

numerous surgeries and received numerous schedule awards for a 46 percent permanent impairment of the right arm.

On July 2, 2001 appellant requested additional compensation for permanent impairment. The Office reviewed the merits of his claim and formally denied an increased schedule award on four occasions. In the most recent merit decision, dated May 29, 2003, the Office found that the evidence did not support appellant's contention that he had greater than a 46 percent permanent impairment of his right arm.

On May 13, 2004 appellant, through is attorney, requested reconsideration. He argued that the Office failed to consider his shoulder injury, as the previous ratings involved only the right wrist, a ruptured tendon in the right thumb and right carpal tunnel syndrome. Appellant argued that the statement of accepted facts was apparently incomplete: there was no question that he had a shoulder injury in addition to the other injuries noted. He added that the Office never considered the injury to his face, which resulted in scar tissue.

In a decision dated June 30, 2004, the Office denied appellant's May 13, 2004 request for reconsideration. The Office found that he failed to submit relevant medical evidence: "You have not provided any additional medical evidence to modify the decision of our Office dated May 29, 2003. You still have not presented medical evidence of a permanent impairment greater than 46 percent of your right upper extremity, as defined under the Federal Employees' Compensation Act utilizing the [American Medical Association, *Guides to the Evaluation of Permanent Impairment*]."

LEGAL PRECEDENT

The Act provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.² The employee shall exercise this right through a request to the District Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."³

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and 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 or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.605 (1999).

⁴ *Id.* at § 10.606.

request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁵

ANALYSIS

Appellant filed his May 13, 2004 request for reconsideration within one year of the Office's most recent merit decision, which was issued on May 29, 2003. The request is therefore timely and the criteria described above apply.

In this request appellant, through his attorney, advanced a legal argument. He argued that the Office, in denying an increased schedule award, improperly failed to consider the permanent impairment to his right shoulder and improperly failed to consider the injury to his face, which left a scar.

In its June 30, 2004 decision denying reconsideration, the Office never addressed this argument. Instead, the Office denied a merit review of appellant's claim on the grounds that he failed to submit relevant or additional medical evidence of a permanent impairment greater than 46 percent. While it is true that appellant's request contained no relevant and pertinent new evidence not previously considered by the Office, this is only one of three criteria by which a claimant may obtain a merit review of his case. By not considering whether appellant was entitled to a merit review under the other criteria, the Office did not properly determine whether he presented evidence or argument that meets at least one of the standards described.⁶

The Board will set aside the Office's June 30, 2004 decision and remand the case for a proper application of the regulation and for an appropriate final decision on whether appellant is entitled to a merit review of his claim based on his May 13, 2004 request for reconsideration. Should the Office deny this request, it must make a specific finding on each of the criteria described.

CONCLUSION

The Office improperly denied appellant's March 14, 2003 request for reconsideration on the narrow grounds that he failed to submit new and relevant medical evidence. The Office may not deny reconsideration without considering whether appellant is entitled to a merit review of his claim under the other criteria set forth in its regulations.

⁵ *Id.* at § 10.608.

⁶ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 30, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: March 11, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member