

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES GILLESPIE and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

*Docket No. 03-1337; Submitted on the Record;
Issued September 5, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant is entitled to a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On February 1, 2002 appellant, then a 62-year-old clerk, filed a notice of traumatic injury alleging that on January 18, 2002 he was keying with his right hand and moving packages with his left hand when he felt a pulling sensation in his neck. The Office accepted the claim for cervical radiculopathy, cervical sprain syndrome, left shoulder sprain/strain and temporary aggravation of cervical disc disease. Appellant received appropriate compensation for wage loss and returned to limited duty effective February 15, 2002. On May 4, 2002 appellant filed a Form CA-7 claim for a schedule award.¹

In a letter dated June 17, 2002, the Office explained to appellant that schedule awards could not be paid for impairment to the back, but that such awards could be paid for impairment of the upper extremities. On May 28, 2002 the Office requested that appellant's treating physician, Dr. Dirk Nelson, a Board-certified orthopedic surgeon, provide a comprehensive report addressing whether under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had any permanent impairment of the upper extremities causally related to his accepted work injury. The Office also asked Dr. Nelson to complete an Office Form CA-1303 to rate appellant's upper extremity impairment.

In a July 8, 2002 report, Dr. Nelson advised that appellant was first treated on February 8, 2002 for neck, lower back and left shoulder pain resulting from work duties performed on

¹ Appellant sustained a recurrence of disability and received compensation for wage loss from July 2 to August 29, 2002. Appellant returned to a modified job on September 9, 2002 but stopped work again on September 16, 2002.

January 18, 2002. He stated that following a period of physical therapy appellant reported to him on March 15, 2002 that his pain symptoms had improved. He noted that, when appellant returned on June 25, 2002, appellant continued to complain of occasional neck pain that radiated to the arms with activities. The physician stated, however, that the physical examination showed full active range of motion of the left shoulder and no weakness in any of the muscle groups of the left upper extremity. Dr. Nelson completed the Form CA-1303, reporting that appellant's cervical radiculopathy with pain radiating to the shoulder had resolved completely as of March 15, 2002. With respect to the upper extremities, he stated that appellant had normal range of motion, no loss of function, ankylosis, muscle weakness or atrophy. The date of maximum medical improvement was listed as March 15, 2002.

On August 7, 2002 the Office forwarded a copy of the medical record and Dr. Nelson's report to an Office medical adviser for review and calculation of any ratable impairment under the A.M.A., *Guides*. In a report dated August 12, 2002, an Office medical adviser opined that appellant's condition resolved as of March 15, 2002 and that "no residuals existed." He stated that there was no objective evidence to support any permanent partial impairment for either upper extremity.

On July 23, 2002 the Office requested additional information from Dr. Nelson and he responded by report dated August 1, 2002. Dr. Nelson opined that appellant suffered from cervical sprain syndrome with mild radiculitis as a result of his work injury and stated that it caused a temporary aggravation of preexisting cervical disc disease. He reiterated that, as of March 15, 2002, appellant's arm and neck pain were gone.

In a decision dated October 28, 2002, the Office denied appellant's claim for a schedule award on the grounds that the medical evidence failed to support that he had any permanent impairment of the upper extremities.² Subsequent to the Office decision, additional evidence was received by the Office including copies of physical therapy notes dated August 5 through September 9, 2002, a duplicate copy of Dr. Nelson's July 8, 2002 report and a September 17, 2002 report signed by Dr. Tapas Das Gupta, a Board-certified general surgeon. By letter dated December 17, 2002, appellant requested reconsideration.³ In a February 19, 2003 decision, the Office denied appellant's request for reconsideration on the grounds that it was insufficient to warrant a merit review of the record.⁴

The Board finds that the Office properly denied appellant's claim for a schedule award.

² On October 25, 2002 the Office informed appellant that his claim for a recurrence of disability beginning July 2, 2002 had been accepted.

³ Appellant also filed a claim for a recurrence of disability and submitted additional evidence consisting of copies of physical therapy notes dated January 3 through 17, 2003, a disability slip dated December 6, 2002 and a report dated December 3, 2002 from Dr. Das Gupta. He reported that appellant sustained left shoulder, cervical and lumbar strains as a result of his work injury of January 18, 2002. He indicated that appellant was totally disabled for work from October 14 to November 11, 2002, at which time appellant was found to be able to perform light duty with restrictions.

⁴ Appellant did not submit any evidence with his reconsideration request.

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁵ The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁶ Effective February 1, 2001, schedule awards are determined in accordance with the fifth edition of the A.M.A., *Guides*.⁷

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations. In this case, the Office correctly informed appellant that the back is not a payable member identified by the Act or the regulations.⁸ Notwithstanding, since the schedule award provisions of the Act include the extremities, appellant could be entitled to a schedule award for permanent impairment to the upper extremities that is due to his work-related back injury.⁹

Appellant's treating physician, Dr. Nelson, specifically opined that appellant had no permanent impairment of the upper extremities. The Office medical adviser carefully reviewed the physical findings obtained by Dr. Nelson and agreed in his August 12, 2002 report that appellant's work-related back and shoulder condition resolved as of March 15, 2002. The Office medical adviser concluded that appellant had no residuals due to the work injury and stated that there was no objective evidence to support any permanent partial impairment of the upper extremities. The Office medical adviser's report, as supported by the opinion of Dr. Nelson, is reasoned and based on the fifth edition A.M.A., *Guides*. Because there is no contradictory evidence of record from which to conclude that appellant has impairment of the upper extremities due to his work injury, the Board finds that appellant did not meet his burden of proof to establish entitlement to a schedule award.

The Board also finds that the Office properly denied appellant's request for reconsideration.¹⁰

Section 10.608(a) of Title 20 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

⁵ The Act provides that for a total, or 100 percent loss of use of an arm, an employee shall receive 312 weeks of compensation. 5 U.S.C. § 8107(c)(1).

⁶ 20 C.F.R. § 10.404 (1999).

⁷ The Act (FECA) Bulletin No. 01-05 (January 29, 2001).

⁸ The Act specifically excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award. *Francesco C. Veneziani*, 48 ECAB 572 (1997).

⁹ See generally *George E. Williams*, 44 ECAB 530 (1993).

¹⁰ Appellant filed a claim for a recurrence of disability beginning January 15, 2003, which was denied by the Office on May 16, 2003. 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, see 20 C.F.R. §§ 501.2(c), 501.3(d)(2). Since the Office May 16, 2003 decision was issued subsequent to appellant's appeal with the Board filed on May 5, 2003, the Board does not have jurisdiction to review that decision.

10.606(b)(2).¹¹ Section 10.606(b)(2) provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹² When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹³ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.¹⁴ When a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.¹⁵

Appellant's December 17, 2002 reconsideration request neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, the Board notes that the report of Dr. Nelson was previously of record and does not constitute "relevant and pertinent new evidence."¹⁶ Furthermore, although appellant submitted reports from Dr. Das Gupta indicating that appellant was precluded from working more than light duty with restrictions, the physician does not address whether appellant had any permanent impairment of the upper extremities that would entitle him to a schedule award under the A.M.A., *Guides*. Evidence that does not address the particular issue involved does not constitute a basis for reopening a case for merit review.¹⁷ Although Dr. Das Gupta's reports were not previously of record, the Board considers this evidence to be immaterial to the issue of whether appellant is entitled to a schedule award for permanent impairment of the upper extremities. Additionally, the physical therapy notes provided by

¹¹ 20 C.F.R. § 10.608(a) (1999).

¹² 20 C.F.R. § 10.606(b)(2) (1999).

¹³ *Joan F. Martin*, 51 ECAB 131 (1999).

¹⁴ *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹⁵ *James E. Norris*, 52 ECAB 93 (2000).

¹⁶ Evidence that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening the claim. *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

¹⁷ *Robert P. Mitchell*, *supra* note 14.

appellant do not constitute medical evidence¹⁸ and, therefore, the notes are not relevant to the schedule award issue.

Because appellant has failed to satisfy the requirements of section 10.606(b)(2), he is not entitled to a merit review. Accordingly, the Board finds that the Office properly denied appellant's request for reconsideration.¹⁹

The decisions of the Office of Workers' Compensation Programs dated February 19, 2003 and October 28, 2002 are hereby affirmed.

Dated, Washington, DC
September 5, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁸ A physical therapist is not a physician as defined under Act and is not competent to render a medical opinion; *see Thomas R. Horsfall*, 48 ECAB 180 (1996).

¹⁹ The Board notes that appellant submitted medical evidence subsequent to February 19, 2003, the date of the most recent Office decision and with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record, which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Appellant retains the right to submit this evidence to the Office, along with a valid request for reconsideration.