United States Department of Labor
Employees' Compensation Appeals Board

MAXIMIANA MEDINA, Appellant	)	
and	)	**Docket No. 04-1925**
	)	**Issued: January 24, 2005**
DEPARTMENT OF JUSTICE, U.S. MARSHALL SERVICE, Southern District, FL, Employer	)	

Appearances:
Maximiana Medina, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 30, 2004 appellant filed a timely appeal of the June 23, 2004 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration. He also timely appealed an Office hearing representative's April 30, 2004 merit decision denying his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the schedule award issue.[1]

ISSUES

The issues are: (1) whether appellant established entitlement to a schedule award for permanent impairment of his left upper extremity; and (2) whether the Office properly denied appellant's request for a review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] The record on appeal includes evidence that was received by the Office after the issuance of its most recent decision dated June 23, 2004. The Board may not review such evidence as it's review is limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On November 5, 2001 appellant, a 42-year-old deputy U.S. Marshall, filed a traumatic injury claim for an injury he sustained after being assaulted while in the performance of his duties on November 1, 2001. He obtained immediate medical attention following the November 1, 2001 incident and underwent left wrist surgery. On June 24, 2002 the Office accepted the claim for a left ulnar fracture. On December 26, 2002 appellant returned to light-duty work and on March 6, 2003 was released for regular duties without any restrictions.

On September 7, 2002 appellant filed a claim for a schedule award. The claim was accompanied by medical reports dated September 25, 2002 and March 6, 2003 from Dr. Gary B. Schwartz, an attending Board-certified orthopedic surgeon. In a September 25, 2002 report, he noted the history of injury, reported his examination findings and diagnosed status post left ulnar styloid fracture and Dupuytren's nodule without any contractures. In a March 6, 2003 report, Dr. Schwartz noted that no new symptoms were reported and that appellant's intermittent discomfort in the left wrist remained the same since his last examination on September 25, 2002. Left wrist dorsiflexion was 70 degrees, palmar flexion was 60 degrees, radial deviation was 30 degrees and ulnar deviation was 45 degrees. All fingertips came to within the distal palmar crease. No tenderness was noted along the distal radial ulnar joint. Grip strength, right compared to the left, was 60/15 pounds, 120/35 pounds, 120/50 pounds, 115/30 pounds and 90/20 pounds. Appellant was released to full-time work without restrictions.

On April 24, 2003 the Office referred the record to an Office medical adviser. In an April 24, 2003 report, the Office medical adviser reviewed the notes of Dr. Schwartz and stated that the date of maximum medical improvement was November 1, 2002. The Office medical adviser then applied the physical examination findings to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and determined that appellant did not have a permanent impairment. Based on Figure 16-28, page 467, an extension of 70 degrees and a palmar flexion of 60 degrees yielded a 0 percent impairment. Based on Figure 16-32, page 471, radial deviation of 30 degrees and ulnar deviation of 45 degrees also yielded a 0 percent impairment. He further stated that more than a 20 percent variation existed in the grip strength measurements, which were not valid under section 16-8b, page 508.

By decision dated May 8, 2003, the Office found that appellant did not have a ratable impairment due to his accepted work condition and thus, was not entitled to a schedule award.

On May 16, 2003 appellant requested an oral hearing before an Office representative, which was held on February 25, 2004. By decision dated April 30, 2004, the Office hearing representative affirmed the May 8, 2003 decision that appellant had not established a permanent impairment related to his accepted work injury.

In a May 10, 2004 letter, appellant requested reconsideration of the April 30, 2004 decision. He advised that he had visited Dr. Schwartz so that a permanent impairment rating of his hand could be obtained.

By decision dated June 23, 2004, the Office denied appellant's request for reconsideration. The Office found that he letter neither raised substantive legal questions nor included new and relevant evidence; thus, the request was insufficient to warrant a merit review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the standard to be used for evaluating schedule losses.[4]

ANALYSIS -- ISSUE 1

Appellant failed to submit sufficient medical evidence to establish entitlement to a schedule award for his accepted left arm condition. As Dr. Schwartz's March 6, 2003 report did not include an impairment rating under the A.M.A, *Guides*, the Office properly referred the case record to an Office medical adviser for review.[5] Based on the A.M.A., *Guides* and Dr. Schwartz's findings, the Office medical adviser found that appellant did not have any ratable impairment. The Office medical adviser correctly applied the applicable tables of the A.M.A, *Guides* to Dr. Schwartz's range of motion findings to determine that none of the range of motion findings resulted in a ratable impairment. Therefore, no schedule award could be assessed based on the range of motion results.[6] Although Dr. Schwartz provided appellant's grip strength measurements, he failed to explain why the other methods in the A.M.A., *Guides* could not adequately address appellant's loss of strength.[7] The Office medical adviser noted that there was more than a 20 percent variance in demonstrated grip strength measurements and opined that these values were unreliable to determine an impairment rating for grip strength. As the Office medical adviser's calculation of appellant's impairment conforms to the A.M.A., *Guides*, his findings constitute the weight of the medical evidence. Accordingly, appellant has failed to provide any probative medical evidence that he has a ratable impairment of the left upper extremity under the A.M.A., *Guides*.

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[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Id.*

[5] *See Paul R. Evans, Jr.*, 44 ECAB 646 (1993).

[6] *See* Figures 16-28, 16-32, pages 467, 471 A.M.A., *Guides* (5th ed.).

[7] According to section 16.8 of the A.M.A., *Guides*, impairment due to loss of grip strength is only to be determined in a rare case when loss of strength cannot be considered adequately by other methods in the A.M.A., *Guides*. A.M.A., *Guides*, (5th ed. 2001) at 507.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[8] Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[9]

ANALYSIS -- ISSUE 2

Appellant's May 10, 2004 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[10]

With respect to the third requirement, that the information submitted constitute relevant and pertinent new evidence not previously considered by the Office, appellant did not submit any evidence with his reconsideration request. Although he referenced Dr. Schwartz's examination, the Board notes that the Office reviewed all of Dr. Schwartz's reports of record. Consequently, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[11]

Appellant is not entitled to a review of the merits of his claim pursuant to the three requirements under section 10.606(b)(2). The Board finds that the Office properly denied his May 10, 2004 request for reconsideration.

CONCLUSION

The Board finds that appellant failed to establish that he is entitled to a schedule award. The Board further finds that the Office properly denied appellant's May 10, 2004 request for reconsideration.

[8] 20 C.F.R. § 10.606(b)(2) (1999).

[9] 20 C.F.R. § 10.608(b) (1999).

[10] 20 C.F.R. §§ 10.608(b)(2)(i) and (ii) (1999).

[11] 20 C.F.R. § 10.608(b)(2)(iii) (1999).

ORDER

IT IS HEREBY ORDERED THAT the June 23 and April 30, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 24, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member