

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN STARACE and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Ronkonkoma, NY

*Docket No. 99-673; Submitted on the Record;
Issued May 26, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS,

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was insufficient to warrant reopening the case for merit review.

In the present case, the Office issued a schedule award decision dated October 17, 1996, for a 17 percent permanent impairment to the right arm. By decision dated July 10, 1997, an Office hearing representative affirmed the schedule award decision.

In a decision dated September 30, 1998, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

The Board has reviewed the record and finds that the Office abused its discretion in denying merit review.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.¹ Since appellant filed his appeal on November 17, 1998, the only decision over which the Board has jurisdiction on this appeal is the September 30, 1998 decision denying his request for reconsideration.

In this case, the Office based its schedule award decision on a September 9, 1996 report from Dr. Gerald S. Wertlieb, an orthopedic surgeon, and a report dated October 11, 1996 from an Office medical adviser. Dr. Wertlieb had opined that appellant had a 30 percent impairment to the right arm, without explaining how he had applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. The Office medical adviser had concluded that appellant had a 12 percent impairment for loss of motion, and a 6 percent impairment for weakness. Following the July 10, 1997 Office decision, Dr. Wertlieb submitted reports dated

¹ 20 C.F.R. § 501.3(d).

April 7, June 15 and June 23, 1998. In the June 15, 1998 report, Dr. Wertlieb stated that his 30 percent impairment estimate had been based on state guidelines. He stated that, based on the A.M.A., *Guides*, he agreed with the Office medical adviser as to loss of motion, but believed appellant had a 10 percent impairment for loss of strength. In the June 23, 1998 report, Dr. Wertlieb stated that he arrived at the strength deficit by testing the flexion strength of the right elbow.

The Office found that the reports of Dr. Wertlieb were immaterial as they only supported that the medical adviser correctly had applied the A.M.A., *Guides*. The issue, however, is not whether appellant submitted evidence showing that the medical adviser was incorrect, but whether appellant has submitted evidence that is new and relevant to the issue presented. Dr. Wertlieb's reports clearly represent new and relevant evidence as to the degree of permanent impairment. For the first time, Dr. Wertlieb explained the degree of impairment he associated with loss of strength, and he described how he attempted to apply the A.M.A., *Guides*. Under 10.138(b)(1)(iii), appellant is entitled to a merit review of his claim.

The decision of the Office of Workers' Compensation Programs dated September 30, 1998 is reversed.

Dated, Washington, D.C.
May 26, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member