

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

C.A., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Pittsburgh, PA, Employer)

**Docket No. 09-1979
Issued: April 9, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 30, 2009 appellant filed a timely appeal from an August 29, 2008 nonmerit decision denying reconsideration of an August 27, 2007 merit decision that granted her a schedule award. As over a year has passed since the date of the last merit decision in this case, dated August 27, 2007, and the filing of this appeal, dated July 30, 2009, the Board lacks jurisdiction over the merits of this case.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerits of this case.

ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128.

¹ See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On November 17, 2004 appellant, a 53-year-old letter carrier, filed an occupational disease claim (Form CA-2) which the Office accepted for a right rotator cuff tear.²

Appellant underwent medical treatment and submitted evidence supporting her claim.

On August 8, 2005, May 1 and July 16, 2007 appellant filed schedule award claims.

By decision dated June 26, 2007, the Office denied appellant's schedule award claim, finding the evidence of record did not demonstrate she sustained a permanent impairment to a scheduled member causally related to her accepted injury.

Appellant submitted additional evidence supporting her claim, including a July 3, 2007 report in which Dr. Eric S. Stem, a Board-certified orthopedic surgeon, assigned appellant's right upper extremity a six percent impairment rating and an August 22, 2007 note in which the district medical adviser concurred with Dr. Stem's impairment rating.

By decision dated August 27, 2007, the Office granted appellant a schedule award for six percent impairment of her upper right extremity.

On August 12, 2008 appellant requested reconsideration and submitted a July 11, 2008 report in which Dr. Stem opined that appellant had reached maximum medical improvement that day and sustained a 15 percent permanent impairment calculated as follows:

“[Appellant] receives a one percent impairment for loss of forward flexion. One percent impairment for loss of abduction. One percent impairment for loss of external rotation. Seven percent impairment for loss of strength. Five percent impairment of the upper extremity for pain. [T]he most recent [functional capacity examination] her [partial permanent impairment] has changed from the rating given July [3], 2007.” [sic]

By decision dated August 29, 2008, the Office denied the request because appellant's request neither raised a substantive legal question nor presented new relevant and pertinent evidence.

LEGAL PRECEDENT

A claimant may seek an increased schedule award if the evidence establishes that she sustained an increased impairment at a later date causally related to her employment injury.³ Office procedure provides that a claim for an increased schedule award may be based on an

² Appellant submitted additional evidence on appeal. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). See *J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision).

³ *Linda T. Brown*, 51 ECAB 115, 116 (1999); *Paul R. Reedy*, 45 ECAB 488, 490 (1994).

incorrect calculation of the original award or an increased impairment at a later date, which is due to work-related factors. In such a situation, an increased schedule award may be payable if supported by the medical evidence.⁴

ANALYSIS

The Board finds that the case is not in posture decision.

The Office accepted appellant's claim for right rotator cuff tear. Appellant was granted a schedule award for six percent permanent impairment of her right upper extremity. In its August 29, 2008 decision, the Office treated appellant's claim as a request seeking reconsideration of its August 27, 2007 granting appellant a schedule award rather than one seeking an award for increased impairment. This was improper since review of the record indicates that appellant was claiming increased impairment, which occurred during a period after the original schedule award.

Appellant submitted a July 11, 2008 report in which Dr. Stem opines that appellant has a 15 percent permanent impairment. Dr. Stem opines that appellant reached maximum medical improvement that day, July 11, 2008. This evidence clearly concerns appellant's condition in 2008 and provides an opinion concerning her permanent impairment at that time. The evidence does not address appellant's condition prior to the time her original schedule award was granted. The Office's decision finding that appellant had not submitted new and relevant evidence in support of her claim for increased schedule award did not evaluate this new evidence.

Appellant has made a claim for an increased schedule award for her upper extremities and she is entitled to a merit decision on the medical evidence. The Office has not determined appellant's entitlement to a schedule award for any increased impairment to her upper extremities. Accordingly, the case will be remanded to the Office for further development to be followed by an appropriate decision.

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits of her claim. The case is remanded to the Office for further development, including an appropriate merit decision regarding appellant's claim for an increased upper extremity impairment schedule award.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7.b (August 2002). In addition, the Office procedure provides that a request for reconsideration of a schedule award based on a disagreement with the percentage awarded must be distinguished from a situation where a claimant who previously received an award is filing for an increased impairment due to a worsening of the claimant's medical condition due to deterioration of her condition or increased exposure. Such a request for increased impairment is not subject to the one-year time limitation for reconsideration. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.b (January 2004).

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: April 9, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board