

**United States Department of Labor
Employees' Compensation Appeals Board**

JANIE O. BINGHAM, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer**

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**Docket No. 04-680
Issued: July 1, 2004**

Appearances:
Janie O. Bingham, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On January 14, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated September 2, 2003, denying reconsideration of appellant's claim for a schedule award. Because more than one year has elapsed between the last merit decision dated December 16, 2002 and the filing of this appeal on January 14, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On May 25, 1999 appellant, a 43-year-old city letter carrier, filed an occupational disease claim alleging that her back problems were employment related. The Office accepted the claim for cervical herniation and subsequently authorized a cervical fusion, which was performed on

May 15, 2000. On January 5, 2000 the Office accepted that appellant was totally disabled and subsequently placed her on the periodic rolls on August 13, 2001. Appellant accepted the employing establishment's limited-duty job offer for the position of modified clerk on August 22, 2002. Appellant returned to work for four hours per day on August 26, 2002.

In an October 1, 2002 work capacity evaluation (Form OWCP-6c), Dr. Walter R. Sassard, an attending Board-certified orthopedic surgeon, reported that appellant had not reached maximum medical improvement and released her to work for six hours per day with restrictions to gradually work up to eight hours.

On November 3, 2002 appellant filed a claim for a schedule award.

In a decision dated December 16, 2002, the Office denied appellant's claim for a scheduled award on the basis that there was no medical evidence establishing a permanent impairment of a scheduled member under the Federal Employees' Compensation Act.

Appellant filed another claim for a schedule award on June 9, 2003. In a March 28, 2003 letter, the Office advised appellant that it was unable to process her schedule award claim since it had denied her claim in the December 16, 2002 decision. It advised her to exercise the appeal rights provided with the December 16, 2002 decision.

In a report dated March 25, 2003, Dr. Sassard diagnosed brachial neuritis and post-laminectomy syndrome of the cervical region. A physical examination revealed "about two-thirds of normal rotation" and flexion and extension of 50 percent in the cervical spine, "diffuse numbness in the left hand with normal sensation on the right," and "about 1+ biceps reflexes bilaterally."

Dr. Sassard, in a May 13, 2003 report, detailed physical findings of abnormal sensation in the left hand including "some weakness of grip and overall strength," rotation on motion of "about 30 degrees," and "some mild-to-moderate spasm in the upper trapezii bilaterally."

On June 9, 2003 appellant again filed a claim for a schedule award. In a June 23, 2003 letter, the Office advised appellant that it was unable to process her schedule award claim since it had previously denied her claim. It advised her to exercise the appeal rights provided with the December 16, 2002 decision.

In a July 3, 2003 report, Dr. Sassard reported physical findings of "some tenderness at the deltoid insertion on the right side as well as some crepitus and pain on range of motion." The physician noted that appellant complained of tingling and numbness in her face as well as trouble with her right shoulder and arm.

In a letter dated July 23, 2003, appellant requested reconsideration of the denial of her claim for a schedule award and submitted a copy of a page from the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) which addressed impairment ratings for the cervical spine and contained a notation of 15 percent.¹

¹ This appears to be a copy of page 392 from the A.M.A., *Guides*.

Dr. Sassard, in an August 19, 2003 report, noted that appellant had “a likelihood of considerable amount of rotator cuff pathology with either tendinitis or possible rotator cuff tear.” A physical examination revealed “some crepitus on motion,” that she had “less pain on range of motion” and the neurologic status of the right upper extremity appeared satisfactory.

In a decision dated September 2, 2003, the Office denied appellant’s request for reconsideration. The Office found that appellant failed to show that the Office erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by the Office and did not submit any relevant and pertinent new evidence with her request.²

LEGAL PRECEDENT

Section 8128(a) of the Act³ vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.⁵

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).⁶ The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (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.⁷

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 of the merits.⁸

² The Board notes that appellant submitted new medical evidence subsequent to Office’s September 2, 2003 nonmerit decision. However, the Board cannot consider that evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

³ 5 U.S.C. § 8128(a) (“the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

⁴ *Raj B. Thackurdeen*, 54 ECAB ____ (Docket No. 02-2392, issued February 13, 2003); *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁵ 20 C.F.R. § 10.608(a).

⁶ 20 C.F.R. § 10.606(b)(1)-(2); *see Sharyn D. Bannick*, 54 ECAB ____ (Docket No. 03-567, issued April 18, 2003).

⁷ 20 C.F.R. § 10.608(b).

⁸ *Id.*

ANALYSIS

The issue in the instant case is whether appellant is entitled to a merit review of the denial of her claim for a schedule award. In order to obtain merit review, appellant must submit a timely application for reconsideration in writing and submit pertinent and relevant new evidence, advance a relevant legal argument not previously considered by the Office or show that the Office erroneously applied or interpreted a specific point of law. Appellant's July 23, 2003 reconsideration request neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Appellant requested the Office to reconsider its denial of her schedule award claim due to the impairment and pain she has had from her employment injury. Appellant does not point out any error by the Office in its application of the law, but merely requested that the Office reconsider its denial due to the pain she suffers from her injury. 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 her claim based on the first and second above-noted requirements under section 10.608(b)(2).

The only evidence appellant submitted was a page apparently copied from the A.M.A., *Guides* noting an impairment rating of 15 percent for cervical spine disorders and containing no physician's signature. The record also contains medical reports submitted subsequent to the December 16, 2002 decision from Dr. Sassard who noted impairments to appellant's hand or arm, but provides no opinion relating these conditions of the upper extremity to the accepted cervical herniation, indicating that she had rotator cuff pathology. As Dr. Sassard did not provide any opinion relating appellant's complaints to the accepted cervical injury, the physician's opinion is not relevant to the underlying issue in this case. Neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or cervical spine.⁹ With regard to the A.M.A., *Guides'* text submitted by appellant, the Board has held that newspaper clippings, medical texts and excerpts of publications are of no evidentiary value in establishing a claim as they are of general application and are not probative as to whether specific conditions were the result of particular circumstances of the employment.¹⁰ The Board finds that the evidence submitted by appellant falls in the same class as newspaper clippings, medical texts and excerpts of publications. This evidence is not relevant or pertinent new evidence in support of her reconsideration request. Appellant has failed to submit any relevant and pertinent new evidence not previously considered by the Office. The Board finds that the Office properly determined that appellant had failed to meet the requirements of 20 C.F.R. § 10.608(b)(2).

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration of the merits of her claim for a schedule award pursuant to 5 U.S.C. § 8128(a).

⁹ *Tomas Martinez*, 54 ECAB ____ (Docket No. 03-396, issued June 16, 2003).

¹⁰ *Willie M. Miller*, 53 ECAB ____ (Docket No. 02-328, issued July 25, 2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 2, 2003 is affirmed.

Issued: July 1, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member