

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONNIE B. FREEMAN and U.S. POSTAL SERVICE,
PLANT & DISTRIBUTION CENTER, Montgomery, AL

*Docket No. 01-1681; Submitted on the Record;
Issued March 8, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant is entitled to a greater than five percent impairment of the right upper extremity for which she has received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On December 17, 1998 appellant, then a 51-year-old manual distribution clerk, filed an occupational disease claim (Form CA-2) alleging that on November 24, 1998 she first realized her shoulder pain was due to her employment duties. The Office accepted the claim for right shoulder impingement syndrome and tendinitis.

Appellant filed a claim for a schedule award.

In a June 12, 2000 report, Dr. Charles T. Fletcher, Jr., an attending Board-certified orthopedic surgeon, noted appellant "lacks just a little bit of forward flexion" and opined that appellant had a 10 percent impairment of her right shoulder due to loss of motion. He concluded that this would "correspond to a five percent upper extremity impairment and a three percent whole person impairment."

In a July 25, 2000 report, the Office medical adviser reviewed Dr. Fletcher's report determined appellant had a 3 percent permanent impairment of her right upper extremity based upon Figure 38 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

In a report dated August 14, 2000, Dr. Fletcher reviewed the Office medical adviser's report and noted that he had only considered loss of motion. Dr. Fletcher indicated that appellant had "significant loss of strength and the overall impairment remains at five percent."

By letter dated August 30, 2000, the Office requested Dr. Fletcher to provide objective evidence to support his determination that appellant had a five percent impairment of her right upper extremity.

Dr. Fletcher, in a September 11, 2000 report, stated that he did “not have to defer to the A.M.A., *Guides*. This is my assessment” and he stood by his impairment rating.

In a December 26, 2000 report, Dr. Fletcher reiterated that the A.M.A., *Guides* were not the only guideline and there were other parameters to be considered in determining appellant’s impairment rating. He concluded that based upon appellant’s loss of strength that appellant had a three percent whole person impairment and a five percent impairment of the right upper extremity.

In a January 5, 2000¹ letter, the Office medical adviser recommended accepting Dr. Fletcher’s impairment rating of five percent with June 12, 2000 as the date of maximum medical improvement.

By decision dated January 17, 2001, the Office granted appellant a schedule award for a five percent impairment of the right arm for the period from June 12 to September 29, 2000 for a total of 15.60 weeks of compensation.

Appellant requested reconsideration by letter dated January 31, 2000 contending she was entitled to an eight percent impairment for her right upper extremity.²

By decision dated February 21, 2001, the Office denied appellant’s request for a merit review.

The Board finds that appellant has no more than five percent impairment of the right upper extremity

Section 8107 of the Federal Employees’ Compensation Act³ provides that, if there is permanent disability involving the loss or loss of use of a specific enumerated member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁴ The Act does not specify the manner by which the percentage of impairment for a schedule award shall be determined. For consistent results and to

¹ This appears to be a typographical error and the date should read as “2001.”

² *Id.*

³ 5 U.S.C. §§ 8101-8193; § 8107.

⁴ *Id.* This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid, additional members of the body are found at 20 C.F.R. § 10.404(a).

ensure equal justice for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁵

In the instant case, Dr. Fletcher opined that appellant had a five percent impairment of the right upper extremity. The Office medical adviser reviewed Dr. Fletcher's reports and recommended that appellant be awarded a five percent impairment of the right upper extremity based upon Dr. Fletcher's reports. The record contains no medical evidence indicating that appellant has a greater than five percent impairment of the right upper extremity. Thus, the Office properly found that appellant had a five percent impairment of the right upper extremity.

Next, the Board finds that the Office properly denied appellant's request for reconsideration on the merits.

Under section 8128(a) of the Act,⁶ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,⁷ which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁸

In support of her request for reconsideration dated January 31, 2000,⁹ appellant did not submit any relevant and pertinent evidence not previously considered by the Office and did not

⁵ *Mary L. Henninger*, 51 ECAB _____ (Docket No. 00-552, issued June 20, 2001); 20 C.F.R. § 10.404 (1999). The Office first utilized *A Guide to the Evaluation of Permanent Impairment of the Extremities and Back*, published in The Journal of the American Medical Association, Special Edition, February 15, 1958. From 1958 until 1971 a series of 13 *Guides* was published in The Journal of the American Medical Association. The American Medical Association published the first hardbound compilation edition of the A.M.A., *Guides* in 1971, which revised the previous series of JAMA *Guides*.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b) (1999).

⁸ 20 C.F.R. § 10.608(b).

⁹ This appears to be a typographical error and the year should be “2001.” The Office received appellant's request on February 5, 2001.

argue that the Office erroneously applied or interpreted a point of law. Nor did she advance a point of law or a fact not previously considered by the Office. The Office, therefore, properly refused to reopen appellant's claim for a merit review.

The decisions of the Office of Workers' Compensation Programs dated February 21 and January 17, 2001 are hereby affirmed.

Dated, Washington, DC
March 8, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

A. Peter Kanjorski
Alternate Member