

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

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**J.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Washington, PA, Employer**

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**Docket No. 10-403  
Issued: September 16, 2010**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 30, 2009 appellant filed a timely appeal of a June 12, 2009 decision by the Office of Workers' Compensation Programs denying merit review. Because over 180 days elapsed from the most recent merit decision, dated December 23, 2008, 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 pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On September 22, 1989 appellant, then a 42-year-old letter carrier, sustained injury to his right shoulder while attempting to open a mailbox. The Office accepted his claim for right shoulder strain and torn rotator cuff and authorized surgery. Dr. Anthony C. Canterna, a Board-

certified orthopedic surgeon, performed surgery on April 25, 1990. Appellant underwent additional arthroscopic surgery on May 15, 1991.

Appellant filed a recurrence of disability on June 14, 1991. He alleged that he stopped work on May 15, 1991 due to his September 22, 1989 employment injury. Appellant stated that he had performed light-duty work and developed increasing discomfort and loss of strength in his right shoulder. On May 29, 1992 Dr. Canterna performed an arthroscopy of the right shoulder with debridement which was authorized by the Office. Appellant filed a second recurrence claim on July 1, 1992 alleging that he stopped work on May 28, 1992 due to loss of strength, pain and discomfort in the right shoulder. The Office accepted this claim on July 24, 1992.

Dr. Canterna performed additional arthroscopic surgery on the right shoulder with repair of the glenoid rim on August 8, 1997. Appellant filed a recurrence of disability on September 1, 1997 and alleging that he stopped work on August 7, 1997 due to his September 22, 1989 employment injury.

On April 9, 1999 Dr. Canterna performed a left carpal tunnel release. The Office authorized right shoulder surgery on January 22, 2003. Appellant filed a recurrence of disability on March 10, 2003 alleging that he stopped work on March 31, 2003 due to his right shoulder condition. On April 1, 2003 Dr. Dean Sotereanos, a Board-certified orthopedic surgeon of professorial rank, performed a right shoulder arthroscopy and rotator cuff repair with open acromioplasty. Dr. Sotereanos described the surgery as revision of right shoulder arthroscopy, distal clavicle resection, massive rotator cuff repair, tuberopecty and open acromioplasty. The Office entered appellant on the periodic rolls on June 11, 2003.

In a decision dated August 16, 2005, it reduced appellant's compensation to zero as his earnings as a modified city carrier fairly and reasonably represented his wage-earning capacity.

Appellant requested a schedule award on July 12, 2007. By decision dated September 4, 2007, the Office denied appellant's claim for a schedule award on the grounds that he failed to submit sufficient medical evidence.

On August 8, 2007 Dr. Sotereanos stated that appellant had persistent weakness with resisted external rotation. He found internal rotation of 40 degrees, external rotation of 40 degrees, forward elevation of 140 degrees and backward elevation of 160 degrees. Appellant demonstrated abduction of 120 degrees and adduction of 90 degrees. Dr. Sotereanos concluded that appellant had 30 percent impairment of the right upper extremity.

Appellant, through his attorney, requested reconsideration on August 29, 2008. He submitted a report dated July 29, 2008 from Dr. Sotereanos stating that appellant had no change and the same range of motion. Dr. Sotereanos noted that appellant had atrophy of the deltoid, supraspinatus and infraspinatus consistent with his lack of strength. The district medical adviser reviewed the medical records on November 29, 2008 and found that appellant had 10 percent impairment due to distal clavicle resection in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>1</sup> He also found that

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<sup>1</sup> A.M.A., *Guides* 506, Table 16-27.

appellant had loss of range of motion of the shoulder including three percent impairment due to 140 degrees of forward flexion,<sup>2</sup> three percent impairment due to 120 degrees of abduction<sup>3</sup> and one percent impairment due to 40 degrees of external rotation.<sup>4</sup> The district medical adviser combined these values to reach 17 percent impairment of the right upper extremity.<sup>5</sup> He concluded that appellant had reached maximum medical improvement on August 8, 2007. By decision dated December 1, 2008 the Office vacated its prior decision and found that appellant was entitled to a schedule award. In a decision dated December 23, 2008, the Office granted appellant a schedule award for 17 percent impairment of his right upper extremity based on the district medical adviser's application of the A.M.A., *Guides* to Dr. Sotereanos' findings.

Appellant requested reconsideration on June 1, 2009 and submitted a report from Dr. Sotereanos dated April 22, 2009. Dr. Sotereanos noted appellant's history of four right shoulder surgeries for rotator cuff repair. He reviewed his prior reports and noted the findings of loss of range of motion and loss of strength. Dr. Sotereanos opined that appellant had 30 percent impairment of his right shoulder.

By decision dated June 12, 2009, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that Dr. Sotereanos did not correlate his findings with the A.M.A., *Guides* and that the estimate of 30 percent impairment could not be considered new or relevant evidence.

### **LEGAL PRECEDENT**

The Federal Employees' Compensation Act provides in section 8128(a) that the Office may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.<sup>6</sup> Section 10.606(b) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence that shows that the Office erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by the Office; or includes relevant and pertinent new evidence not previously considered by the Office.<sup>7</sup> Section 10.608 of the Office's regulations provide that when a request for reconsideration is timely, but does not meet at least one of these three requirements, the Office will deny the application for review without reopening the case for a review on the merits.<sup>8</sup>

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<sup>2</sup> *Id.* at 476, Figure 16-40.

<sup>3</sup> *Id.* at 477, Figure 16-43.

<sup>4</sup> *Id.* at 479, Figure 16-46.

<sup>5</sup> *Id.* at 604.

<sup>6</sup> 5 U.S.C. §§ 8101-8193, 8128(a).

<sup>7</sup> 20 C.F.R. § 10.606.

<sup>8</sup> *Id.* at § 10.608.

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>9</sup>

### ANALYSIS

Appellant requested a schedule award and submitted reports from Dr. Sotereanos, a Board-certified orthopedic surgeon of professorial rank, dated August 8, 2007 and July 29, 2008 listing appellant's range of motion and loss of strength. Dr. Sotereanos opined that appellant had 30 percent impairment of the right shoulder, but did not provide any citations to the A.M.A., *Guides* in support of his impairment rating. The Office referred Dr. Sotereanos' reports to the district medical adviser, who reviewed the findings and provided correlations between the findings and the applicable provisions of the A.M.A., *Guides*. It granted appellant a schedule award for 17 percent impairment of his right upper extremity based on the district medical adviser's opinion.

Appellant requested reconsideration and submitted an additional report from Dr. Sotereanos dated April 22, 2009. In this report, Dr. Sotereanos noted his previous findings and again concluded that appellant had 30 percent impairment of the right upper extremity. The Board finds that this report was cumulative as it was merely a restatement of the August 8, 2007 and July 29, 2008 reports. Dr. Sotereanos did not provide any new evidence in support of his impairment rating which would require the Office to review the merits of appellant's claim. As the April 22, 2009 report was substantially similar to the reports previously reviewed by the Office, this report did not constitute relevant and pertinent new evidence and was not sufficient to require the Office to reopen appellant's claim for review of the merits.

### CONCLUSION

The Board finds that appellant's request for reconsideration did not contain pertinent new and relevant evidence and that the Office therefore properly declined to reopen his claim for consideration of the merits.

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<sup>9</sup> M.E. 58 ECAB 694 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 12, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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