

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA J. BURDEN and U.S. POSTAL SERVICE,
POST OFFICE, Hixson, TN

*Docket No. 03-1221; Submitted on the Record;
Issued August 27, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On October 16, 1998 a traumatic injury claim (Form CA-1) was filed on behalf of appellant, then a 55-year-old rural carrier, alleging that on October 15, 1998 she was in an automobile accident and sustained internal injuries and numerous broken bones. Appellant's claim was accepted for multiple fractures (jaw, left shoulder, elbows, wrist, ribs, collapsed lung, right leg fracture, left ankle fracture, intestines and closed head injury).

On November 11, 1999 appellant filed a claim for a schedule award. The Office considered medical reports dated September 2, September 23 and November 22, 1999 by Dr. Lynn A. Crosby, appellant's treating Board-certified orthopedic surgeon, who opined that appellant's left upper extremity was 100 percent impaired and her right upper extremity was 4 percent impaired. The Office also considered a February 18, 2000 report from Dr. John A. Gracy, a Board-certified orthopedic surgeon, who conducted a fitness-for-duty evaluation and noted that he agreed with Dr. Crosby's evaluation of 64 percent impairment. On July 17, 2000 the Office medical adviser reviewed appellant's impairment with regard to her upper extremities only and found that appellant had a three percent impairment to right upper extremity. With regard to the left upper extremity, the Office medical adviser found that appellant had an 89 percent impairment.¹

By decision dated October 11, 2000, the Office issued a schedule award for 50 percent of the upper extremities and 52 percent of the left hand. On November 15, 2000 appellant requested an oral hearing, which was held on October 17, 2001. By decision dated March 19,

¹ The Office medical adviser noted impairments as follows: shoulder 50 percent; elbow 54 percent; wrist 12 percent; thumb 3 percent; 2nd finger 12 percent; 3d finger 12 percent; 4th finger 12 percent; and 5th finger 12 percent. Using the Combined Values Charts, he concluded that appellant sustained an impairment to her left upper extremity of 89 percent.

2001, the hearing representative instructed the Office to issue an amended award of compensation for a 3 percent impairment of the right upper extremity and an 89 percent permanent impairment of the left upper extremity. By decision dated April 16, 2001, the Office issued a schedule award conforming to the hearing representative's instructions. This decision was affirmed by another Office hearing representative on December 20, 2001.

On December 19, 2002 appellant requested reconsideration of the December 20, 2001 decision. Appellant, through her attorney, argued that she was entitled to an award for total disability plus additional compensation for serious disfigurement of the face and head and loss of use of important internal organs of the body. Appellant submitted additional medical notes by Dr. W.H. King. In a February 20, 2002 note, Dr. King indicated:

“[Appellant] returns to the office today for follow-up of her right shoulder pain. At this time she has a 75 percent impairment to the body as a whole according to page 131 of the [American Medical Association] A.M.A., *Guides*, 5th edition and are permanent. According to Table 11-7, there is an ENT, impairment of 30 percent to the whole body. She has a 90 percent impairment, secondary to her brain damage. This is according also to a Class 4 Table 13-2 page 209. These tables are over 100 percent. She has further impairment to her shoulder according to this and is permanent.”

In an October 22, 2002 note, Dr. King opined:

“At this time the imbalance is related to the head injury and stroke. These injuries need to be compensated. The shoulder and arm are related as an upper extremity. The 75 percent is to the upper extremity. I agree with Dr. Crosby who said this lady has a 100 percent impairment to the right arm. It is also noted that this lady cannot sufficiently function with her arms and is unable to attend to her activities of daily living to include bathroom hygiene.”

By decision dated January 13, 2003, the Office denied appellant's request without reviewing the case on the merits.²

The only Office decision before the Board on appeal is dated January 13, 2003, denying appellant's request for reconsideration. Because more than one year has elapsed between the last merit decision dated December 20, 2001 and the filing of this appeal on April 10, 2003, the Board lacks jurisdiction to review the merits of appellant's claim.³

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

² On the same date, the Office sent letters seeking to further develop appellant's case with regard to her request for services of an attendant, her claim for compensation for disfigurement and her claim for compensation for alleged consequential injuries of balance disorder and broken right shoulder. As of the date appellant filed this appeal, April 10, 2003, no decision had been issued on these matters.

³ 20 C.F.R. §§ 501.2(c); 501.3(d)(2). *See John Reese*, 49 ECAB 397, 399 (1998).

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence 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.⁴ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).⁵

In the instant case, medical evidence submitted in support of appellant's request for reconsideration was a copy of medical notes dated February 20 and October 22, 2002 by Dr. King. Dr. King addressed appellant's impairment to the body as a whole, discussed an increase in disability to appellant's right arm, and appear to refer to a possible consequential right shoulder injury. Dr. King indicated that he agreed with Dr. Crosby's assessment that appellant had a 100 percent impairment to her right arm; however, the only reports by Dr. Crosby in the record refer to a 100 percent impairment to her left arm and only a 4 percent impairment to her right upper extremity. Accordingly, the medical evidence submitted on reconsideration is not relevant to the schedule award made in this case.

Appellant's attorney contended that appellant had other injuries regarding disfigurement of the face and loss of important internal organs. With regard to disfigurement, there is no final decision issued by the Office on these matters for this Board to review. Accordingly, appellant has not advanced a relevant legal argument with regard to the schedule award for appellant's upper extremities not previously considered by the Office.

⁴ 20 C.F.R. § 10.606(b)(2) (i-iii).

⁵ 20 C.F.R. § 10.608(a); *see also Sharyn D. Bannick*, 54 ECAB ____ (issued April 18, 2003).

The decision of the Office of Workers' Compensation Programs dated January 13, 2003 is hereby affirmed.

Dated, Washington, DC
August 27, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member