United States Department of Labor
Employees' Compensation Appeals Board

DAVID A. STENSON, Appellant	)	
and	)	**Docket No. 04-1800**
	)	**Issued: December 23, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, Employer	)	

Appearances:
David A. Stenson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 12, 2004 appellant filed an appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated June 23, 2004 which denied his request for reconsideration; a merit decision dated May 24, 2004 which affirmed a prior schedule award; and a December 12, 2003 decision which granted a schedule award for a one percent impairment of the left upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has greater than a one percent impairment of his left upper extremity, for which he has received a schedule award; and (2) whether the Office properly denied appellant's request for reconsideration of his case under 5 U.S.C. § 8128.

FACTUAL HISTORY

On February 4, 1994 appellant, then a 40-year-old mail handler, filed an occupational disease claim alleging that he developed swelling and pain in the left hand, forearm and elbow

after pulling trays of mail for an extended period. On August 22, 1994 the Office accepted that appellant sustained tendinitis of the left elbow and acute strain of the left forearm. On July 28, 1995 appellant filed another occupational disease claim for bilateral carpal tunnel syndrome, a pinched nerve in the left elbow and bilateral elbow pain due to his employment duties. On January 18, 1996 the Office accepted that he sustained bilateral lateral epicondylitis and right carpal tunnel syndrome. Surgery for lateral epicondylar debridement and a modified Gardner procedure were approved. He underwent surgery on December 9, 1996 and was totally disabled for work until January 9, 1997.

Appellant requested a schedule award. On January 26, 1998 the Office medical adviser reviewed the medical evidence of record and opined that appellant had a permanent right upper extremity impairment of 10 percent.

On February 19, 1998 the Office granted appellant a schedule award for a 10 percent permanent impairment of his right upper extremity for the period December 9, 1997 to January 31, 1998 for a total of 31.20 weeks of compensation.

On April 29, 1998 appellant accepted a position as a modified mail handler and returned to work. He continued to work and noted left upper extremity pain and problems.

On April 29, 2002 appellant was diagnosed with left lateral epicondylitis.

On May 10, 2002 left lateral epicondylitis surgery was authorized by the Office after steroid injections did not work.

On August 25, 2002 Dr. Steven I. Grindel, a Board-certified upper extremity and microsurgeon of professorial rank, examined appellant. He noted that appellant had a lateral epicondylar release on April 29, 2002 and had minimal discomfort or pain, occasional ache with aggressive use and subtle limitations of strength and discomfort with extreme use, which would be rated at a five percent. Dr. Grindel found mild decreased strength secondary to discomfort, some pain with aggressive use, but no atrophy, anklyosis, loss of motion or other sensory changes. He noted that the five percent impairment was in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*

On October 22, 2003 appellant filed a claim for a schedule award for his left upper extremity.

On October 31, 2003 the record was referred to an Office medical adviser for an opinion as to the degree of left upper extremity impairment. On November 17, 2003 Dr. David H. Garelick, an orthopedic surgeon and the Office medical adviser, determined that the date of maximum medical improvement was August 25, 2002, the date of Dr. Grindel's report. Dr. Garelick stated:

> "[Appellant] continues to complain of intermittent lateral elbow pain most noted with aggressive use awarding one percent upper extremity [permanent impairment] for Grade 4 pain in the distribution of the musculocutaneous nerve

(lateral antebrachial cutaneous nerve) according to Table 16-15, page 492 and Table 16-10, page 482 of the A.M.A., *Guides,* [f]ifth [e]dition. Physical examination in notes dated August 25, 2002 as well as September 11, 2002 revealed full range of motion. Sensation was intact, and the wound was well healed. There were no objective deficits in strength. Therefore, at this time, the only residual [left upper extremity permanent impairment] is for subjective sensation of pain as described above."

On December 12, 2003 the Office granted appellant a schedule award for a one percent permanent impairment of his left upper extremity for the period August 25 to September 15, 2002 for a total of 3.12 weeks of compensation.

On December 16, 2003 appellant requested a review of the written record on the amount of the schedule award. He argued that Dr. Grindel had determined that he had a five percent permanent impairment.

Appellant's record was reviewed and on May 24, 2004 the hearing representative affirmed the December 12, 2003 schedule award.

By letter dated June 15, 2004, appellant requested reconsideration of the hearing representative's decision. He argued that Dr. Grindel made a five percent impairment rating due to pain and that he had significant loss of strength. Appellant argued that Dr. Harvey S. Kohn, a Board-certified orthopedic surgeon, who treated him in regard to the right upper extremity impairment, found that he had a 10 percent permanent impairment after a similar surgery.

By decision dated June 23, 2004, the Office denied appellant's request for reconsideration, finding that he neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of the Federal Employees' Compensation Act[1] and section 10.304 of the implementing federal regulation,[2] schedule awards are payable for the permanent impairment of specified bodily 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 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 A.M.A., *Guides,* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses. As of February 1, 2001, the fifth edition of the A.M.A., *Guides* was to be used to calculate schedule awards.[3]

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.304.

[3] FECA *Bulletin*, No. 01-05 (issued January 29, 2001).

The Office's procedure manual provides that the Office should advise any physician evaluating permanent impairment to use the A.M.A., *Guides* and to report findings in accordance with those guidelines. The procedure manual notes that some objective and subjective impairments, such as pain, atrophy, loss of sensation and scarring, cannot easily be measured by the A.M.A., *Guides*, but that the effects of any such factors should be explicitly considered along with measurable impairments and correlated as closely as possible with factors set forth in the A.M.A., *Guides*.[4]

Board precedent is well settled, however, that when an attending physician's report gives an estimate of permanent impairment but does not indicate that the estimate is based upon the application of the A.M.A., *Guides*, the Office is correct to follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.[5] Board cases are clear that if the attending physician does not utilize the A.M.A., *Guides*, the opinion is of diminished probative value in establishing the degree of any permanent impairment.[6]

ANALYSIS -- ISSUE 1

In the instant case, Dr. Grindel provided physical examination results which described appellant's permanent impairment. He found a mild decrease in strength secondary to discomfort and some pain with aggressive use, but no atrophy, ankylosis, loss of motion or sensory changes which could be rated. Dr. Grindel opined that appellant had a five percent permanent impairment which he stated was in accordance with the A.M.A., *Guides.* However, the physician did not identify which table or figure he applied or discuss how he calculated the degree of impairment. As Dr. Grindel's report lacks specific information regarding how he applied the A.M.A., *Guides* to find a five percent impairment, his impairment estimate is of diminished probative value as it is not rationalized.

Dr. Garelick, an Office medical adviser, reviewed the report of Dr. Grindel and he properly applied the A.M.A., *Guides* to determine appellant's left upper extremity impairment. Dr. Garelick identified the musculocutaneous nerve for which Table 16-15 provides a maximum sensory deficit for pain of five percent. He then graded the pain under Table 16-10 as Grade 4, which allows a range of 1 to 25 percent for distorted superficial tactile sensibility. Dr. Garelick applied the 25 percent grade to the 5 percent maximum to conclude there was impairment of one percent. He noted that appellant had no objective indices of left upper extremity impairment and only complained of subjective symptomatology consisting of pain with use. Dr. Garelick also noted that Dr. Grindel had found some weakness secondary to pain, but that it was still impairment due to pain and not mechanical loss of strength. He thoroughly explained how he applied the A.M.A., *Guides.* Dr. Garelick identified the nerves involved and cited to the tables referenced. The Board finds that his report constitutes the weight of the medical evidence

[4] Federal (FECA) Procedure Manual, Chapter 2.808, para. 5(c) (August 1985).

[5] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

[6] *See Thomas P. Gauthier*, 34 ECAB 1060 (1983); *Raymond Montanez*, 31 ECAB 1475 (1980).

opinion in this case, particularly since there is no other rationalized medical evidence of record identifying any greater impairment of appellant's left upper extremity.[7]

As there is no other rationalized medical evidence in the record which supports that appellant had a greater left upper extremity impairment than that determined by Dr. Garelick, his report remains the weight of the medical evidence opinion and establishes that appellant has no greater than a one percent permanent impairment of his left upper extremity.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting 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. Evidence or argument 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 does not constitute a basis for reopening a case.[9]

ANALYSIS -- ISSUE 2

In this case, with his request for reconsideration of the hearing representative's denial of any greater schedule award, appellant failed to submit any new or probative factual or medical evidence. The only basis for his reconsideration request was his argument that Dr. Grindel had given him a 5 percent permanent impairment due to pain and loss of strength, and that the estimate was closer to the 10 percent awarded for his right upper extremity. The hearing representative had considered this argument in the review of the written record and discounted it. An argument that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.

Therefore, appellant did not meet the requirements of 20 C.F.R. § 10.606(b) and accordingly, his request to reopen his case for further reconsideration on its merits must be denied in accordance with Title 20 C.F.R. § 10.608(b).

[7] *See James R. Bradford*, 48 ECAB 320 (1997).

[8] *Helen E. Paglinawan*, 51 ECAB 591 (2000).

[9] *Kevin M. Fatzer*, 51 ECAB 407 (2000).

CONCLUSION

Appellant has no greater than a one percent permanent impairment of his left upper extremity, for which he has received a schedule award. The Board finds that the Office properly refused to reopen appellant's case for a further review on its merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 23 and May 24, 2004 and December 12, 2003 are hereby affirmed.

Issued: December 23, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member