *Id.* at § 10.608(b).

[8] 20 C.F.R. § 10.606(b)(2)(i) and (ii).

[9] *Id.* at § 10.606(b)(2)(iii). Appellant has since submitted more recent medical evidence, but as previously indicated, *supra* note 1, the Board is precluded from reviewing evidence that was not in the case record when the Office issued its final decision.

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 17, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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