

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS E. BALLARD and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, EXAMINATION DIVISION, Clayton, MO

*Docket No. 01-728; Submitted on the Record;
Issued December 5, 2001*

DECISION and ORDER

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

The issues are: (1) whether appellant has more than a 27 percent permanent impairment of the right arm; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

The case has been on appeal three times previously.¹ In a June 25, 1991 decision, the Board found that there existed a conflict in the medical evidence on whether appellant had a 10 percent permanent impairment of the left arm due to his November 3, 1987 fall in the performance of duty. The Board also noted that appellant had claimed that his right rotator cuff tear, fractured left fifth finger and fractured left elbow were due to the employment injury, either directly or as the result of consequential injuries. The Board remanded the case for further development. In an August 2, 1996 decision, the Board remanded the case because the case record submitted on appeal was incomplete. In a March 22, 1999 decision, the Board noted that the Office had found appellant had a total 43 percent permanent impairment of the left arm and had accepted that his right shoulder rotator cuff tear was a consequential injury related to the November 3, 1987 employment injury. The Office, however, denied appellant's claims that the fractured left elbow and fractured left fifth finger were consequential injuries. The Board found that there existed a conflict in the medical evidence on the issue and remanded the case for referral of appellant to an appropriate impartial medical specialist.

In an April 9, 1999 letter, the Office informed appellant that it had accepted his left elbow fracture and the fracture of the left fifth finger as consequential injuries to his employment injury. The Office then referred appellant, together with a statement of accepted facts and the case record, to Dr. Donald McPhaul, a Board-certified physiatrist, for an examination and opinion on the extent of the permanent impairment of both of appellant's arms. In a June 30,

¹ Docket No. 97-404 (issued March 22, 1999); Docket No. 94-1616 (order remanding case issued August 2, 1996) Docket No. 91-502 (issued June 25, 1991). The history of the case is contained in the prior decisions and is incorporated by reference.

1999 report, Dr. McPhaul indicated that appellant had torn rotator cuffs in both shoulders, which had been repaired surgically, a left elbow fracture and a fracture of the left fifth finger. He reported that appellant had 100 degrees of flexion in the right shoulder, which equaled a 5 percent permanent impairment; 40 degrees of extension, which equaled a 1 percent permanent impairment; 80 degrees of abduction, which equaled a 5 percent permanent impairment; 20 degrees of adduction, which equaled a 1 percent permanent impairment; 40 degrees of external rotation, which equaled a 1 percent permanent impairment; and a 20 degrees of internal rotation which equaled a 4 percent permanent impairment. Dr. McPhaul calculated that appellant had a 17 percent permanent impairment of the right arm due to loss of motion. He indicated that appellant had an 80 percent sensory impairment of the right shoulder which, when multiplied by the maximum 5 percent permanent impairment for sensory impairment of the axillary nerve, equaled a 4 percent permanent impairment of the right arm due to pain and sensory loss. Dr. McPhaul determined that appellant had a 25 percent motor deficit in the shoulder girdle muscles which, when multiplied by the maximum 35 percent permanent impairment rating for motor impairment of the axillary nerve, equaled an 8.75 percent permanent impairment of the right arm, which was rounded up to 9 percent. He then combined the permanent impairment calculations for loss of motion, pain and weakness and calculated that appellant had a 27 percent permanent impairment of the right arm.

Dr. McPhaul also calculated the permanent impairment of appellant's left arm. He found appellant had 120 degrees of flexion in the left shoulder which equaled a 4 percent permanent impairment; 30 degrees of extension which equaled a 1 percent permanent impairment; 90 degrees of abduction which equaled a 4 percent permanent impairment; 20 degrees of adduction which equaled a 1 percent permanent impairment; 10 degrees of internal rotation which equaled a 5 percent permanent impairment; and 40 degrees of external rotation which equaled a 1 percent permanent impairment. Dr. McPhaul concluded that appellant had a 16 percent permanent impairment of the left arm due to loss of motion in the shoulder. He found that appellant had an 80 percent sensory impairment of the left shoulder due to sensory loss and a 25 percent motor deficit of the left shoulder which, as in the right shoulder, equaled a 4 percent permanent impairment due to sensory loss and a 9 percent permanent impairment for weakness. Dr. McPhaul concluded that appellant had a 27 percent permanent impairment of the left arm due to his shoulder.

Dr. McPhaul reported that appellant had 130 degrees of flexion in the left elbow, which equaled a 1 percent permanent impairment and 10 degrees of extension, which equaled a 1 percent permanent impairment. He found no permanent impairment in supination or pronation. Dr. McPhaul concluded that appellant had a two percent permanent impairment of the arm due to loss of motion in the elbow. He indicated that appellant had a 20 percent sensory deficit in the left elbow which, when multiplied by the maximum 5 percent permanent impairment for the medial antebrachial cutaneous nerve, equaled a 1 percent permanent impairment due to pain. Dr. McPhaul stated that appellant had no objective weakness in the left elbow. He concluded that appellant had a 3 percent permanent impairment of the left arm due to his elbow condition.

Dr. McPhaul reported, in regard to appellant's left fifth finger, that appellant had 60 degrees of flexion in the distal interphalangeal joint, which equaled a 5 percent permanent impairment of the finger and 10 degrees of extension in the distal interphalangeal joint which equaled a 2 percent permanent impairment for a total of a 7 percent permanent impairment of the

finger due to the loss of motion in the interphalangeal joint. He indicated that appellant had 60 degrees of flexion in the proximal interphalangeal joint, which equaled a 24 percent permanent impairment and 20 degrees of extension which equaled a 7 percent permanent impairment, for a total 31 percent permanent impairment of the finger due to loss of motion in the proximal interphalangeal joint. Dr. McPhaul stated that appellant had 50 degrees of flexion in the metaphalangeal joint but no loss of motion in extension, which equaled 22 percent permanent impairment of the finger due to loss of motion in the metaphalangeal joint. He combined the values together to calculate that appellant had a 50 percent permanent impairment of the finger due to loss of motion. Dr. McPhaul found no weakness or atrophies in the finger. He stated that appellant had a 25 percent sensory impairment of the finger which, when multiplied by the maximum 30 percent permanent impairment for sensory loss along the ulnar aspect of the fifth finger, equaled a 7.5 percent permanent impairment of the finger, which was rounded up to 8 percent. Dr. McPhaul indicated that sensory deficit along the radial side of the finger equaled a maximum 20 percent permanent impairment of the finger. He, therefore, calculated that appellant had a 5 percent permanent impairment of the finger, which yielded a total 13 percent permanent impairment of the finger due to sensory loss. Dr. McPhaul combined the 50 percent permanent impairment of the finger due to loss of motion with the 13 percent permanent impairment due to sensory loss to determine that appellant had a 57 percent permanent impairment of the finger.

In an October 26, 1999 memorandum, the Office medical adviser indicated that appellant's 57 percent permanent impairment of the left fifth finger equaled a 6 percent permanent impairment of the hand, which in turn equaled a 6 percent permanent impairment of the arm. He combined the 27 percent permanent impairment due to the left shoulder, the 3 percent permanent impairment due to the left elbow and the 6 percent permanent impairment due to the left fifth finger to calculate appellant had a 33 percent permanent impairment of the left arm. Dr. McPhaul noted that appellant had already received a schedule award for more than 33 percent permanent impairment of the left arm. He, therefore, indicated that appellant was entitled to a schedule award for a 27 percent permanent impairment of the right arm.

In a January 25, 2000 decision, the Office issued a schedule award for a 27 percent permanent impairment of the right arm.

In a September 18, 2000 letter, appellant requested reconsideration. He stated that the permanent impairment calculation for the left arm did not include the calculation of Dr. John Gagnani, who stated that appellant had a 24 percent permanent impairment of the left shoulder due to resection arthroplasty of the left shoulder. Appellant, therefore, requested that the permanent impairment of the left arm be recalculated. In a December 27, 2000 decision, the Office denied appellant's request for reconsideration on the grounds that he had not shown the Office had erroneously applied or interpreted the law, had not advanced a point of law not previously considered and had not submitted new medical evidence in support of his claim.

The Board finds that the Office properly determined that appellant had a 27 percent permanent impairment of the right arm.

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of, members or functions of the body listed in the schedule. However, neither the Act nor its regulations specify the manner in which the percentage loss of a member shall be determined. For consistent results and to ensure equal justice to all claimants, the Board has authorized the use of a single set of tables in evaluating schedule losses, so that there may be uniform standards applicable to all claimants seeking schedule awards. The American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment*⁴ has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁵

Dr. McPhaul applied the A.M.A., *Guides* properly to appellant's ranges of motion in the right shoulder and to the sensory and motor deficits. He accurately used the combined value table of the A.M.A., *Guides* to determine that appellant had a 27 percent permanent impairment of the right arm due to his shoulder condition.⁶ There is no other medical evidence of record showing that appellant had a greater impairment.

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

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant. Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advanced a point of law not previously considered by the Office, or submitted relevant and pertinent evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁷ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁸ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁹

In his request for reconsideration, appellant stated that the Office had failed to consider the resection arthroplasty of his left shoulder in determining the permanent impairment of his left arm. The decision of the Office, however, only addressed appellant's permanent impairment of

² 5 U.S.C. § 8107(c).

³ 20 C.F.R. § 10.304.

⁴ (4th ed. 1993).

⁵ *Thomas P. Gauthier*, 34 ECAB 1060, 1063 (1983).

⁶ A.M.A., *Guides*, pages 322-24

⁷ 20 C.F.R. § 10.608(b).

⁸ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

the right arm. The Office did not issue a formal decision finding that appellant had no greater permanent impairment of the left arm.¹⁰ Appellant's contention that the permanent impairment of his left arm was not calculated properly is irrelevant to consideration of whether the Office properly determined the permanent impairment of the right arm. The Office, therefore, properly denied appellant's request for reconsideration.

The decisions of the Office of Workers' Compensation Programs, dated December 27 and January 25, 2000, are hereby affirmed.

Dated, Washington, DC
December 5, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

¹⁰ The Board notes that the A.M.A., *Guides* states that impairment ratings due to certain disorders of the arm, such as those requiring arthroplasty, should be used only when the other criteria, such as ratings based on ranges of motion and impairments of nerve function, do not adequately encompass the extent of the impairment. A.M.A., *Guides*, page 58.