

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICHARD L. PANETTA and U.S. POSTAL SERVICE,  
POST OFFICE, Schenectady, NY

*Docket No. 02-281; Submitted on the Record;  
Issued August 8, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On November 18, 1998 appellant, then a 45-year-old maintenance mechanic, filed an occupational disease claim, alleging that factors of employment caused bilateral carpal tunnel syndrome and tendinitis in both elbows. By letter dated March 3, 1999, the Office accepted that appellant sustained employment-related bilateral carpal tunnel syndrome. On March 24, 1999 appellant underwent left carpal tunnel release and on May 4, 1999 underwent right carpal tunnel release.

On May 3, 2000 appellant filed a claim for a schedule award. In a decision dated August 29, 2000, appellant was granted a schedule award for a 20 percent impairment of the right upper extremity and a 20 percent impairment of the left upper extremity, for a total of 73.20 weeks of compensation, to run from June 5, 2000 to October 30, 2001. The Office based its decision on an August 21, 2000 opinion of the Office medical adviser who applied the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>1</sup> to the findings of appellant's treating Board-certified orthopedic surgeon, Dr. Richard L. Uhl.

On June 6, 2001 appellant requested reconsideration and Dr. Uhl submitted a report dated July 30, 2001. In a September 14, 2001 decision, the Office denied appellant's reconsideration request. The Office further noted that the Office was currently utilizing the fifth edition of the A.M.A., *Guides* and requested that appellant submit a report from Dr. Uhl utilizing this edition. The instant appeal follows.

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<sup>1</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB \_\_\_ Docket No. 01-1361 (issued February 4, 2002).

The Board finds that the Office abused its discretion in failing to reopen appellant's case for merit review.

The only decision before the Board in this appeal is the decision of the Office dated September 14, 2001 denying appellant's application for review. Since more than one year had elapsed between the date of the schedule award decision dated August 29, 2000 and the filing of appellant's appeal on December 11, 2001, the Board lacks jurisdiction to review the merits of his claim.<sup>2</sup>

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>3</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.<sup>4</sup> Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

In support of his request for reconsideration, appellant submitted a report dated July 30, 2001 in which his treating Board-certified orthopedic surgeon, Dr. Uhl, advised that appellant continued to "have difficulties" including discomfort of the arm and that his left had "is actually much worse." Dr. Uhl reported findings on examination, opining "he remains with profound sensory losses." He concluded that, based on the A.M.A., *Guides*, appellant had a 30.4 percent impairment of each upper extremity.<sup>6</sup>

The Board finds that, as Dr. Uhl provided an opinion that appellant's left upper extremity condition had worsened, his July 30, 2001 report is relevant to the issue of whether appellant is entitled to an increased schedule award. Appellant therefore submitted relevant and pertinent evidence not previously considered by the Office, and he thus established that the Office abused its discretion in its September 14, 2001 decision by denying his request for review on the merits.<sup>7</sup> The case is therefore remanded to the Office for review of the merits of appellant's claim and any other proceedings deemed necessary, to be followed by an appropriate *de novo* decision.

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<sup>2</sup> 20 C.F.R. § 501.3(d)(2).

<sup>3</sup> 20 C.F.R. § 10.608(a) (1999).

<sup>4</sup> 20 C.F.R. § 10.608(b)(1) and (2) (1999).

<sup>5</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>6</sup> The Board notes that, in a report dated July 10, 2000, Dr. Uhl advised that appellant had a 30.4 percent impairment of the right upper extremity and a 22.8 percent impairment on the left, based on Table 11, page 48, of the fourth edition of the A.M.A., *Guides*.

<sup>7</sup> See *Willie H. Walker, Jr.*, 45 ECAB 126 (1993).

The decision of the Office of Workers' Compensation Programs dated September 14, 2001 is hereby vacated and the case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, DC  
August 8, 2002

Michael J. Walsh  
Chairman

Alec J. Koromilas  
Member

Willie T.C. Thomas  
Alternate Member