

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHEILA R. SMITH and U.S. POSTAL SERVICE,
POST OFFICE, Baltimore, MD

*Docket No. 01-209; Submitted on the Record;
Issued August 2, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that she has any permanent impairment related to the temporary aggravation of her pulmonary condition; and (2) whether the Office of Workers' Compensation Programs abused its discretion pursuant to 5 U.S.C. § 8128 by denying merit review on October 12, 2000.

On August 23, 1993 appellant, then a 29-year-old medical unit clerk, filed a claim for occupational disease alleging that her sarcoidosis lung disease was caused by employment factors.¹

In a report dated September 9, 1993, Dr. Henry J. Silverman, appellant's treating Board-certified internist, stated that she had sarcoidosis, lung disease, which was aggravated by the lack of air conditioning in the workplace from July 9 to 23, 1993.

By decision dated December 10, 1993, the Office accepted appellant's claim for temporary aggravation of sarcoidosis from July 9 to 23, 1993.

On June 10, 1998 appellant filed a claim for a schedule award.

In a report dated July 2, 1998, Dr. Silverman stated that appellant had been under his care for sarcoidosis and that she had reached maximum medical improvement on July 16, 1996. He noted that appellant's "pulmonary function testing revealed a FVC [forced vital capacity] of 48 percent predicted," and that, according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), she has a 53 whole person impairment, "as the FVC is 47 percent of predicted."

By letter dated June 22, 1998, the Office advised appellant that the information she had submitted for her schedule award claim was insufficient. The Office noted that it had accepted

¹ The Office had accepted a prior claim for aggravation of a preexisting sarcoidosis condition.

her claim for a temporary aggravation of pulmonary sarcoidosis from July 9 to 23, 1999 and that her doctor should state whether her disability ended on July 23, 1999 and, if not, whether she has residuals from her work-related aggravation.

In an attending physician's supplemental report dated August 6, 1998, Dr. Silverman stated that appellant could work four hours daily in a dust free environment.

In a report dated September 2, 1998, Dr. Silverman stated that appellant was under his care for sarcoidosis and that she had greater than 50 percent impairment of her pulmonary reserve.

In a report dated June 11, 1999, Dr. Hassan M. Makhzoumi, a second opinion physician and Board-certified internist, stated that appellant had been diagnosed with pulmonary sarcoidosis in 1990 and since that time has been treated with steroid medications. He noted that she had significant dyspnea and cough on a daily basis exacerbated by hot weather. Dr. Makhzoumi stated that these conditions were secondary to the scarring of the lung tissue caused by sarcoidosis. He noted that appellant's condition was unrelated to her occupation and could not be construed "as secondary to work environmental conditions." Dr. Makhzoumi agreed with Dr. Silverman's assessment of a 53 percent impairment percent, which was supported by pulmonary functions test taken that day.

In a clarifying report dated July 20, 1999, Dr. Makhzoumi stated that, if appellant were to be exposed to a dusty environment, "this would no doubt cause her temporary breathing difficulties."

By decision dated August 5, 1999, the Office denied appellant's claim for a schedule award.

By letter dated December 3, 1999, appellant requested reconsideration and submitted a report from Dr. Melissa A. McDiarmid, Board-certified in internal medicine, who noted that she examined appellant on that day and reported findings. Dr. McDiarmid stated that based on appellant's occupational and family history, it was unlikely that asbestos or beryllium would have caused her condition and that "sarcoid is the most likely explanation" for her pulmonary sarcoidosis. She noted that environmental exposure to asbestos or chronic exposure to dusty environments could exacerbate appellant's underlying condition and account for additional decline in pulmonary function.

In a report dated March 29, 2000, the Office medical adviser noted that the source of appellant's aggravation had been removed and that, therefore, there was no permanent impairment.

In a July 6, 2000 decision, the Office denied modification of the Office's prior decision.

By letter dated July 13, 2000, appellant again requested reconsideration. In support of her petition, appellant submitted an April 27, 2000 report from Dr. Marcia McAvoy, Board-certified in radiology, who stated that x-rays taken on April 26, 2000 revealed sarcoidosis. Dr. McAvoy added that no definite adenopathy was identified. Appellant also submitted an

August 24, 2000 attending physician's report from Dr. Silverman who stated that appellant's sarcoidosis was aggravated by a "dusty and asbestos environment."

By nonmerit decision dated October 12, 2000, the Office denied appellant's application for review on the grounds that, because her petition raised neither substantive legal questions nor included new and relevant evidence, it was insufficient to warrant review of its prior decision.

The Board finds that the Office properly determined that appellant had no permanent impairment based on her accepted sarcoidosis condition.

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

Although Drs. Silverman and Makhzoumi agreed that appellant had a 53 percent whole person impairment, neither of the doctors supported appellant's claim that her pulmonary sarcoidosis was causally related to her employment. For example, although Dr. Silverman stated that appellant was temporarily disabled from July 9 to 23, 1993 as a result of her sarcoidosis and indeed stated that it was a chronic condition, at no time did he state that her condition was attributable to her employment. Indeed, after the Office advised appellant regarding the specific kind of medical evidence necessary to establish her claim, Dr. Silverman's subsequent September 2, 1998 medical report, stated only that appellant "is under my care for sarcoidosis," and did not relate her underlying condition to employment factors. It is appellant's burden to provide medical evidence establishing her entitlement to a schedule award and the medical evidence in this case does not support such entitlement. The Board finds that the Office properly determined that appellant was not entitled to a schedule award under the Act.

The Board also finds that the Office acted within its discretion by denying merit review on October 12, 2000.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁴ the Office's regulations provide that an application for reconsideration must set forth arguments that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁵ When a claimant

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b).

fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁶ To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.⁷

In this case, appellant submitted a report from Dr. McAvoy who stated that x-rays revealed sarcoidosis but that no adenopathy was present. Appellant also submitted an attending physician's report from Dr. Silverman who stated that appellant's sarcoidosis was aggravated by a dusty and asbestos environment. Appellant's request neither established that the Office erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered by the Office, nor constituted relevant and pertinent new evidence not previously considered by the Office. Consequently, the evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.606. For these reasons, the Office's refusal to reopen the case for a merit review did not constitute an abuse of discretion.

The October 12 and July 6, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
August 2, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁶ *Carol Cherry*, 47 ECAB 658 (1996).

⁷ 20 C.F.R. § 10.607.