

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHRYN B. McCABE and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

*Docket No. 01-05; Submitted on the Record;
Issued July 24, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

In October 1995 the Office accepted that appellant, then a 41-year-old mail carrier, sustained employment-related cervical radiculopathy and bilateral shoulder impingement and tendinitis. She received compensation for periods of disability; she began working in a limited-duty position for the employing establishment in May 1999. By award of compensation dated August 17, 1999, the Office granted appellant a schedule award for a one percent impairment of her left arm and a one percent impairment of her right arm. The Office based the award on the opinion of Dr. John Lavorgna, a Board-certified orthopedic surgeon who served as an Office referral physician, as reviewed by the Office district medical consultant. By decision dated August 24, 2000, the Office denied appellant's request for merit review.

The only decision before the Board on this appeal is the Office's August 24, 2000 decision denying appellant's request for a review on the merits of its August 17, 1999 decision. Because more than one year has elapsed between the issuance of the Office's August 17, 1999 decision and September 21, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the August 17, 1999 decision.¹

¹ See 20 C.F.R. § 501.3(d)(2).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.⁴ When a claimant 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.⁵

In support of her August 2000 reconsideration request, appellant submitted two August 17, 1999 reports in which Dr. Lawrence Quan, an attending physician Board-certified in occupational medicine, indicated that appellant continued to require work restrictions. However, these reports do not contain an opinion on the extent of the permanent impairment of appellant's upper extremities as determined in accordance with the relevant standards for evaluating permanent impairment.⁶ Therefore, they are not relevant to the main issue of the present case, *i.e.*, whether the medical evidence shows that appellant has more than a one percent permanent impairment in each arm. The Board has held that the submission of evidence, which does not address the particular issue involved does not constitute a basis for reopening a case.⁷

Appellant argued that the fact that she had work restrictions showed that she has more than a one percent permanent impairment in each arm. However, as noted above, the main issue of the present case is medical in nature and should be resolved by the submission of relevant medical evidence. Therefore, her argument is not relevant to the main issue of the present case.⁸

In the present case, appellant has not established that the Office abused its discretion in its August 24, 2000 decision by denying her request for a review on the merits of its August 17,

² 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.607(a).

⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁶ The schedule award provision of the Act and its implementing regulation 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. 5 U.S.C. § 8107; 20 C.F.R. § 10.404. 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses; *see* 20 C.F.R. § 10.404; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁷ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁸ Appellant also submitted administrative documents regarding her limited-duty position, but these documents also would not be relevant to the main issue of the present case.

1999 decision under section 8128(a) of the Act, because she did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

The August 24, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 24, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member