

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JESSE L. LYON and DEPARTMENT OF DEFENSE,
DEFENSE LOGISTICS AGENCY, Fort Worth, TX

*Docket No. 99-1385; Submitted on the Record;
Issued August 22, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a 6 percent permanent impairment of the left upper extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on October 2, 1998.

The Board has duly reviewed the case record and concludes that appellant has no greater than a 6 percent permanent impairment of the left upper extremity.

Under section 8107 of the Federal Employees' Compensation Act¹ and section 10.304 of the implementing federal regulations,² schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner, in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ (hereinafter A.M.A., *Guides*) have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁴

On July 21, 1998 the Office doubled appellant's work-related left shoulder sprain sustained on November 8, 1996 and his May 29, 1997 left rotator cuff tear and surgery.

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

³ A.M.A., *Guides* (4th ed. 1993).

⁴ *James A. England*, 47 ECAB 115 (1995).

The relevant medical evidence indicates that, at the request of the Office, Dr. Robert G. Ranelle, appellant's treating osteopath, evaluated him for permanent partial impairment. By report dated July 5, 1998, he provided the Office with the results of his evaluation. On examination the range of motion in appellant's shoulder was reported as: 30 degrees of extension, 160 degrees of flexion, 160 degrees of abduction, 20 degrees of adduction, no decreased range of motion to external rotation and 60 degrees of internal rotation. Dr. Ranelle noted that, based on the A.M.A., *Guides*, appellant had a 6 percent impairment of the upper extremity and had reached maximum medical improvement on June 9, 1998. He did not explain which edition of the A.M.A., *Guides* he applied or how he applied them.

On August 18, 1998 the Office referred appellant's medical record to the Office medical adviser for review of the rating and date of maximum medical improvement. The Office medical adviser stated in a report dated August 17, 1998 that he had reviewed Dr. Ranelle's report, applied the standards of the A.M.A., *Guides*⁵ to Dr. Ranelle's findings and concluded that appellant had a six percent impairment of his left upper extremity and that the date of maximum medical improvement was June 9, 1998, as noted by Dr. Ranelle. The Office medical adviser stated the following findings: 160 degree forward flexion equated to a 1 percent impairment;⁶ 30 degree extension equated to a 1 percent impairment;⁷ 160 degree abduction equated to a 1 percent impairment;⁸ 20 degree adduction equated to a 1 percent impairment;⁹ normal degree of external rotation equated to a 0 percent impairment¹⁰ and 60 degree internal rotation equated to a 2 percent impairment.¹¹ He then added the percentages to reach a six percent impairment of appellant's left upper extremity.

By decision dated August 20, 1998, the Office issued a schedule award for appellant for a 6 percent impairment to his left upper extremity entitling him to 18.72 weeks of compensation from June 9 to October 18, 1998.

In a letter received by the Office on September 29, 1998, appellant requested reconsideration. He noted that the time frame for his schedule award, from June 9 to October 18, 1998, was not fair and that he was "entitled for compensation from the time of the surgery if not from the time of the injury."

⁵ A.M.A., *Guides* (4th ed. 1993).

⁶ A.M.A., *Guides*, 43, Figure 38.

⁷ *Id.*, 44, Figure 41.

⁸ *Id.*, 45, Figure 44.

⁹ *Id.*, 48, Table 11.

¹⁰ *Id.*, 49, Table 12.

¹¹ *Id.*, 52, Table 14.

By nonmerit decision dated October 2, 1998, the Office denied appellant's request for review of the August 20, 1998 decision on the grounds that the evidence submitted in support of his request was irrelevant and immaterial and therefore insufficient to warrant a merit review.¹²

The Board finds that the medical evidence establishes that appellant has no more than a six percent impairment of his left upper extremity for which he received a schedule award.

The Board notes that the A.M.A., *Guides* were prepared to allow one physician to use the raw clinical data of another physician in order to arrive at a uniform, standardized evaluation.¹³ While the medical opinion of Dr. Ranelle might be accorded some greater weight as the opinion of a treating physician, his clinical data can be readily extrapolated and evaluated within the tables and guidelines as presented. Although he was advised by the Office to use the fourth edition of the A.M.A., *Guides*, his report did not indicate which edition he used.¹⁴ The Office properly based appellant's schedule award on the calculation of its Office medical adviser since he used the A.M.A., *Guides* and properly determined that appellant had no more than a six percent permanent impairment of his left upper extremity.

Further, the Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for merit review on October 2, 1998.

Under section 8128(a) of the Act,¹⁵ 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 10.138(b)(1) of the implementing federal regulations,¹⁶ which provides that a claimant may obtain review of the merits of the claim by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or a fact not previously considered by the Office;
or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

¹² The Board notes that in the conclusion of its October 2, 1998 decision the Office incorrectly stated that appellant's evidence was relevant. It should read irrelevant.

¹³ See *James E. Jenkins*, 39 ECAB 860 (1988). Further, Chapters 1 and 2 of the A.M.A., *Guides* note that they were prepared to allow one physician to use the raw clinical data of another physician to arrive at a uniform standardized evaluation.

¹⁴ The Board notes that Dr. Ranelle cited to specific sections of the A.M.A., *Guides* but failed to specify which edition he cited. It is also noted that Dr. Ranelle's rating of six percent was the same as the Office medical adviser's finding.

¹⁵ 5 U.S.C. § 8128.

¹⁶ 20 C.F.R. § 10.138(b)(1).

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.¹⁷

In this case, appellant failed to raise any error of fact or law and failed to submit new relevant and pertinent evidence not previously considered by the Office in the prior decision. Although he stated that his period of entitlement to compensation should have run from the time of his surgery or from the time of his injury, he failed to submit any evidence to establish that the Office erred in its October 2, 1998 decision. The Board therefore finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

The decisions of the Office of Workers' Compensation Programs dated October 2 and August 20, 1998 are affirmed.

Dated, Washington, D.C.
August 22, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

¹⁷ 20 C.F.R. § 10.138(b)(2).