United States Department of Labor
Employees' Compensation Appeals Board

G.W., Appellant	)	
and	)	**Docket No. 08-213**
	)	**Issued: November 12, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Winston Salem, NC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 30, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated August 29, 2007 which denied her request for reconsideration without a merit review. Because more than one year has elapsed from the most recent merit decision of September 26, 2006 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration without conducting further merit review.

FACTUAL HISTORY

On February 24, 2003 appellant, then a 60-year-old distribution and window clerk, filed an occupational disease claim stating that she developed tendinitis and musculoskeletal strains due to boxing mail. She did not initially stop work, but accepted a limited-duty assignment. On

February 14, 2003 Dr. Warren D. Stacks, a Board-certified family practitioner, diagnosed shoulder strain and related appellant's condition to repetitive motion at work. The Office accepted overuse shoulder strains and bilateral rotator cuff tears.

On May 30, 2003 Dr. James Dallis, a Board-certified orthopedic surgeon, performed a right shoulder decompression, acromioclavicular tendon resection and rotator cuff tendon repair. He recorded preoperative and postoperative diagnoses of right shoulder acromioclavicular joint arthritis, impingement syndrome and rotator cuff tendon tear.

In a March 11, 2004 report, Dr. John E. Ritchie, a Board-certified orthopedic surgeon, noted that appellant had persistent aching, stiffness and pain and had not recovered fully from surgery. He diagnosed persistent right shoulder pain status post rotator cuff repair and decompression and left shoulder pain with probable rotator cuff tear. Dr. Ritchie opined that appellant's right shoulder condition had reached maximum medical improvement and recommended an impairment rating. On April 28, 2004 appellant underwent a left shoulder rotator cuff repair, distal clavicle excision and cervical mid decompression. Dr. Ritchie performed the procedure and noted preoperative and postoperative diagnoses of left shoulder rotator cuff tear, impingement syndrome and distal clavicle osteoarthritis.

On June 22, 2004 appellant claimed a schedule award.

In an August 19, 2004 report, Dr. Ritchie explained that appellant's left shoulder showed full abduction and external rotation, while her internal rotation lacked by 20 degrees. He found that appellant's right shoulder exhibited a painful arc of motion and diagnosed right shoulder residual impingement. On September 30, 2004 Dr. Ritchie noted that appellant's left shoulder lacked 20 degrees of forward elevation and 20 degrees of external rotation. He diagnosed residual impingement of the left shoulder. In a November 16, 2004 report, Dr. Ritchie noted that appellant's right shoulder was tender over the acromioclavicular joint and showed forward elevation of 110 degrees and external rotation of 40 degrees. Her left shoulder exhibited forward elevation of 130 degrees and external rotation of 50 degrees. Dr. Ritchie diagnosed right shoulder pain with evidence of osteoarthritis at the acromioclavicular joint and left shoulder status post rotator cuff repair, improved. On March 31, 2005 he noted 20 degrees of forward elevation, 60 degrees of internal rotation and internal rotation from the hand to the belt line for appellant's left shoulder, and approximately 120 degrees of forward elevation without pain in the right shoulder. Dr. Ritchie diagnosed right shoulder pain with probable rotator cuff tear, rule out impingement with acromioclavicular joint arthritis, left shoulder pain, status post rotator cuff repair, Mumford procedure and subacromial decompression, and recommended that appellant undergo surgery for her right shoulder. He concluded that appellant's left shoulder had reached maximum medical improvement and that she had approximately 20 percent permanent impairment of the shoulder.

On May 18, 2005 appellant underwent a right shoulder arthroscopic subacromial decompression, distal clavicle excision, lysis of adhesions and open rotator cuff repair. Dr. Ritchie performed the procedure and diagnosed right shoulder rotator cuff tear, impingement syndrome, acromioclavicular joint arthritis and adhesions.

In a September 1, 2005 report, a medical adviser noted appellant's left upper extremity range of motion measurements. However, Dr. Ritchie had not stated whether the left shoulder was at maximum medical improvement. Therefore, the evidence was insufficient to support a schedule award for permanent impairment of the left upper extremity.

On November 30, 2005 the Office requested additional information from Dr. Ritchie concerning appellant's permanent impairment. In a January 17, 2006 report, Dr. Ritchie diagnosed recovering right shoulder pain status post rotator cuff repair, lysis of adhesions, arthroscopic decompression and rotator cuff repair. With regard to appellant's left shoulder, he measured 130 degrees of forward elevation, 25 degrees of extension, 90 degrees of abduction, 30 degrees of adduction, 50 degrees of internal rotation and 60 degrees of external rotation. Dr. Ritchie explained that, while appellant's right shoulder continued to improve, she had reached maximum medical improvement of the left shoulder and had 15 percent impairment. On January 30, 2006 he measured appellant's loss of range of motion of the right shoulder and found that she had 80 degrees of abduction, 30 degrees of adduction, 90 degrees of forward elevation with some increase with passive motion, 60 degrees of external rotation and 40 degrees of internal rotation. Dr. Ritchie determined that appellant had 20 percent impairment of the right shoulder based on loss of motion, persistent weakness and arthroplasty of the acromioclavicular joint.

In a May 8, 2006 report, the Office medical adviser reviewed the record and determined that appellant had 15 percent impairment of the right upper extremity and 12 percent impairment of the left upper extremity. He applied Dr. Ritchie's loss of motion measurements to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Figures 16-40, 16-43 and 16-46.[1] The medical adviser determined that appellant's left shoulder condition reached maximum medical improvement on January 17, 2006 and her right shoulder condition reached maximum medical improvement on January 30, 2006.

In a July 26, 2006 report, Dr. Ritchie disagreed with the Office medical adviser's rating of appellant's impairment. He explained that the medical adviser failed to account for appellant's resection arthroplasty of the distal clavicle at the acromioclavicular joint. Dr. Ritchie stated that this procedure should allow for an additional 10 percent impairment to each upper extremity.

On August 23, 2006 the Office medical adviser reiterated that appellant had 12 percent impairment of the left upper extremity and 15 percent impairment of the right upper extremity. On September 18, 2006 he explained that Dr. Ritchie had recommended additional impairment for weakness, which was not permitted in the presence of impairment for decreased motion pursuant to the A.M.A., *Guides*.

By decision dated September 26, 2006, the Office granted appellant schedule awards for 12 percent impairment of the left upper extremity and 15 percent impairment of the right upper extremity.

[1] A.M.A., *Guides*, 5th edition at 476, Figure 16-40; 477, Figure 16-43; 479, Figure 16-46.

In a December 19, 2006 report, Dr. Ritchie noted appellant's complaint of continuing right shoulder pain and explained that she was currently receiving physical therapy for a frozen shoulder. On physical examination, he measured appellant's right shoulder motion as follows: 90 degrees of forward elevation and 40 degrees of external rotation. Dr. Ritchie diagnosed status post rotator cuff repair with residual frozen shoulder and concluded that she had reached maximum medical improvement.

On August 13, 2007 appellant requested reconsideration of the Office's September 26, 2006 schedule award decision. She asserted that she was entitled to additional schedule award compensation because Dr. Ritchie had supported an additional 10 percent impairment to each upper extremity. Appellant resubmitted copies of Dr. Ritchie's reports dated January 17 and 30 and July 26, 2006.

By decision dated August 29, 2007, the Office denied appellant's request for reconsideration without conducting a merit review on the grounds that appellant had failed to meet the one of the three regulatory criteria justifying a merit review.

LEGAL PRECEDENT

Under section 8128 of the Federal Employees' Compensation Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulations provides guidance for the Office in using this discretion.[2] The regulations provide that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(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]."[3]

Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements 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.[4] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section

[2] 20 C.F.R. § 10.606(b)(2) (1999).

[3] *Id.*

[4] 20 C.F.R. § 10.608(b) (1999).

10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[5]

ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review on the grounds that appellant failed to meet one of the three regulatory criteria justifying a merit review.[6] Appellant submitted an August 13, 2007 letter contending that she was entitled to further schedule award compensation because Dr. Ritchie had supported an additional 10 percent impairment of each upper extremity. The Board notes that appellant did not assert that the Office misapplied or misinterpreted a point of law or advance a new and relevant legal argument. Appellant's argument that her doctor supported additional impairment is not new and relevant as it had been previously considered by the Office in reaching its final decision on her schedule award claim.[7] Therefore appellant has not met either of the first two regulatory criteria justifying a merit review of her claim.

Appellant did submit a December 19, 2006 report from Dr. Ritchie that provided loss of motion measurements for her right shoulder but did not address the issue of her impairment. The Board finds that the report is not relevant evidence warranting a merit review because the physician did not address whether appellant had permanent impairment greater than that for which she received schedule awards. Dr. Ritchie's December 19, 2006 report does not constitute new and relevant evidence to require the Office to reopen her claim for a merit review. Appellant also submitted several reports from Dr. Ritchie that were previously of record. However, submission of duplicative evidence is not a basis for reopening a claim for a merit review.[8]

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review on the grounds that appellant failed to meet any of the three regulatory criteria justifying a merit review.

[5] *Annette Louise*, 54 ECAB 783 (2003).

[6] On appeal, appellant submitted additional medical evidence. The Board, however, notes that it cannot consider this evidence for the first time on appeal because the Office did not consider this evidence in reaching its final decision. The Board's review is limited to the evidence in the case record at the time the Office made its final decision. 20 C.F.R. § 501.2(c).

[7] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

[8] *See id.*

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 12, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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