

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGIANA L. SIMCHICK and U.S. POSTAL SERVICE,
POST OFFICE, Johnsonburg, PA

*Docket No. 98-766; Submitted on the Record;
Issued December 1, 1999*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI:

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review of her claim under 20 C.F.R. § 10.138.

On November 14, 1990 appellant, then a 43-year-old rural mail carrier, sustained injuries to both her right and left knee, her left ankle, her right hand and her left shoulder.¹ She explained that while attempting to exit her mail delivery vehicle, she caught her left foot on the floor of the vehicle and as a result, she fell to the ground. Appellant further explained that while falling, she tried to catch herself with her left hand on the side of the vehicle. The Office accepted appellant's claim for abrasion of the right knee, strain of the left knee and ankle, abrasion of the right hand and sprain and strain of the left shoulder. The Office also authorized two surgical procedures, the first of which occurred on May 18, 1992 when appellant underwent an arthroscopic acromioplasty for left shoulder impingement syndrome. Appellant was subsequently diagnosed as suffering from degenerative joint disease of the left acromial clavicular joint, for which the Office authorized a distal clavicle resection of the left shoulder. This procedure was performed on March 16, 1993. As a result of her injury and subsequent surgeries, appellant was awarded appropriate medical benefits and wage-loss compensation.²

Approximately four years after her November 1990 employment injury, the Office referred appellant for a second opinion examination to Dr. Robert M. Yanchus, a Board-certified

¹ Appellant initially injured her left shoulder on September 12, 1990. On that same date, she filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that she felt a sharp pain in her left shoulder after reaching over her seat to retrieve a parcel from the back of her mail delivery vehicle. Appellant described the nature of her injury as an inability to raise her left shoulder and arm without experiencing pain. However, she did not cease work at the time of her initial injury. Appellant's initial claim was subsequently merged with the instant claim.

² Appellant last worked for the employing establishment on May 11, 1992.

orthopedic surgeon. In reports dated December 7, 1994 and March 18, 1995, Dr. Yanchus explained that, based upon his examination, appellant had reached maximum medical improvement and was able to return to work without restrictions. Although appellant continued to complain of pain in her left shoulder, he found no evidence of impingement syndrome. Dr. Yanchus further explained that appellant's subjective complaints were not supported by objective findings and that she suffered from symptom magnification syndrome, type III. He concluded that appellant should be encouraged to return to work.

On April 7, 1995 the Office advised appellant that it proposed to terminate her compensation on the basis that her disability resulting from the accepted employment injury had ceased. The Office explained that its proposed action was based on Dr. Yanchus' findings. Appellant was further advised that if she disagreed with the proposed termination of compensation, she had 30 days within which to submit additional evidence or argument.

In response, appellant indicated that on May 5, 1995 she was treated by Dr. Robert L. Perneski, an orthopedic surgeon, to relieve pain and spasms in her left shoulder.³ She also advised the Office that Dr. Perneski would be submitting a report indicating that she could not resume her former employment due to the physical limitations of her left arm and shoulder. Appellant also argued that contrary to Dr. Yanchus' findings, there was objective evidence to support her continuing disability.

By decision dated May 19, 1995, the Office terminated appellant's compensation on the basis that there were no further residuals of her November 14, 1990 employment injury. The Office noted appellant's allegation of continued disability, but explained that no new evidence was received in support thereof, despite appellant's statement that additional medical evidence would be forthcoming. Accordingly, the Office concluded that Dr. Yanchus' opinion represented the weight of the medical evidence.

Appellant filed a request for reconsideration on May 15, 1996. In support of her request, appellant submitted a report dated June 2, 1995 from Dr. Perneski as well as a June 1, 1995 duty status report (Form CA-17). In his June 2, 1995 report, Dr. Perneski indicated that, based on his May 4, 1995 evaluation of appellant, it was his opinion that she was unable to return to her previous job status with the employing establishment.

In a merit decision dated August 15, 1996, the Office denied appellant's request for reconsideration. The Office noted, among other things, that Dr. Perneski's June 2, 1995 report did not include any discussion, any physical findings or any rationale to support his conclusion that appellant was unable to resume her former employment. Consequently, the Office concluded that the record was insufficient to warrant modification of the prior decision terminating compensation.

On August 13, 1997 appellant filed another request for reconsideration, which the Office denied on October 14, 1997 without reviewing the merits of appellant's claim. Appellant subsequently filed an appeal with the Board on January 13, 1998.

³ Appellant's letter is undated, however, it is date stamped as being received by the Office on May 9, 1995.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁴ As appellant filed her appeal with the Board on January 13, 1998 the Board lacks jurisdiction to review the Office's most recent merit decision dated August 15, 1996. Consequently, the only decision properly before the Board is the Office's October 14, 1997 decision denying appellant's request for reconsideration.

The Board finds that the Office properly exercised its discretion in refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁵ Section 10.138(b)(2) 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 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.⁶

Appellant's August 13, 1997 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a point of law. Additionally, appellant did not advance a point of law or a fact not previously considered by the Office. While appellant's representative provided a chronology of alleged improprieties on the part of both the Office and the employing establishment in processing the claim, none of the alleged improprieties pertained to the central issue on reconsideration. As the Office correctly noted, the allegations were not material to the question of whether the medical evidence of record shows any continuing disability. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above noted requirements under section 10.138(b)(1). With respect to the third requirement, submitting relevant and pertinent evidence not previously considered, the Office correctly noted that appellant did not submit any new medical evidence with her August 13, 1997 request for reconsideration.⁷ Therefore, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.138(b)(1). As appellant is not entitled to a review of the merits of her claim based on any of the above noted requirements under section 10.138(b)(1), the Board finds that the Office did not abuse its discretion in denying appellant's August 13, 1997 request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated October 14, 1997 is hereby affirmed.

⁴ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

⁵ 20 C.F.R. § 10.138(b)(1).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ Although the August 13, 1997 request for reconsideration indicated that additional medical evidence would be forthcoming, no such evidence was received by the Office prior to the issuance of its October 14, 1997 decision denying modification.

Dated, Washington, D.C.
December 1, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member