U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE ROBINSON and U.S. POSTAL SERVICE
POST OFFICE, Palo Alto, CA

*Docket No. 00-1414 Submitted on the Record;*
*Issued April 23, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On June 20, 1994 appellant, then a 56-year-old custodian, filed a notice of occupational disease and claim for compensation (Form CA-2), indicating that his left shoulder was weakened as a result of overcompensation for an employment-related right shoulder injury.[1] The Office accepted appellant's claim for aggravation of left shoulder impingement syndrome. Appellant missed work intermittently and the Office paid him for appropriate compensation benefits.

In a letter dated December 4, 1997, appellant, through his attorney requested a rating of appellant's impairment. He provided the April 10, 1997 report of Dr. Mark Anderson, Board-certified in orthopedic surgery and appellant's treating physician. He noted:

"From objective findings, his measurements are as follows, left [to] right

Biceps: 14.5" Forearms: 12"/12.5"

Shoulder range of motion, left [to] right/normal:

Forward flexion: Abduction:

160/160/180 160/160/180

[1] Appellant originally sustained an injury to his right arm on August 25, 1992. His claim was accepted by the Office on February 24, 1992 for right shoulder sprain and he subsequently received a schedule award on May 4, 1995 for 26 percent impairment to the right arm.

| External Rotation: | Internal Rotation: |
|---|---|
| 60/60/80 | 60/60/80" |

In getting his hands behind the back, he can get to T-12 bilaterally with normal being T-6 with a difference between the two of six inches. Grip strength, left/right 70/60, 65/70, 65/65. Grip on the left is felt to be normal where his estimated first grip normal on the right would be 80." Dr. Anderson also stated that at this point, appellant could be declared permanent and stationary. He did not provide a specific impairment rating.

The Office subsequently referred appellant to an Office medical adviser who in a February 3, 1998 report, determined that appellant had a five percent impairment of the left upper extremity. The Office medical adviser indicated that she had reviewed Dr. Anderson's April 10, 1997 report and used it for the determination of impairment of the left upper extremity. Dr. Anderson noted that the accepted condition was for left shoulder impingement syndrome with rotator cuff tear and repair. She indicated that according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993):

> "Impairment due to loss of motion: [F]or the shoulder, loss of flexion, one percent, loss of extension, zero percent ([F]igure 38, page 43); loss of abduction, one percent and loss of adduction, zero percent ([F]igure 41, page 44); loss of internal rotation, two percent and loss of external rotation, zero percent ([F]igure 44, page 45). Total four percent.
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> Impairment due to pain: Level of symptoms as Grade 2, 25 percent (Table 11, page 48). Maximum impairment based on the axillary nerve is five percent (Table 15, page 54). 25 percent times five percent equals one percent." The Office medical adviser indicated that the total impairment for the left upper extremity was equal to five percent and the date of maximal medical improvement was April 10, 1997.

Accordingly, on February 9, 1998 the Office granted appellant a schedule award for a five percent permanent loss of use of his left arm. The award covered a period of 15.60 weeks from April 10 to July 28, 1997.

In a letter dated February 25, 1998, appellant, through his attorney, requested an oral hearing.

In a June 16, 1998 report, Dr. Anderson indicated that appellant continued to be asymptomatic and had about 150 degrees of flexion or so on each side and grip strength was 50/50 pounds.

In a June 16, 1998 report, (CA-17), Dr. Anderson indicated that appellant was not able to do full duty, however, it did not discuss or explain appellant's percentage of impairment to his left rotator cuff tear.

On August 5, 1998 the Office advised appellant that a hearing would be held on August 27, 1998.

In a September 25, 1998 report, Dr. Anderson acknowledged the five percent rating given to appellant by the Office medical adviser, who used the A.M.A., *Guides* (4th ed. 1993) and stated that the A.M.A., *Guides* were not used in the state of California for the usual workers compensation cases. Dr. Anderson indicated that the patient's subjective complaints, given in the first paragraph, are those of intermittently minimal to slight when working below shoulder level and intermittently moderate with work at or above shoulder level. He also noted that it was also felt to be intermittently moderate with repetitive, heavy pushing and pulling and the intermittently minimal to slight rating was three percent and increased to intermittently moderate which was 25 percent. Dr. Anderson also indicated that appellant had loss of flexion in the left shoulder and it was felt that he had minimal grip on the left at that point. Appellant had lost approximately 50 percent of his lifting capacity for push and pull as well as 75 percent of his capacity to reach above shoulder level. He indicated that when looked at like this, appellant had a level of disability, which would exceed five percent. Dr. Anderson did not explain how these percentages were derived.

In a November 10, 1998 decision, the hearing representative found that appellant had not provided any probative evidence to establish that he sustained greater than a five percent impairment of his left upper extremity causally related to his employment injury.

In a December 14, 1998 form report, Dr. Anderson indicated that there had been no significant improvement in appellant's condition. He provided a shoulder flexion measurement similar to that noted in prior reports.

In a letter dated January 15, 1999, appellant, through his attorney, requested reconsideration of the hearing representative's November 10, 1998 decision. Appellant's attorney asserted that appellant's subjective complaints were not addressed and the Office medical adviser was in no position to assess appellant's subjective complaints or his continuing complaints of pain as he had never met or examined appellant. She also asserted that Dr. Anderson was appellant's treating physician and his opinion constituted the weight of the medical evidence and was entitled to far greater weight than the Office medical adviser. Additionally, appellant's attorney asserted that appellant suffered a similar injury to his right shoulder and his left shoulder was impaired similarly to his right one, however, the ratings varied widely. Appellant's attorney also submitted additional copies of the September 25 and the June 16, 1998 CA-17 reports from Dr. Anderson.

In a nonmerit decision dated March 12, 1999, the Office denied appellant's claim as the evidence submitted was found to be of a repetitious nature and thus not sufficient to warrant review of the prior decision.

In a report dated August 9, 1999, Dr. Anderson, indicated that he had examined appellant in follow-up for his left rotator cuff repair. He noted it was four years, postop and appellant continued to have complaints of pain in the left shoulder with pushing and pulling that occasionally gave out on him. Dr. Anderson indicated that appellant had ¼ tenderness to palpation about the left rotator cuff and minimal crepitation. He still had 150 degrees of forward flexion and his grip strength, left/right, was 40/50 pounds. Dr. Anderson noted that appellant continued to have difficulty with the shoulder and remained working. He did not assign an impairment rating.

In a letter dated November 9, 1999, appellant, through his attorney, requested reconsideration. The attorney reiterated contentions made in the January 15, 1999 reconsideration request.

In a December 13, 1999 decision, the Office denied appellant's claim on the grounds that no new evidence was submitted and the argument submitted was repetitious, cumulative or immaterial in nature.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[2] As appellant filed his appeal with the Board on March 10, 2000, the Board lacks jurisdiction to review the Office's most recent merit decision dated November 10, 1998. Consequently, the only decisions properly before the Board are the Office's December 13 and March 12, 1999 decisions denying appellant's requests for reconsideration.

The Board finds that the Office properly denied merit review of appellant's requests for reconsideration pursuant to 5 U.S.C. § 8128(a).

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 or her own motion or on application. The Secretary in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2) (1999), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[3]

In the present case, appellant, through his attorney, alleged that appellant's permanent impairment exceeded five percent and appellant's subjective complaints were not addressed sufficiently. She also alleged that the Office medical adviser did not physically examine appellant, therefore, he was in no position to address appellant's subjective complaints. In

[2] 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998); 20 C.F.R. § 10.607(a) (1999).

[3] 20 C.F.R. § 10.608(b) (1999).

addition, she alleged that Dr. Anderson's report constituted the weight of the medical evidence and his report was entitled to greater weight than the Office medical adviser. Finally, she argued that appellant received a similar injury to his right shoulder and received a rating that varied widely and was not uniform. However, these arguments have no reasonable color of validity[4] as it is well established that is proper for the Office to rely on its medical adviser to compute a percentage of impairment where the report of a claimant's attending physician does not conform to the Office procedures in evaluating a schedule award.[5]

Additionally, appellant's attorney submitted duplicate copies of reports dated September 26 and June 16, 1998 from Dr. Anderson, in support of appellant's reconsideration request. Both of these reports were previously considered by the hearing representative in the November 10, 1998 decision. This is important, since the requirement pertaining to the submission of evidence in support of reconsideration, specifies that the evidence be relevant and pertinent and not previously considered by the Office.[6] The August 9, 1999 and December 14, 1998 reports of Dr. Anderson, while new, did not specifically address appellant's permanent impairment or provide new measurements that could be used to calculate impairment, that were different than those already of record. In this case, as noted above, appellant has not submitted relevant and pertinent new evidence not previously considered by the Office. Additionally, appellant has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant and pertinent legal argument not previously considered by the Office.[7]

[4] *See Constancy G. Mills*, 40 ECAB 317 (1988) (legal premise not previously considered must have reasonable color of validity). *See generally Daniel O'Toole*, 1 ECAB 107 (1948) (that which is offered as an application should contain at least the assertion of an adequate legal premise or the proffer of proof, or the attachment of a report or other form of written evidence, material to the kind of decision which the applicant expects to receive as the result of his application; if the proposition advanced should be one of law, it should have some reasonable color of validity to establish an application as *prima facie* sufficient).

[5] *See Bobby L. Jackson*, 40 ECAB 593 (1989).

[6] *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

[7] *See supra* note 4.

The decisions of the Office of Workers' Compensation Programs dated December 13 and March 12, 1999 are hereby affirmed.

Dated, Washington, DC
April 23, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member