

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOSS HENDERSON and U.S. POSTAL SERVICE,
POST OFFICE, Dallas, TX

*Docket No. 99-1168; Submitted on the Record;
Issued November 22, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

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

On July 26, 1988 appellant sustained injuries to his neck and back as a result of an employment-related motor vehicle accident. The Office accepted appellant's claim for lumbosacral and cervical strain. Appellant received appropriate wage-loss compensation.

In April 1993, appellant filed a claim for a schedule award and submitted an April 6, 1993 report from his treating physician, Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon, who found that appellant had a 27 percent whole person impairment due to loss of range of motion in his cervical and lumbar spine. The Office later referred appellant for further evaluation to determine whether he sustained any permanent impairment to his upper or lower extremities as a result of his July 26, 1988 employment injury. The medical evidence subsequently received by the Office did not demonstrate any such impairment.

By decision dated June 22, 1995, the Office denied appellant's request for a schedule award. The Office explained that the spine was specifically excluded from schedule award consideration under the Federal Employees' Compensation Act.¹ Additionally, the Office found that the medical evidence did not establish a permanent partial impairment of any extremities.

On November 6, 1998 appellant filed a second claim for a schedule award, which the Office treated as a request for reconsideration. In a decision dated November 25, 1998, the Office denied appellant's request without reaching the merits of his claim. Appellant filed an appeal with the Board on February 16, 1999. He subsequently filed a request for reconsideration

¹ See 5 U.S.C. § 8101(19).

with the Office on July 8, 1999. While the instant appeal was pending, the Office issued a decision dated July 12, 1999 denying appellant's July 8, 1999 request for reconsideration.²

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.³ As appellant filed his appeal with the Board on February 16, 1999, the Board lacks jurisdiction to review the Office's most recent merit decision dated June 25, 1995. Consequently, the only decision properly before the Board is the Office's November 25, 1998 decision denying 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.⁴ 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.⁵

Appellant's November 24, 1998 request for reconsideration did not demonstrate 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. Appellant merely noted that he wanted a schedule award for the "other areas this injury has affected."⁶ Accordingly, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.138(b)(1).

² The Board finds that the Office did not have the authority to issue its July 12, 1999 decision denying reconsideration. The Board and the Office may not simultaneously exercise jurisdiction over the same issue in a case. *Arlonia B. Taylor*, 44 ECAB 591 (1993). At the time the Office issued its July 12, 1999 decision, appellant had already filed an appeal with the Board regarding the Office's November 25, 1998 decision denying reconsideration. Inasmuch as the Board had obtained jurisdiction over the case on February 16, 1999, the Office lacked the authority to issue the July 12, 1999 decision denying reconsideration. Accordingly, the Office's decision dated July 12, 1999 is set aside as null and void. *Terry L. Smith*, 51 ECAB ____ (Docket No. 97-808, issued November 29, 1999).

³ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ Appellant apparently does not take issue with the longstanding legal proposition that the Act does not provide for the payment of a schedule award for permanent impairment of the back. 5 U.S.C. § 8101(19); e.g., *Francesco C. Veneziani*, 48 ECAB 572, 574 (1997). While the Act precludes the payment of a schedule award for an impairment of the back, a schedule award is payable for permanent impairment of the extremities that is due to an employment-related back condition. *Denise D. Cason*, 48 ECAB 530, 531 (1997).

With respect to the third requirement, submitting relevant and pertinent evidence not previously considered by the Office, the November 25, 1998 decision denying reconsideration correctly notes that appellant did not submit any new and relevant evidence along with his November 24, 1998 request for reconsideration.⁷ Consequently, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.138(b)(1).

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.138(b)(1), the Board finds that the Office did not abuse its discretion in denying appellant's November 24, 1998 request for reconsideration.⁸

The November 25, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 22, 2000

Michael J. Walsh
Chairman

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁷ Subsequent to Office's June 22, 1995 denial of a schedule award, appellant submitted numerous treatment records from Dr. Shade. While this evidence documents appellant's ongoing complaints of neck, back, arm and leg pain, Dr. Shade's treatment records do not specifically address the relevant issue on reconsideration of whether appellant has a permanent impairment of his lower or upper extremities as a result of his employment-related back condition. Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim. *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

⁸ The record on appeal includes evidence submitted to the Office subsequent to the issuance of its November 25, 1998 decision denying reconsideration. Inasmuch as the Board's review is limited to the evidence of record that was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).