

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**MARTIN GAITAN, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Huntington Beach, CA, Employer**

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**Docket No. 05-1028  
Issued: July 22, 2005**

*Appearances:*  
*Martin Gaitan, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On April 4, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated March 22, 2005 which denied appellant's request for merit review. Because more than one year has elapsed between the last merit decision dated March 2, 2004 and the filing of this appeal on April 4, 2005, 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 refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On December 3, 2002 appellant, then a 56-year-old modified letter carrier, filed an occupational disease claim alleging that he developed pain in the left shoulder and numbness in his left wrist and fingers due to factors of his federal employment. The Office accepted appellant's claim for left shoulder strain on January 14, 2003. Appellant underwent an

arthroscopic subacromial decompression and mini open rotator cuff repair on April 15, 2003. The Office authorized surgery on May 30, 2003.

Appellant requested a schedule award on December 8, 2003 and submitted a report from his attending physician, Dr. Thai T. Do, a Board-certified internist, dated October 13, 2003. Dr. Do performed a physical examination and found that appellant's left shoulder demonstrated mild tenderness to palpation of the deltoid muscle, as well as flexion of 180 degrees, abduction of 140 degrees, external rotation of 50 degrees and internal rotation of 80 degrees. He stated that appellant had a positive supraspinatus sign and negative Speed's test. Dr. Do provided appellant's grip strength measurements in the left hand of 20, 22 and 20 kilograms and in the right hand 40, 44 and 40 kilograms. He found that appellant reached maximum medical improvement on October 14, 2003 and diagnosed status post arthroscopic decompression with rotator cuff repair of the left shoulder and left cubital tunnel syndrome. Dr. Do concluded that appellant had limited range of motion, moderate pain with heavy lifting above the shoulder and intermittent numbness in the left fourth and fifth fingers as well as 40 percent loss of grip strength in the left hand.

An Office medical adviser reviewed Dr. Do's report on January 19, 2004 and found that appellant had ratable loss of shoulder motion due to loss of abduction of two percent and loss of external rotation of one percent. She further found that appellant had 20 percent upper extremity impairment due to loss of grip strength and combined these values to reach appellant's left upper extremity impairment of 22 percent.

On March 2, 2004 the Office granted appellant a schedule award for 22 percent impairment of his left upper extremity. The period of the schedule award was October 14, 2003 to February 21, 2004.

Appellant underwent a magnetic resonance imaging (MRI) scan of his left shoulder on March 26, 2004 which demonstrated the postoperative status of his left shoulder compatible with acromioplasty and rotator cuff tendon repair with no recurrent tears and unremarkable labrum.

By letter dated March 29, 2004, appellant requested to change his attending physician to Dr. James C. Thomas, Jr., a Board-certified orthopedic surgeon. The Office authorized this change on April 30, 2004.

Appellant requested reconsideration of the Office's March 2, 2004 decision on February 22, 2005 stating that he felt he had a loss of strength and loss of range of motion of his left shoulder. He opined that he could use his shoulder to only 50 percent of its prior capacity. In support of his request, he submitted a report dated September 1, 2004 from Dr. Thomas who provided appellant's range of motion of the left shoulder including abduction to 170 degrees, flexion to 170 degrees,<sup>1</sup> external rotation to 90 degrees and found that appellant had loss of range of motion in extension and internal rotation, but did not provide these loss in terms of degrees, instead noting that appellant could reach the left hand to L3. He noted that appellant had already received a rating for his left shoulder and recommended termination of therapy.

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<sup>1</sup> A one percent impairment in accordance with the American Medical Association, *Guides to the Evaluation of the Permanent Impairment*, (5<sup>th</sup> ed. 2000), 476, Figure 16-40.

By decision dated March 22, 2005, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that appellant's personal opinion regarding the extent of his impairment lacked probative value as he was not a physician and that the remainder of the evidence did not address appellant's level of permanent partial impairment nor indicate that his schedule award was incorrect.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>4</sup>

### **ANALYSIS**

In this case, the Office granted appellant a schedule award for 22 percent impairment of his left upper extremity on March 2, 2004.<sup>5</sup> Appellant timely requested reconsideration of this decision on February 22, 2005 and alleged that he was entitled to an amended schedule award as he believed that he had 50 percent impairment of his left shoulder rather than the 22 percent granted by the Office.<sup>6</sup> In addition to appellant's argument that he was entitled to an amended schedule award, he submitted a report from Dr. Thomas, a Board-certified orthopedic surgeon and his attending physician, dated September 1, 2004.

The Board finds that Dr. Thomas' September 1, 2004 report is sufficiently relevant to the March 2, 2004 schedule award determination to require the Office to reopen appellant's claim for further consideration of the merits. Dr. Thomas provided findings on physical examination indicating that appellant had loss of motion in the left shoulder due to loss of extension and external rotation. In developing appellant's schedule award, the Office medical adviser did not consider any range of motion figures for loss of extension. While Dr. Thomas did not provide the extent of this loss in terms of the A.M.A., *Guides*, his report containing range of motion calculations is relevant to appellant's claim for an amended schedule award. As Dr. Thomas'

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<sup>2</sup> 5 U.S.C. §§ 8101-8193, § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> 20 C.F.R. § 10.608(b).

<sup>5</sup> As this decision was issued more than one year prior to the date of appellant's appeal to the Board, on April 4, 2005, the Board lacks jurisdiction to review the merits of appellant's claim. 20 C.F.R. § 501.3(d)(2).

<sup>6</sup> There is no evidence in the record supporting that appellant was in fact arguing that he was entitled to an additional schedule award due to increased permanent impairment found after Dr. Do opined that he had reached maximum medical improvement. *Paul R. Reedy*, 45 ECAB 488, 490 (1994).

September 1, 2004 report is relevant new evidence, it is sufficient to require the Office to reopen appellant's claim for consideration of the merits.

**CONCLUSION**

The Board finds that appellant has submitted sufficient relevant new evidence regarding the extent of his permanent impairment consisting of a September 1, 2004 report from Dr. Thomas, his attending physician, to require the Office to reopen appellant's claim for consideration of the merits.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 22, 2005 decision of the Office of Workers' Compensation Programs is hereby set aside and remanded for review of the merits and an appropriate decision.

Issued: July 22, 2005  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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