

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARVIN H. McINTYRE and U.S. POSTAL SERVICE,
POST OFFICE, East Saint Louis, IL

*Docket No. 03-200; Submitted on the Record;
Issued March 27, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On January 14, 1994 appellant, then a 51-year-old letter carrier, filed an occupational disease claim, alleging that factors of employment caused a left wrist and forearm injury.¹ By letter dated August 3, 1994, the Office accepted that appellant sustained an employment-related chronic scapholunate dissociation of the left wrist and authorized surgery, which appellant underwent on September 20, 1994. He retired on July 29, 1996.

On July 14, 1997 appellant filed a schedule award claim. Dr. Bruce T. Vest, appellant's treating Board-certified orthopedic surgeon, provided a report dated August 6, 1997 and in reports dated August 26 and September 15, 1997, an Office medical adviser reviewed Dr. Vest's findings and advised that appellant was entitled to a schedule award for a 44 percent impairment of the left upper extremity. On November 8, 1997 appellant began receiving payment of the schedule award, which was to run for 137.28 weeks, from August 6, 1997 to March 23, 2000. A formal schedule award decision was not issued, however, until January 25, 2001, when the oversight was corrected by the Office. In that decision, appellant was granted a schedule award

¹ The procedural history further reveals that on June 24, 1994 appellant filed an occupational disease claim, alleging that his right wrist condition was employment related. By decision dated July 27, 1995, the Office denied his claim regarding his right wrist, based on an impartial medical evaluation. On that same date, the Office proposed to terminate appellant's compensation benefits regarding his left wrist. Following a timely request regarding both wrists, a hearing was held on March 12, 1996. In a decision dated July 24 and finalized July 25, 1996, an Office hearing representative affirmed the finding that appellant's right wrist condition was not employment related and that the Office properly terminated appellant's wage-loss compensation regarding his left wrist, but remanded the case to the Office regarding any continuing disability regarding his left wrist. In a December 10, 1996 decision, the Office vacated the August 28, 1995 termination decision. The record does not indicate that appellant requested reconsideration regarding his right wrist condition.

for a 44 percent impairment of the left arm, for a total of 137.28 weeks of compensation, to run from August 6, 1997 to March 23, 2000.

By letters dated May 10 and October 11, 2001, appellant, through counsel, requested a hearing and submitted a report dated February 22, 2000 from Dr. Vest. In a letter dated July 18, 2002, appellant's attorney requested either a hearing or reconsideration. By decision dated August 5, 2002, the Office denied appellant's reconsideration request. The instant appeal follows.

The Board finds that the Office abused its discretion in failing to reopen appellant's case for merit review.

The only decision before the Board in this appeal is the decision of the Office dated August 5, 2002 denying appellant's application for review. Since more than one year had elapsed between the schedule award decision dated January 25, 2001 and the filing of appellant's appeal with the Board on October 21, 2002 the Board lacks jurisdiction to review the merits of his claim.²

Section 10.608(a) of the code of federal regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).³ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.⁴ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁵

In support of his request for reconsideration, appellant submitted a report dated February 22, 2000, in which his treating Board-certified orthopedic surgeon, Dr. Vest, provided findings on examination of the upper extremities and diagnosed chronic scapholunate dissociation of both wrists with Stage II Kienbock's disease on the left and Stage III on the right as well as bilateral degenerative arthritis of the radiocarpal joint. The physician opined that appellant's previous work at the employing establishment was responsible for the conditions present in both wrists, which caused permanent disability that precluded work at any occupation.

² 20 C.F.R. § 501.3(d)(2).

³ 20 C.F.R. § 10.608(a) (1999).

⁴ 20 C.F.R. § 10.608(b)(1) and (2) (1999).

⁵ 20 C.F.R. § 10.608(b) (1999).

He further provided range-of-motion measurements of both wrists which, when compared with his August 6, 1997 report, demonstrated a deterioration in the condition of appellant's left wrist.⁶

The Board finds that, as Dr. Vest provided an opinion that appellant's left upper extremity condition had worsened, his February 22, 2000 report, is relevant to the issue of whether appellant is entitled to an increased schedule award. Appellant, therefore, submitted relevant and pertinent evidence not previously considered by the Office and he thus established that the Office abused its discretion in its August 5, 2002 decision by denying his request for review on the merits.⁷ The Board further notes that a claimant may seek an increased schedule award if the evidence establishes that progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated.⁸ For the foregoing reasons, the case is, therefore, remanded to the Office for review of the merits of appellant's claim regarding his entitlement to an increased schedule award for the left upper extremity and any other proceedings deemed necessary, to be followed by an appropriate *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated August 5, 2002 is hereby vacated and the case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, DC
March 27, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ For example, in the August 6, 1997 report, left wrist flexion was at 50 degrees, whereas it had decreased to 20 degrees in the February 22, 2000 report. Likewise, radial deviation had decreased from 30 degrees to 20 degrees.

⁷ See *Willie H. Walker, Jr.*, 45 ECAB 126 (1993).

⁸ *Linda T. Brown*, 51 ECAB 115 (1999).