

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD CINCIARELLI and U.S. POSTAL SERVICE,
BULK MAIL FACILITY, Jersey City, NJ

*Docket No. 98-1535; Submitted on the Record;
Issued December 8, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a) constituted an abuse of discretion; and (2) whether the Office properly denied appellant's request for a hearing.

The Board has duly reviewed the case record and finds that the Office abused its discretion in this case.

In the present case, the Office has accepted that appellant, a maintenance equipment worker, sustained a sprain in both shoulders as a result of a December 19, 1992 employment injury. The Office later expanded appellant's claim to include frozen left shoulder, authorized surgical decompression with acromioplasty of the left shoulder on February 27, 1995 and arthroscopy of the left shoulder on August 2, 1995.

On February 29, 1996 appellant filed a claim for a schedule award. In a report dated April 23, 1996, Dr. Danecia M. DiPaolo, an attending Board-certified orthopedic surgeon, opined that appellant had a 25 percent impairment of the upper extremity. The Office medical adviser opined, based upon Dr. DiPaolo's report, that appellant had an 18 percent impairment of the left upper extremity.

On February 3, 1997 the Office issued appellant a schedule award for an 18 percent permanent impairment of the left upper extremity.

By letter dated April 11, 1997, appellant's representative requested reconsideration of the February 3, 1997 schedule award and a hearing before an Office hearing representative. The Office denied appellant's hearing request on October 6, 1997. By letter dated October 28, 1997, appellant's representative requested reconsideration of the February 3, 1997 decision and enclosed a copy of a July 14, 1997 report from Dr. Ronald J. Potash, a Board-certified surgeon,

who opined, based upon the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.), that appellant had a 32 percent impairment of the left upper extremity. By letters dated November 15 and December 2, 1997, the Office requested clarification as to whether appellant was appealing the schedule award or requesting additional compensation. By letter dated November 13, 1997, appellant's counsel indicated that appellant was requesting review of the schedule award. By compensation order dated January 20, 1998, the Office denied appellant's request for a merit review.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations¹ provides that a claimant may obtain review of the merits of his or her claim under 5 U.S.C. § 8128(a) by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.

The only decisions before the Board on this appeal are the January 20, 1998 decision finding that appellant's application for review was not sufficient to warrant review of its prior decision and the October 6, 1997 decision denying appellant's request for an oral hearing. Since more than one year elapsed between the date of the Office's most recent merit decision on February 3, 1997 and the filing of appellant's claim on April 21, 1998, the Board lacks jurisdiction to review the merits of appellant's claim.²

To obtain reconsideration of the Office's February 3, 1997 decision, appellant submitted a new medical report which addressed the issue of his schedule award. Evidence which does not address the particular issue involved³ or evidence which is repetitive or cumulative of that already in the record,⁴ does not constitute a basis for reopening a case. However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁵

¹ 20 C.F.R. § 10.138(b)(1).

² 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

³ *Joseph W. Baxter*, 36 ECAB 228 (1984).

⁴ *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393 (1984).

⁵ *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

Appellant submitted a July 14, 1997 report from Dr. Potash, wherein he opined that appellant had a 32 percent impairment of his left upper extremity and referred to the tables in the A.M.A., *Guides*. The Board notes that at the time it decided appellant's schedule award of an 18 percent impairment of the left upper extremity, the Office did not review any reports from Dr. Potash to ascertain his opinion regarding appellant's impairment rating.

As appellant has met the requirement of section 10.138(b)(1)(3) that he submit new and relevant evidence to support a claim that he is entitled to a greater than 18 percent impairment of his left upper extremity, the Office abused its discretion in the case by denying merit review. On remand the Office shall grant appellant a merit review and issue an appropriate decision.

The Board further finds that the Office properly denied appellant's hearing request.

Section 8124(b)(1) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁶

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁷

In this case, the Office issued a schedule award decision on February 3, 1997. Appellant, however, requested a hearing before an Office hearings representative in a letter from his representative dated April 11, 1997. Because appellant clearly did not request a hearing within 30 days of the Office's February 3, 1997 decision, he was not entitled to a hearing before an Office representative under section 8124 as a matter of right. The Office also exercised its discretion, but decided not to grant appellant a discretionary hearing on the grounds that he could have his case further considered on reconsideration by submitting additional relevant evidence. Consequently, the Office properly denied appellant's hearing request.

⁶ 5 U.S.C. § 8124(b)(1).

⁷ *Henry Moreno*, 39 ECAB 475 (1988).

The decision of the Office of Workers' Compensation Programs dated October 6, 1997 is affirmed and the decision dated January 20, 1998 is hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
December 8, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member