

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL SHAWN HUNTER and DEPARTMENT OF THE NAVY,  
ELECTRIC BOAT SHIPYARD, Groton, CN

*Docket No. 02-1329; Submitted on the Record;  
Issued September 18, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for merit review.

Appellant's claim filed on March 5, 1999 was accepted for rotator cuff impingement syndrome after appellant, then a 34-year-old electronic specialist, slipped on a ladder on a submarine and hurt his right shoulder. Appellant underwent surgery on October 20, 1999 and returned to work on December 13, 1999.

On September 18, 2000 appellant filed a claim for a schedule award. On October 16, 2000 the Office issued a schedule award for a 10 percent permanent impairment of appellant's right upper extremity. The \$15,336.39 award ran from September 1, 2000, the date of maximum medical improvement, to April 7, 2001.<sup>1</sup>

On January 9, 2001 appellant requested reconsideration and submitted a report from Dr. Jeffrey A. Miller, an osteopathic practitioner, explaining his impairment assessment of 15 percent. On April 20, 2001 the Office denied modification of its prior decision, based on the Office medical adviser, Dr. Cohen, who found a 10 percent impairment in his April 11, 2001 report.

On November 14, 2001 appellant again requested reconsideration and cited the case of *Bobby L. Jackson*<sup>2</sup> as legal argument that the impairment rating for his right shoulder should be at least 14 percent. On February 12, 2002 the Office denied appellant's request on the grounds

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<sup>1</sup> The Office medical adviser calculated the award based on Table 27, page 61 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, noting that this table covered resection arthroplasty of the distal clavicle and when it is used, there is no additional impairment for pain, limited motion or weakness.

<sup>2</sup> 40 ECAB 693 (1989).

that the argument submitted was immaterial and therefore insufficient to warrant review of its prior decision.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's claim for merit review.

The only Office decision before the Board on appeal is dated February 12, 2002, denying appellant's request for reconsideration. Because more than one year has elapsed between the last merit decision dated April 20, 2001 and the filing of this appeal on May 2, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>3</sup>

Section 8128(a) of the Federal Employees' Compensation Act<sup>4</sup> vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>5</sup> Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>6</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>7</sup> 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>8</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 of the merits.<sup>9</sup>

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<sup>3</sup> 20 C.F.R. §§ 501.2(c); 501.3(d)(2). See *John Reese*, 49 ECAB 397, 399 (1998).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 5 U.S.C. § 8128(a) ("The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

<sup>6</sup> *Veletta C. Coleman*, 48 ECAB 367, 368 (1997).

<sup>7</sup> 20 C.F.R. § 10.608(a) (1999).

<sup>8</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>9</sup> 20 C.F.R. § 10.608(b).

With his request for reconsideration, appellant submitted no new medical evidence. Therefore, appellant has failed to meet the subsection (iii) requirement of relevant and pertinent new evidence.<sup>10</sup>

Appellant argued that the *Jackson* case provided a precedent for finding a greater impairment rating of his right shoulder. That case, which involved a lower extremity impairment and voluminous medical evidence from various physicians, is immaterial to the issue of impairment in this case, as determined by the Office medical adviser because Dr. Miller failed to apply the A.M.A., *Guides* correctly. Further, appellant has failed to show that the Office erred in interpreting the law and regulations governing schedule awards, nor has he advanced any relevant legal argument not previously considered by the Office. Inasmuch as appellant failed to meet any of the three requirements for reopening his claim for merit review, the Office properly denied his reconsideration request.<sup>11</sup>

The February 12, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
September 18, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>10</sup> See *Eugene L. Turchin*, 48 ECAB 391, 397 (1997) (finding that appellant's failure to submit new and relevant evidence on reconsideration justified the Office's refusal to reopen his case for merit review).

<sup>11</sup> See *Thomas J. Engelhart*, 50 ECAB 322, 324 (1999) (appellant's legal contention regarding concurrent payment of schedule awards and wage-loss benefits was insufficient to require merit review because the Office previously addressed the issue in line with long-standing contrary Board precedent).