United States Department of Labor
Employees' Compensation Appeals Board

H.D., Appellant	)	
	)	**Docket No. 07-1324**
and	)	**Issued: November 7, 2007**
	)	
U.S. POSTAL SERVICE, Belton, SC, Employer	)	
	)	

Appearances:
Lester L. Bates, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 17, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 24, 2007 nonmerit decision denying her request for reconsideration of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's January 9, 2006 decision. Because more than one year has elapsed between the last merit decision and the filing of this appeal on April 10, 2007, the Board lacks jurisdiction to review the merits of this claim.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits on the grounds that appellant did not provide any additional evidence or legal argument to establish that she has more than 12 percent permanent impairment of the left arm.

FACTUAL HISTORY

On June 16, 1993 appellant, then a 44-year-old rural carrier, sustained a traumatic injury while moving a basket of mail. Her claim was accepted for temporary aggravation of thoracic outlet syndrome. On August 27, 1993 appellant underwent an anterior cervical discectomy and fusion at C5-6. Her claim was also accepted for herniated disc, C5-6.

On May 30, 1994 appellant filed an occupational disease claim alleging that she sustained aggravation of thoracic outlet syndrome as a result of her employment. Her May 30, 1994 aggravation claim was accepted.[1] The Office also accepted a neck strain and temporary aggravation of migraine headaches as employment-related conditions.

On June 19, 2003 appellant filed for a schedule award. In an August 2, 2002 report, Dr. Stephen Gardner, her treating physician, opined that she had a 40 percent impairment to the left upper extremity.

In a June 8, 2004 letter, the Office instructed appellant to contact her treating physician to determine the extent of permanent impairment to her neck. On June 23, 2004 Dr. Gardner responded stating that appellant reached maximum medical improvement on August 2, 2002 and "see attached" in response to the other questions with the previously submitted August 2, 2002 letter attached.

On September 21, 2004 appellant was seen by a second opinion physician, Dr. James F. Bethea, Board-certified in orthopedic surgery, who stated that she had reached maximum medical improvement on the same date. Dr. Bethea examined appellant to determine the degree of permanent impairment of the upper extremities. He referenced the tables from the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) used to rate appellant's impairment. Dr. Bethea opined that appellant had a 10 percent impairment of the left upper extremity due to sensory deficit, pain or discomfort and 3 percent due to decreased strength. On September 21, 2004 the district medical adviser found appellant to have a combined permanent impairment of 12 percent of the left upper extremity.

In an October 25, 2004 decision, the Office granted a schedule award to appellant for 12 percent permanent impairment of the left arm.

On October 10, 2005 appellant requested reconsideration and submitted new medical evidence. In a progress note dated July 20, 2005, Dr. Stefan J. Tolan, a Board-certified orthopedic surgeon, reported that appellant underwent surgery for a left shoulder arthroscopic acromioplasty and partial caviculectomy.

In a January 9, 2006 decision, the Office denied modification of the October 25, 2004 schedule award on the grounds that the medical evidence did not establish a greater percentage of impairment.

[1] The Office combined the two claims into the one record before the Board.

On January 9, 2006 counsel for appellant contended that she had a 40 percent impairment to the left upper extremity. On January 4, 2007 appellant requested reconsideration arguing that she should have been sent to a third doctor as her primary doctor found a greater impairment rating than the second opinion doctor.

On January 24, 2007 the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitious and insufficient to warrant further merit review.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] The Act does not mandate that the Office review a final decision simply upon request by a claimant.[4]

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.[5]

ANALYSIS

The Office is required to reopen a case for merit review if an application for reconsideration demonstrates that the Office erroneously applied a specific point of law, puts forth relevant and pertinent new evidence or presents a new relevant legal argument. Appellant did not argue that the Office erroneously applied a point of law. She did not submit any relevant and pertinent new evidence. The evidence submitted consists solely of the January 9, 2006 letter from appellant's attorney who contended that her physician's impairment rating should be given more weight. The letter does not constitute relevant and pertinent new evidence as it addresses evidence already reviewed and considered by the Office. Appellant also contended that she should have been sent to a third physician as her primary physician, Dr. Gardner, provided an impairment rating greater than the 12 percent awarded to appellant. The Board notes however that Dr. Gardner did not respond to the Office's request for specific impairment percentages nor did he provide appellant's range of motion or reference the tables of the A.M.A., *Guides* he used as a basis for his impairment ratings. Dr. Gardner did not properly assess appellant's impairment using the A.M.A., *Guides*. Therefore, the Office's use of the second opinion physician's opinion was proper. Appellant's argument that she should have been sent to a third doctor is not a valid new legal argument.

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[2] 5 U.S.C. § 8128(a).

[3] *Darletha Coleman*, 55 ECAB 143 (2003).

[4] *Donna M. Campbell*, 55 ECAB 241 (2004).

[5] 20 C.F.R. § 10.606(b)(2)(iii) (2004).

As appellant is not entitled to a review of the merits of her claim, the Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 7, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board