

**United States Department of Labor
Employees' Compensation Appeals Board**

ROLAND MALDANADO, Appellant)	
)	
and)	Docket No. 04-656
)	Issued: July 15, 2004
U.S. POSTAL SERVICE, POST OFFICE,)	
Phoenix, AZ, Employer)	
)	

Appearances:
Roland Maldonado, *pro se*
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On January 12, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated November 25, 2003 denying reconsideration of a September 22, 2003 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue and the denial of merit review issue.

ISSUES

The issues are: (1) whether appellant is entitled to a schedule award for greater than a 30 percent impairment to the left upper extremity and a 25 percent for the right upper extremity; and (2) whether the Office properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 11, 1998 appellant, then a 54-year-old letter carrier, filed a traumatic injury claim following a motor vehicle accident in the performance of his federal duties. In a

November 18, 1998 letter, the Office accepted appellant's claim for back and cervical strains. In 1999 appellant underwent left shoulder surgery for a posterior Bankert lesion and repair of the labrum. In 2000 he underwent left shoulder capsular release due to severe degenerative changes to the glenohumeral joint. On August 8, 2000 appellant underwent surgery for his right shoulder with additional surgical procedure performed in 2001 for repair of a torn rotator cuff and subacromial decompression.

On January 21, 2003 the Office expanded the claim to include bilateral adhesive capsulitis and osteoarthritis of the shoulder region. Appellant requested a schedule award and submitted a January 29, 2003 report from Dr. Theodore Hofstedt, Board-certified in orthopedic surgery, who stated that range of motion of appellant's right shoulder revealed elevation to 90 degrees, extension to 30 degrees, abduction 75 degrees, internal rotation 45 degrees, external rotation 80 degrees and adduction at 45 degrees. Regarding the left shoulder, he reported elevation at 60 degrees, extension 30 degrees, abduction 60 degrees, internal rotation at 10 degrees, external rotation at 20 degrees and adduction at 20 degrees. Dr. Hofstedt also noted that bilaterally appellant had a positive impingement sign, supraspinatus sign, external rotation sign and equivocal Speed and O'Brien sign. He stated that he could not find appellant's right shoulder condition stationary until he could perform a magnetic resonance imaging (MRI) scan.

In an April 15, 2003 report, Dr. Hofstedt stated that the MRI scan of appellant's right shoulder revealed a likely rotator cuff tear, but appellant declined surgery. Dr. Hofstedt stated that on examination he found positive impingement sign, supraspinatus sign, external rotation sign and equivocal Speed and O'Brien sign. He added that appellant's extension was to 15 degrees, elevation to 75 degrees, adduction to 10 degrees, abduction to 50 degrees, internal rotation 10 degrees and external rotation at 50 degrees. Dr. Hofstedt found appellant's right shoulder stable and with a 22 percent impairment of the right upper extremity and a 23 percent impairment for the left upper extremity for a whole person impairment rating of 26 percent.

The Office referred appellant's medical records to Dr. Ellen Pichey, a district medical adviser. In a May 27, 2003 report, she applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) and found that appellant had a 22 percent impairment due to loss of range of motion for the left shoulder. She based her findings on an eight percent for loss of flexion, one percent loss of extension (Figure 16-40, page 476) loss of abduction, six percent and loss of adduction, one percent (Figure 16-43, page 477); loss of internal rotation, five percent, and loss of external rotation, one percent (Figure 16-46, page 479). Dr. Pichey added that appellant's impairment rating for loss of strength and due to sensory deficit or pain was a Grade 3; meaning a 50 percent impairment based on Tables 16-10 and 16-11, pages 482 and 484. She found a sensory impairment based on suprascapular nerve to be 20 percent, per Table 16-15, page 492. Dr. Pichey multiplied 50 percent impairment times 20 percent to find a 10 percent impairment for sensory and strength deficits. Using the Combined Values Chart, page 604, the total impairment of the left upper extremity equaled 30 percent with March 15, 2001 as the date of maximum improvement.

In an August 31, 2003 report, Dr. Pichey stated that appellant had a 23 percent impairment for loss of range of motion for the right shoulder. She noted a seven percent loss of flexion, a two percent loss of extension, (Figure 16-40, page 476); a six percent loss of abduction

and a one percent loss of adduction (Figure 16-43, page 477); a six percent loss of internal rotation,¹ a one percent loss of external rotation (Figure 16-46, page 479). She added that appellant's impairment due to sensory deficit or pad was a Grade 3, for a 60 percent impairment (Table 16-10, page 482). She stated that appellant's maximum impairment based on axillary nerve was 5 percent (Table 16-15, page 492) and noted that 60 percent times 5 percent equaled 3 percent. Using the Combined Values Chart on page 604, the total impairment for the right upper extremity equaled 25 percent with a date of maximum medical improvement of April 15, 2003.

In a September 22, 2003 decision, the Office granted appellant schedule awards based on a 30 percent left upper extremity impairment and a 25 percent right upper extremity impairment. The Office determined that appellant was entitled to 171.6 weeks of compensation commencing April 15, 2003.

In a November 12, 2003 letter, appellant requested reconsideration and argued that the Office made its decision on incomplete medical evidence. He stated that he would send supporting documentation. In a November 25, 2003 decision, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,³ including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.⁴

The schedule award provision of the Act⁵ and its implementing regulation⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to 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 regulation as the appropriate standard for evaluating schedule losses.⁷

¹ The Board notes that the A.M.A., *Guides* provide a five percent loss of internal rotation.

² 5 U.S.C. §§ 8101-8193.

³ *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

⁷ *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

ANALYSIS -- ISSUE 1

In the present case, the Office medical adviser properly applied the A.M.A., *Guides* to the impairment values provided by Dr. Hofstedt in a January 29, 2003 report. Regarding appellant's left shoulder, Dr. Pichey correctly found that a 60 degree elevation equates to 8 percent arm impairment, and 30 degrees of extension equates to 1 percent impairment. (Figure 16-40 page 476). The medical adviser also found that 60 degrees of abduction equates to 6 percent impairment and 20 degrees of adduction represents a 1 percent arm impairment (Figure 16-43, page 477) 10 degrees internal rotation represents a 5 percent impairment and 20 degrees of external rotation represents a 1 percent impairment, (Figure 16-46, page 479) for a total impairment due to loss of range of motion of 22 percent. She then applied Tables 16-10, 11 (pages 482, 4) to Dr. Hofstedt's finding of positive impingement, and external rotation sign to find a Grade 3, or 50 percent impairment, and Table 16-15 (page 492) to appellant's positive supraspinatus sign to find a 20 percent impairment based on the suprascapular nerve. Next, Dr. Pichey multiplied the 50 percent by 20 percent to find a 10 percent impairment based on combined motor and sensory deficits. Finally, the medical adviser used the Combined Values Chart on page 604 to correctly determine that appellant had a total of 30 percent impairment to his left shoulder.

Regarding appellant's right shoulder, the Office medical adviser used Dr. Hofstedt's April 15, 2003 report and determined that 75 degrees flexion equates to a 7 percent arm impairment and 15 degrees of extension equates to a 2 percent arm impairment, (Figure 16-40 page 476); that 50 degrees of abduction equates to a 6 percent impairment and 10 degrees of adduction represents a 1 percent impairment (Figure 16-43, page 477) and 10 degrees internal rotation represents a 6 percent impairment and 50 degrees of external rotation represents a 1 percent impairment (Figure 16-46, page 479) for a total impairment due to loss of range of motion of 23 percent. She then used Table 16-10, (page 482) to find a Grade 3, or 60 percent maximum impairment, due to sensory deficit, following which she used Table 16-15 (page 492) to determine appellant's maximum impairment based on the axillary nerve was 5 percent. Next, the medical adviser correctly multiplied the 60 percent by 5 percent to find a 3 percent impairment. Finally she used the Combined Values Chart on page 604 to correctly determine that appellant's total impairment for his right upper extremity was 25 percent impairment.

The Act provides a maximum of 312 weeks of compensation for permanent impairment to the arm.⁸ A 30 percent impairment to the left arm results in 93.6 weeks of compensation; a 25 percent impairment to the right arm results in 78 weeks, for a total of 171.6 weeks of compensation.

⁸ 5 U.S.C. § 8107(c)(2).

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁹ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.¹⁰ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹¹ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹²

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹³ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴ While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹⁵

ANALYSIS -- ISSUE 2

In his request for reconsideration, appellant argued that the Office relied on incomplete medical evidence and that he would send supporting documentation. However, the medical evidence received by the Office consisted of an MRI of the right shoulder that does not provide any relevant evidence as to the extent of permanent impairment. As appellant did not submit new, relevant evidence, advance a new legal argument or show the Office erroneously applied or interpreted a point of law, the Board finds that the Office did not abuse its discretion in denying his request for reconsideration.¹⁶

⁹ 5 U.S.C. § 8101 *et seq.* Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. §§ 10.606(b)(2).

¹¹ 20 C.F.R. § 10.607(a).

¹² *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

¹³ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁴ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁵ *John F. Critz*, 44 ECAB 788, 794 (1993).

¹⁶ Appellant submitted additional evidence after the Office's last decision of November 25, 2003. However, the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c). Appellant may wish to resubmit such evidence to the Office through the reconsideration process. *See* 5 U.S.C. § 8128; 20 C.F.R. § 10.138.

CONCLUSION

Appellant has not met his burden of proof to establish that he is entitled to a schedule award for a partial permanent impairment greater than 30 percent for the left arm and 25 percent for the right arm. The Board also finds that the Office properly denied appellant a merit review of its September 22, 2003 decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions by the Office of Workers' Compensation Programs dated November 25 and September 22, 2003 are affirmed.

Issued: July 15, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member