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

| | | |
|---|---|---|
| **MARC N. ROSSKOPF, Appellant** | ) | |
| **and** | ) | **Docket No. 05-853** |
| | ) | **Issued: March 7, 2006** |
| **U.S. POSTAL SERVICE, MAIN POST OFFICE, Baltimore, MD, Employer** | ) | |

*Appearances:*
*Joel E. Segal, Esq.,* for the appellant
*Jim C. Gordon Jr., Esq.,* for the Director

Oral Argument February 1, 2006

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On February 25, 2005 appellant filed a timely appeal of the November 15, 2004 merit decision of the Office of Workers' Compensation Programs, which denied an additional schedule award. Appellant also timely appealed the January 25, 2005 decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim for a schedule award.[1]

### ***ISSUES***

The issues are: (1) whether appellant is entitled to an additional schedule award for permanent impairment of his right 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] Appellant's counsel submitted additional evidence on appeal. The Board may not consider evidence that was not before the Office at the time it rendered its final decision. 20 C.F.R. § 501.2. Appellant may submit such evidence to the Office with a request for reconsideration. *See* 20 C.F.R. §§ 10.605-.607 (1999).

## ***FACTUAL HISTORY***

Appellant, a 49-year-old retired mail handler, has an accepted traumatic injury claim for mid-back strain, right shoulder strain and right shoulder arthritis, which arose on August 2, 1985. On August 24, 1988 the Office granted a schedule award for 10 percent impairment of the right arm. The award was based on the February 29, 1988 report of Dr. Louis S. Halikman, a Board-certified orthopedic surgeon. Appellant subsequently underwent right shoulder distal clavicle resections on March 21, 1989 and September 26, 1991.

On March 21, 2001 appellant filed a claim for an additional schedule award.[2] He submitted an April 4, 2001 report from Dr. Halikman, who found 30 percent impairment of the right shoulder. On November 13, 2002 appellant's counsel requested reconsideration and submitted another report from Dr. Halikman.[3] In a decision dated January 27, 2003, the Office found the November 13, 2002 request for reconsideration to be untimely and consequently denied further merit review. Appellant filed an appeal with the Board. In response, the Office requested that the case be remanded for further development of the claim for an additional schedule award rather than a request for reconsideration. By order dated June 17, 2004, the Board granted the Office's motion to remand.[4]

The Office wrote to Dr. Halikman on August 18, 2004 and asked that he examine appellant and provide an impairment rating utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). The Office noted that Dr. Halikman's report should "show how [he] arrived at the figure using applicable tables in the [A.M.A.,] *Guides.*" The Office received an August 30, 2004 report from Dr. Halikman, who found 35 percent impairment of the right shoulder. On physical examination, he noted elevation (abduction) of 120 degrees, adduction of 10 degrees, forward flexion of 120 degrees and extension of 50 degrees. Dr. Halikman stated that, while appellant had fairly good range of motion, all motions were accompanied by pain. He also noted the presence of "significant crepitance" from the acromioclavicular resection and some weakness in the right arm.

An Office medical adviser reviewed Dr. Halikman's findings in a report dated October 17, 2004. He found that appellant had eight percent impairment of the right upper extremity, basing the impairment rating on the right shoulder range of motion measurements obtained by Dr. Halikman.

By decision dated November 15, 2004, the Office denied appellant's claim for an additional schedule award.

---

[2] On at least two prior occasions, appellant sought an increased schedule award. However, in decisions dated March 14, 1996 and January 5, 2000, the Office found that appellant had not established a permanent impairment in excess of the previous award for 10 percent impairment of the right arm.

[3] In an October 25, 2002 report, Dr. Halikman reiterated that appellant had 30 percent impairment of the right shoulder.

[4] Docket No. 03-1012.

On December 9, 2004 appellant's counsel requested reconsideration. Counsel also stated in his request that "I am submitting additional medical information in the form of a report from Louis S. Halikman, M.D. that explains his finding of 35 [percent] for permanency."

In a decision dated January 25, 2005, the Office denied appellant's request for reconsideration.

## ***LEGAL PRECEDENT -- ISSUE 1***

A claim for an increased schedule award may be based on new employment exposure; however, additional occupational exposure is not a prerequisite.[5] Absent additional employment exposure, an increased schedule award may also be based on evidence demonstrating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.[6]

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[7] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[8] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[9]

## ***ANALYSIS -- ISSUE 1***

The medical evidence of record does not establish that appellant has greater than 10 percent impairment of the right upper extremity. Dr. Halikman, appellant's treating physician, provided several reports in which he listed 30 percent permanent impairment of the right shoulder and later 35 percent impairment. However, Dr. Halikman's April 4, 2001, October 5, 2002 and August 30, 2004 reports do not adequately explain the basis for the stated impairment ratings. Notwithstanding the Office's August 18, 2004 instructions, Dr. Halikman's August 30, 2004 impairment rating of 35 percent does not address the A.M.A., *Guides* (5th ed. 2001). The Office was very clear in its instructions that Dr. Halikman "show how [he] arrived at the figure using applicable tables in the [A.M.A.,] *Guides.*" The Office medical adviser reviewed Dr. Halikman's reports and could only find justification for an eight percent

[5] A claim for an increased schedule award based on additional exposure constitutes a new claim. *Paul Fierstein*, 51 ECAB 381, 385 (2000).

[6] *Linda T. Brown*, 51 ECAB 115 (1999).

[7] The Act provides that, for a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks compensation. 5 U.S.C. § 8107(c)(1).

[8] 20 C.F.R. § 10.404 (1999).

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003); FECA Bulletin No. 01-05 (January 29, 2001).

impairment rating based on loss of range of motion in the shoulder.[10] To the extent that Dr. Halikman's 35 percent impairment rating included components for pain and/or muscle weakness, the doctor did not provide support for the additional impairment with specific reference to the applicable tables of the A.M.A., *Guides*. The Board finds that Dr. Halikman's recent reports are of diminished probative value because he did not provide the basis for his impairment rating or reference specific tables in the A.M.A., *Guides* (5th ed. 2001).[11] Accordingly, the Office properly denied appellant's claim for an additional schedule award.

## ***LEGAL PRECEDENT -- ISSUE 2***

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits.[12] 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: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[13] 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.[14]

## ***ANALYSIS -- ISSUE 2***

Appellant's December 9, 2004 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant 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).[15]

Appellant also failed to satisfy the third requirement under section 10.606(b)(2). At oral argument appellant's counsel indicated that his December 9, 2004 request for reconsideration was accompanied by a November 26, 2004 report from Dr. Halikman. Counsel for the Director, responded that no such report was included in the record or considered by the Office in rendering its January 25, 2005 decision.[16] Under certain circumstances appellant's counsel might benefit

[10] Figures 16-40, 16-43, A.M.A., *Guides* 476, 477.

[11] *Mary L. Henninger*, 52 ECAB 408, 409 (2001).

[12] 5 U.S.C. § 8128(a).

[13] 20 C.F.R. § 10.606(b)(2) (1999).

[14] 20 C.F.R. § 10.608(b) (1999).

[15] 20 C.F.R. § 10.606(b)(2)(i) and (ii) (1999).

[16] Under cover letter dated February 21, 2005, appellant's counsel provided the Board a copy of Dr. Halikman's November 26, 2004 report. As this evidence was not part of the record the Office forwarded to the Board, Dr. Halikman's November 26, 2004 report is not properly before the Board. 20 C.F.R. § 501.2.

from the mailbox rule, which presumes that an item mailed in the ordinary course of business was received by the intended recipient.[17] In this case, however, the December 9, 2004 request for reconsideration does not identify any enclosures nor does it specifically reference a November 26, 2004 report from Dr. Halikman. Moreover, counsel did not state in his letter that he had submitted new evidence to the Office. The relevant portion of the letter reads: "Please be advised that I am submitting additional medical information…." Thus, there is insufficient evidence to invoke the mailbox rule in appellant's favor.[18] Because the Office did not receive any new or relevant evidence, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[19]

As appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Office properly denied the December 9, 2004 request for reconsideration.

## ***CONCLUSION***

The Board finds that appellant is not entitled to an additional schedule award for permanent impairment of the right upper extremity. The Board also finds that the Office properly denied appellant's December 9, 2004 request for reconsideration.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the January 25, 2005 and November 15, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 7, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[17] *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

[18] *Id.*; *Joan Martin*, 51 ECAB 131, 132 (1999).

[19] 20 C.F.R. § 10.606(b)(2)(iii) (1999).