

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT

Matter of the Claim of David Sylvester v. Department of Corrections and Community Supervision et al.

2025 NY Slip Op 07064 · No. CV-24-2093 · Decided December 18, 2025

SUMMARY

The Appellate Division, Third Department, affirmed the Workers' Compensation Board's denial of David Sylvester's application for reconsideration and/or full Board review. The court held that Sylvester had not demonstrated newly discovered evidence, a material change in condition, or the Board's failure to consider the relevant issues, and therefore the Board's denial was neither arbitrary and capricious nor an abuse of discretion.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Third Department
WRITING FOR THE COURT	Fisher, J.; Pritzker, J.P.; McShan, J.; Powers, J.; Mackey, J.
JURISDICTION	New York Appellate Division, Third Department
DECIDED	December 18, 2025
DOCKET	CV-24-2093
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a Workers' Compensation Board decision denying claimant's application for reconsideration and/or full Board review.
STANDARD OF REVIEW	The denial of an application for reconsideration and/or full Board review is reviewed to determine whether it was arbitrary and capricious or otherwise constituted an abuse of discretion.
PRECEDENTIAL VALUE	Published New York Appellate Division opinion
PARTIES	David Sylvester v. Department of Corrections and Community Supervision, et al.

TOPICS

workers compensation

appellate procedure

standard of review

judicial review of agency action

employment law

PRACTICE AREAS

workers' compensation

administrative law

appellate procedure

employment law

QUESTIONS PRESENTED

1. Whether the Workers' Compensation Board abused its discretion or acted arbitrarily and capriciously in denying claimant's application for reconsideration and/or full Board review.
2. Whether the merits of the Board's prior decision concerning the 40% schedule loss of use and the carrier's credit were properly before the Appellate Division when claimant appealed only from the denial of reconsideration and/or full Board review.

HOLDINGS

1. When a claimant appeals only from the Workers' Compensation Board's denial of reconsideration and/or full Board review, the merits of the Board's underlying decision are not properly before the Appellate Division.
2. An applicant seeking reconsideration and/or full Workers' Compensation Board review must demonstrate newly discovered evidence, a material change in condition, or that the Board improperly failed to consider issues raised in the application for review.
3. The Workers' Compensation Board did not abuse its discretion or act arbitrarily and capriciously in denying claimant's application for reconsideration and/or full Board review.

KEY QUOTATIONS

*“As such, our review is limited to whether the Board's denial of the application was arbitrary and capricious or otherwise constituted an abuse of discretion” (*1-*2)*

*“To succeed on an application for reconsideration and/or full Board review, the applicant must demonstrate that newly discovered evidence exists, that there has been a material change in condition, or that the Board improperly failed to consider the issues raised in the application for review in making its initial determination” (*2)*

FACTUAL BACKGROUND

Claimant suffered a work-related left-shoulder injury in 2017 and was awarded a 10% schedule loss of use of the left arm. After suffering additional work-related injuries in June 2021, claimant underwent left-shoulder surgery, and his treating orthopedic surgeon assessed a 60% schedule loss of use based on range-of-motion deficits. The Workers' Compensation Law Judge determined under the 2018 Workers' Compensation Guidelines that the deficits equated to a 40% schedule loss of use; the Board also awarded the carrier a credit for the prior 10% award. Claimant sought reconsideration and/or full Board review but did not demonstrate newly discovered evidence or a material change in condition.

PROCEDURAL HISTORY

Claimant sustained work-related injuries in 2017 and 2021 and received a 10% schedule loss of use award for the left arm from the 2017 injury. After a hearing concerning the 2021 injuries, the Workers' Compensation Law Judge determined that claimant sustained a 40% schedule loss of use of the left arm but did not address the carrier's request for a credit for the prior award. The Workers' Compensation Board later determined that claimant sustained a 40% schedule loss of use and that the carrier was entitled to the credit. Claimant did not appeal that decision, instead seeking reconsideration and/or full Board review; the Board denied that application, and claimant appealed to the Appellate Division.

DISPOSITION

affirmed

CASES CITED

- Matter of Genduso v New York City Dept. of Educ., 164 AD3d 1509, 1510 (3d Dept 2018)
- Matter of Persaud v Ash & Peterkin Cent. Lock Co., Inc., 227 AD3d 1336, 1337 (3d Dept 2024), lv dismissed 42 NY3d 1033 (2024)
- Matter of Rios v Rockaway Contr. Corp., 213 AD3d 1061, 1062 (3d Dept 2023)
- Matter of Mascali v Town/Vil. of Harrison, 203 AD3d 1424, 1425 (3d Dept 2022)
- Matter of Lopez v Platoon Constr., Inc., 212 AD3d 953, 954 (3d Dept 2023)
- Matter of Singletary v Schiavone Constr. Co., 174 AD3d 1240, 1242 (3d Dept 2019)
- Matter of Oparaji v Books & Rattles, 168 AD3d 1209, 1209 (3d Dept 2019)
- Matter of Petre v Allied Devices Corp., 213 AD3d 1117, 1118 (3d Dept 2023)
- Matter of Banish v Warren County Sheriff's Off., 209 AD3d 1081, 1084 (3d Dept 2022)

OPINION

Matter of Sylvester v. Department of Corr. & Community Supervision 2025 NY Slip Op 07064
PER CURIAM.

Matter of Sylvester v Department of Corr. & Community Supervision (2025 NY Slip Op 07064) Matter of Sylvester v Department of Corr. & Community Supervision 2025 NY Slip Op 07064 Decided on December 18, 2025 Appellate Division, Third Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered:December 18, 2025 CV-24-2093 [*1]In the Matter of the Claim of David Sylvester, Appellant, v Department of Corrections and Community Supervision et al., Respondents. Workers' Compensation Board, Respondent. Calendar Date:November 12, 2025 Before:Pritzker, J.P., Fisher, McShan, Powers and Mackey, JJ. David Sylvester, Dansville, appellant pro se. Gitto & Niefer, LLP, Binghamton (Jason M. Carlton of counsel), for Department of Corrections and Community Supervision and another, respondents. Fisher, J. Appeal from a decision of the

Workers' Compensation Board, filed June 5, 2024, which denied claimant's application for reconsideration and/or full Board review. In 2017, claimant suffered a work-related injury to his left shoulder and he was ultimately awarded a 10% schedule loss of use (hereinafter SLU) of the left arm. In June 2021, claimant suffered work-related injuries to his head, left knee and left shoulder. Following surgery to claimant's left shoulder, his treating orthopedic surgeon found that claimant had reached maximum medical improvement and, based upon range of motion deficits measured by the surgeon, found that claimant sustained a 60% SLU of the left arm. The orthopedic surgeon who examined claimant on behalf of the employer and its workers' compensation carrier (hereinafter collectively referred to as the carrier) opined that claimant had not reached maximum medical improvement and that any SLU findings should be deferred. The carrier argued in a memorandum it submitted to the Workers' Compensation Law Judge (hereinafter WCLJ) that the range of motion deficits measured by claimant's surgeon only equated to a 40% SLU pursuant to the 2018 Workers' Compensation Guidelines for Determining Impairment. The carrier further argued that it should be given a credit for the prior 10% SLU for the left arm awarded for the 2017 injury to claimant's left shoulder (see *Matter of Genduso v New York City Dept. of Educ.* , 164 AD3d 1509 , 1510 [3d Dept 2018]). Claimant argued in his memorandum that he was entitled to a 70% SLU, adding the prior 10% SLU to the current 60% SLU as calculated by his surgeon. Following a hearing and the deposition of claimant's surgeon, the WCLJ rejected the opinion of the carrier's medical expert regarding permanency to claimant's head, left knee and abdomen. The WCLJ further determined that the range of motion deficits measured by claimant's surgeon equated to a 40% SLU of the left arm pursuant to the 2018 Workers' Compensation Guidelines for Determining Impairment. In concluding that claimant sustained a 40% SLU of the left arm, the WCLJ did not address the carrier's request for a credit for claimant's prior 10% SLU award. Both parties sought review of the WCLJ's determination by the Workers' Compensation Board. Upon review, by decision filed April 1, 2024, the Board found that claimant sustained a 40% SLU of the left arm and that the carrier was entitled to a credit for claimant's prior 10% SLU of the left arm. Claimant did not appeal from the Board's decision and instead filed an application for reconsideration and/or full Board review. By decision filed June 5, 2024, the Board denied claimant's application, and this appeal from that decision ensued. We affirm. Inasmuch as claimant has only appealed the Board's June 2024 decision denying his application for reconsideration and/or full Board review, the merits of the Board's April 2024 decision are not properly before us (see *Matter of Persaud v Ash & Peterkin Cent. [*2]Lock Co., Inc.* , 227 AD3d 1336 , 1337 [3d Dept 2024], lv dismissed 42 NY3d 1033 [2024]; *Matter of Rios v Rockaway Contr. Corp.* , 213 AD3d 1061, 1062 [3d Dept 2023]). "As such, our review is limited to whether the Board's denial of the application was arbitrary and capricious or otherwise constituted an abuse of discretion" (*Matter of Mascali v Town/Vil. of Harrison* , 203 AD3d 1424, 1425 [3d Dept 2022] [internal quotation marks and citations omitted]; see *Matter of Lopez v Platoon Constr., Inc.* , 212 AD3d 953, 954 [3d Dept 2023]). "To succeed on an application for reconsideration and/or full Board

review, the applicant must demonstrate that newly discovered evidence exists, that there has been a material change in condition, or that the Board improperly failed to consider the issues raised in the application for review in making its initial determination" (*Matter of Persaud v Ash & Peterkin Cent. Lock Co., Inc.* , 227 AD3d at 1337-1338 [internal quotation marks and citations omitted]; see *Matter of Singletary v Schiavone Constr. Co.* , 174 AD3d 1240 , 1242 [3d Dept 2019]). The record reflects that claimant did not demonstrate the existence of new evidence or a material change in condition in support of his application, and that the Board, in its April 2024 decision, considered the issues that were before it, including whether the carrier was entitled to a credit for claimant's prior 10% SLU award (see *Matter of Persaud v Ash & Peterkin Cent. Lock Co., Inc.* , 227 AD3d at 1338; *Matter of Oparaji v Books & Rattles* , 168 AD3d 1209 , 1209 [3d Dept 2019]). Accordingly, we find that the Board did not abuse its discretion or act arbitrarily in denying claimant's application for reconsideration and/or full Board review (see *Matter of Petre v Allied Devices Corp.* , 213 AD3d 1117, 1118 [3d Dept 2023]; *Matter of Banish v Warren County Sheriff's Off.* , 209 AD3d 1081, 1084 [3d Dept 2022]). Pritzker, J.P., McShan, Powers and Mackey, JJ., concur. ORDERED that the decision is affirmed, without costs.

PER CURIAM.

Matter of Sylvester v Department of Corr. & Community Supervision (2025 NY Slip Op 07064) *Matter of Sylvester v Department of Corr. & Community Supervision* 2025 NY Slip Op 07064 Decided on December 18, 2025 Appellate Division, Third Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered:December 18, 2025 CV-24-2093 [*1]In the Matter of the Claim of David Sylvester, Appellant, v Department of Corrections and Community Supervision et al., Respondents. Workers' Compensation Board, Respondent. Calendar Date:November 12, 2025 Before:Pritzker, J.P., Fisher, McShan, Powers and Mackey, JJ. David Sylvester, Dansville, appellant pro se. Gitto & Niefer, LLP, Binghamton (Jason M. Carlton of counsel), for Department of Corrections and Community Supervision and another, respondents. Fisher, J. Appeal from a decision of the Workers' Compensation Board, filed June 5, 2024, which denied claimant's application for reconsideration and/or full Board review. In 2017, claimant suffered a work-related injury to his left shoulder and he was ultimately awarded a 10% schedule loss of use (hereinafter SLU) of the left arm. In June 2021, claimant suffered work-related injuries to his head, left knee and left shoulder. Following surgery to claimant's left shoulder, his treating orthopedic surgeon found that claimant had reached maximum medical improvement and, based upon range of motion deficits measured by the surgeon, found that claimant sustained a 60% SLU of the left arm. The orthopedic surgeon who examined claimant on behalf of the employer and its workers' compensation carrier (hereinafter collectively referred to as the carrier) opined that claimant had not reached maximum medical improvement and that any SLU findings should be deferred. The carrier argued in a memorandum it submitted to the Workers' Compensation Law Judge (hereinafter WCLJ) that the

range of motion deficits measured by claimant's surgeon only equated to a 40% SLU pursuant to the 2018 Workers' Compensation Guidelines for Determining Impairment. The carrier further argued that it should be given a credit for the prior 10% SLU for the left arm awarded for the 2017 injury to claimant's left shoulder (see *Matter of Genduso v New York City Dept. of Educ.* , 164 AD3d 1509, 1510 [3d Dept 2018]). Claimant argued in his memorandum that he was entitled to a 70% SLU, adding the prior 10% SLU to the current 60% SLU as calculated by his surgeon. Following a hearing and the deposition of claimant's surgeon, the WCLJ rejected the opinion of the carrier's medical expert regarding permanency to claimant's head, left knee and abdomen. The WCLJ further determined that the range of motion deficits measured by claimant's surgeon equated to a 40% SLU of the left arm pursuant to the 2018 Workers' Compensation Guidelines for Determining Impairment. In concluding that claimant sustained a 40% SLU of the left arm, the WCLJ did not address the carrier's request for a credit for claimant's prior 10% SLU award. Both parties sought review of the WCLJ's determination by the Workers' Compensation Board. Upon review, by decision filed April 1, 2024, the Board found that claimant sustained a 40% SLU of the left arm and that the carrier was entitled to a credit for claimant's prior 10% SLU of the left arm. Claimant did not appeal from the Board's decision and instead filed an application for reconsideration and/or full Board review. By decision filed June 5, 2024, the Board denied claimant's application, and this appeal from that decision ensued. We affirm. Inasmuch as claimant has only appealed the Board's June 2024 decision denying his application for reconsideration and/or full Board review, the merits of the Board's April 2024 decision are not properly before us (see *Matter of Persaud v Ash & Peterkin Cent. Lock Co., Inc.* , 227 AD3d 1336, 1337 [3d Dept 2024], lv dismissed 42 NY3d 1033 [2024]; *Matter of Rios v Rockaway Contr. Corp.* , 213 AD3d 1061, 1062 [3d Dept 2023]). "As such, our review is limited to whether the Board's denial of the application was arbitrary and capricious or otherwise constituted an abuse of discretion" (*Matter of Mascali v Town/Vil. of Harrison* , 203 AD3d 1424, 1425 [3d Dept 2022] [internal quotation marks and citations omitted]; see *Matter of Lopez v Platoon Constr., Inc.* , 212 AD3d 953, 954 [3d Dept 2023]). "To succeed on an application for reconsideration and/or full Board review, the applicant must demonstrate that newly discovered evidence exists, that there has been a material change in condition, or that the Board improperly failed to consider the issues raised in the application for review in making its initial determination" (*Matter of Persaud v Ash & Peterkin Cent. Lock Co., Inc.* , 227 AD3d at 1337-1338 [internal quotation marks and citations omitted]; see *Matter of Singletary v Schiavone Constr. Co.* , 174 AD3d 1240, 1242 [3d Dept 2019]). The record reflects that claimant did not demonstrate the existence of new evidence or a material change in condition in support of his application, and that the Board, in its April 2024 decision, considered the issues that were before it, including whether the carrier was entitled to a credit for claimant's prior 10% SLU award (see *Matter of Persaud v Ash & Peterkin Cent. Lock Co., Inc.* , 227 AD3d at 1338; *Matter of Oparaji v Books & Rattles* , 168 AD3d 1209, 1209 [3d Dept 2019]). Accordingly, we find that the Board did not abuse its discretion or act

arbitrarily in denying claimant's application for reconsideration and/or full Board review (see Matter of Petre v Allied Devices Corp. , 213 AD3d 1117, 1118 [3d Dept 2023]; Matter of Banish v Warren County Sheriff's Off. , 209 AD3d 1081, 1084 [3d Dept 2022]). Pritzker, J.P., McShan, Powers and Mackey, JJ., concur. ORDERED that the decision is affirmed, without costs.

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