

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARNELL J. EDMONDSON and U.S. POSTAL SERVICE,
POST OFFICE, West Sacramento, CA

*Docket No. 03-1256; Submitted on the Record;
Issued October 24, 2003*

DECISION and ORDER

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

The issues are: (1) whether appellant met his burden of proof to establish that he sustained consequential left shoulder and low back injuries, causally related to his accepted right foot conditions; (2) whether the Office of Workers' Compensation Programs properly determined that appellant's wage-earning capacity was represented by the position of word processing machine operator; (3) whether appellant has more than a 21 percent permanent impairment of his right foot, for which he has received a schedule award; and (4) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

In the present case, the Office accepted that on October 31, 1986 appellant, then a 32-year-old custodian, sustained a fractured right fifth toe, with aggravation of preexisting service-related right foot symptomatology,¹ causally related to his federal employment. Appellant worked intermittent light duty until June 9, 1987 and was separated from the employing establishment in 1988. Appellant was vocationally rehabilitated as a word processing technician with the State of California in April 1989, but stopped work in June 1989 to undergo additional foot surgery.

On July 13, 1990 appellant was granted a schedule award for a 21 percent permanent impairment of his right foot. The decision was affirmed by an Office hearing representative in a decision dated February 22, 1991.

In March 1991, vocational rehabilitation efforts resumed and appellant received retraining and vocational counseling until June 1994, when efforts were again interrupted for appellant to undergo foot surgery.

¹ Appellant underwent multiple surgeries for bunions and hammertoes related to his military service.

In November 1999, appellant was again placed in vocational rehabilitation. The potential positions of word processing machine operator and clerk typist were identified by the vocational rehabilitation counselor, in accordance with appellant's physical ability, training and experience. On February 22, 2000 appellant underwent a functional capacity evaluation (FCE) recommended by Dr. Robert C. Kent, his treating osteopath. Based on the FCE results in a report dated February 29, 2000, Dr. Kent stated that appellant could perform the duties of a word processing machine operator. He did not specify the number of hours appellant could perform these duties, in a prior report dated January 11, 2000, Dr. Kent indicated that appellant could work four hours a day, with restrictions.

In March 2000, after receiving authorization from the Office, appellant began treatment with a new attending physician, Dr. James W. Brodsky, a Board-certified orthopedic surgeon. In a narrative report dated August 7, 2000, Dr. Brodsky reviewed the job descriptions provided by the vocational counselor and stated that appellant could perform the duties of a clerk typist or word processor. In an accompanying work capacity evaluation form, OWCP-5, Dr. Brodsky indicated that appellant could work 8 hours a day, with restrictions on walking or standing for more than 1 to 2 hours, squatting, kneeling or climbing for more than 1 hour and lifting more than 10 pounds.

On October 16, 2000 appellant filed a claim for traumatic injury, Form CA-1, alleging that he sustained injuries to his left shoulder and lower back while taking part in the February 22, 2000 functional capacity evaluation.²

In a medical report dated October 16, 2000, Dr. Brodsky revised his earlier assessment and stated that appellant could only work four hours a day.

On December 5, 2000 vocational rehabilitation efforts were closed.

On December 22, 2000 the Office referred appellant, together with a statement of accepted facts, a list of questions to be answered and the relevant medical evidence of record, to Drs. Farooq I. Selod and Charles E. Graham, both Board-certified orthopedic surgeons, for second opinion evaluations. In a report dated January 17, 2001, Dr. Selod evaluated appellant's accepted right foot conditions and opined that appellant's disability was being caused by his second, third and fourth toes, not his accepted fifth toe condition and that while appellant could not perform his date-of-injury job as a custodian, or other work requiring closed toe shoes, he could work as a word processor or clerk typist eight hours a day. In a report dated February 22, 2001, Dr. Graham, who evaluated appellant with respect to his consequential injury claims, opined that appellant's claimed back condition was actually preexisting and that appellant had no back condition or left shoulder condition causally related to the February 22, 2000 functional capacity evaluation. Dr. Graham concluded that appellant could work eight hours a day in a sedentary position. In a report dated May 1, 2001, Dr. Brodsky, appellant's treating physician, concurred with Drs. Selod and Graham that appellant could perform sedentary duties, eight hours a day, with certain restrictions on standing and lifting.

² In a decision dated January 10, 2001, the Office denied appellant's claim for a consequential injury. By order dated October 29, 2001, the Board vacated the Office's decision and remanded this case to be doubled with appellant's prior accepted claim for a right foot injury and for readjudication.

On June 12, 2001 the Office advised appellant that it proposed to reduce his compensation based on his capacity to earn wages in the constructed position of word processing machine operator. The Office also advised appellant that the medical evidence of record did not support his claim for consequential low back and left shoulder injuries. By decision dated July 16, 2001, the Office determined that appellant's wage-earning capacity was represented by the selected position of word processing machine operator and reduced appellant's compensation accordingly. The Office also finalized its prior denial of appellant's claim for consequential low back and left shoulder injuries.

In a separate decision dated July 13, 2001 and finalized July 16, 2001, the Office denied appellant's claim for an increased schedule award.

Appellant requested an oral hearing on the issues of his wage-earning capacity, the denial of increased schedule award and the denial of his claim for consequential injuries and submitted additional evidence in support of his claim. In a decision dated September 19, 2002, an Office hearing representative affirmed the Office's prior decision with respect to the finding that appellant is capable of earning wages as a word processing machine operator, the denial of appellant's claim for a consequential low back and left shoulder injuries and the denial of appellant's claim for an increased schedule award. The Office hearing representative further found that the Office correctly applied the principles of the *Alfred C. Shadrick*³ formula and that the Office used the correct comparative pay rate based on appellant's date-of-injury grade and step. The Office hearing representative further found, however, that the Office had erred in its calculation of appellant's wage-earning capacity by using the date-of-injury compensation pay rate, rather than the applicable date of recurrence pay rate. The hearing representative noted that use of the recurrent pay rate would entitle appellant to higher compensation for lost wage-earning capacity. Finally, the Office hearing representative found that the Office had also erred in applying the wage-earning capacity determination to the period beginning July 15, 2001, when the Office did not issue its decision until July 16, 2001. Therefore, the Office hearing representative ordered the Office to recalculate appellant's wage-earning capacity using the recurrent pay rate and to issue a retroactive adjustment to reflect appellant's July 15, 2001 entitlement to total disability compensation and subsequent entitlement to lost wage-earning capacity based on his recurrent pay rate.

On February 11, 2003 appellant requested reconsideration of the Office's decision. In a decision dated March 11, 2003, the Office denied appellant's request on the grounds that he neither raised substantive legal questions nor included new and relevant evidence. The instant appeal follows.

The Board finds that appellant failed to meet his burden of proof to establish that he sustained consequential low back and left shoulder injuries during a February 22, 2000 functional capacity evaluation of his accepted conditions.

³ The formula for determining loss of wage-earning capacity based on actual earnings developed in the *Shadrick* decision, 5 ECAB 376 (1953), has been codified at 20 C.F.R. § 10.403.

In the case of *John R. Knox*,⁴ regarding consequential injury, the Board stated:

“It is an accepted principal of workers’ compensation law and the Board has so recognized that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee’s own intentional conduct. As is noted by Professor Larson in his treatise: ‘[O]nce the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.... [S]o long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable [under] the circumstances. A different question is presented, of course, when the triggering activity is itself rash in the light of claimant’s knowledge of his condition.’”⁵

Neither the functional capacity evaluation report itself nor the contemporaneous medical opinions supports a finding that appellant sustained low back or left shoulder injuries during the February 22, 2000 evaluation. The February 22, 2000 FCE report itself contains notations that appellant generally complained of foot, increased low back and right shoulder pain throughout the examination, but does not contain any reports of left shoulder pain. In a report dated February 29, 2000, shortly after the FCE, Dr. Kent stated that a review of the FCE report indicated that appellant could perform the duties of a word processing machine operator. Dr. Kent did not mention any additional injuries incurred during the evaluation. In a report dated March 29, 2000, Dr. Brodsky noted that, although appellant complained of backache and joint pain, his primary complaint was of right foot pain. Dr. Brodsky did not mention any injuries appellant might have sustained during the FCE. In his follow-up report dated August 7, 2000, in which he stated that appellant could work eight hours a day as a word processing machine operator, Dr. Brodsky does not mention any back or shoulder conditions. In a report dated May 10, 2000, Dr. Daragh Heitzman, appellant’s treating Board-certified neurologist, noted appellant’s complaints of low back pain and ordered magnetic resonance imaging (MRI) scan and electromyography. An MRI scan performed on June 23, 2000 revealed a tiny central protrusion at L5-S1, which indents the epidural fat and noted that the adjacent central canal was normal in appearance. In his report dated July 12, 2000, Dr. Heitzman diagnosed bilateral foot pain, etiology unclear and chronic low back pain, but did not discuss either the history or the cause of appellant’s back condition. Finally, in a report dated September 18, 2000, Dr. Annette Bamberger-Perkins, a treating orthopedic surgeon, diagnosed intractable right foot pain and chronic low back pain with lumbar disc disease at L5-S1, but Dr. Bamberger-Perkins did not discuss the cause of this low back condition.

With respect to appellant’s claimed left shoulder condition, the first report of any left shoulder complaints occurs in Dr. Heitzman’s report dated September 13, 2000, approximately

⁴ *John R. Fox*, 42 ECAB 193 (1990).

⁵ *Id.* at 196.

seven months after the FCE, in which Dr. Heitzman noted that appellant stated that he had experienced some left shoulder pain over the last three weeks. Dr. Heitzman did not offer a diagnosis with respect to the shoulder and did not discuss the history or cause of this complaint. X-rays of appellant's left shoulder taken on September 19, 2000 were normal. MRI scan of the left shoulder performed on May 7, 2001, however, revealed diffuse post-traumatic tendinopathy with evidence for a full thickness rotator cuff tear in the distal supraspinatus tendon, as well as evidence for minimal effacement of the musculotendinous junction of the supraspinatus tendon due to a low-lying acromium process. This report did not contain any opinion as to the history or cause of the diagnosed condition, other than to note that appellant's pain reportedly increased over a several week period. The record also contains medical reports dated July 12, August 3 and September 6, 2001 and February 8, 2002 from Dr. Jay D. Pond, an orthopedic surgeon, from whom appellant sought treatment for his left shoulder. In these reports, Dr. Pond consistently noted his diagnosis of left shoulder rotator cuff tear, but did not discuss the cause of this condition, other than to note that appellant had reported that the first onset of left shoulder pain occurred during the February 22, 2000 functional capacity evaluation. The Board notes that this history conflicts with the history taken by Dr. Heitzman, that appellant experienced left shoulder pain approximately three weeks prior to Dr. Heitzman's September 13, 2000 report.

In contrast, Dr. Graham, the Office referral physician, discussed appellant's back and shoulder complaints in detail, noting that appellant had a history of preexisting low back problems related to his military service and further noting that x-rays of appellant's left shoulder on September 19, 2000 were normal. Dr. Graham reviewed the functional capacity evaluation report, during which appellant asserted he was injured and stated that the FCE shows an inconsistent effort characterized by the lack of elevation of appellant's heart rate during the static and dynamic lift. Dr. Graham stated that this indicated that appellant did not put forth his best effort and supported a conclusion that appellant had not sustained either left shoulder or low back injuries during the examination.

The Board notes that of all the physicians who commented on appellant's low back and left shoulder conditions, none offered a rationalized opinion explaining its relationship to appellant's February 22, 2000 functional capacity evaluation. In addition, the FCE report itself contains only general notations of appellant's complaints of low back and right shoulder, not left shoulder, pain and appellant did not report any specific low back or left shoulder complaints to his treating physicians until May 10 and September 13, 2000, respectively. Finally, the Office referral physician, who fully examined appellant and reviewed all of the medical evidence of record, opined that appellant had not sustained either a low back or a left shoulder injury during the February 22, 2000 FCE, as alleged. Appellant, therefore, has not established a causal relationship that would show that his low back or left shoulder conditions were consequences of the employment injury. Rather, the medical evidence supports a finding that appellant's back condition was preexisting and causally related to appellant's military service and appellant's left shoulder condition arose subsequent to his accepted employment injury.

The Board further finds that the wage-earning capacity determination in this case was proper.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a

subsequent reduction in such benefits.⁶ Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, appellant's wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, appellant's age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances, which may affect appellant's wage-earning capacity in his disabled condition.⁷

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity, specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.⁸ Finally, application of the principles set forth in *Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁹

The initial question presented is whether the selected position of word processing machine operator was determined with due regard to the nature of appellant's employment injury and the degree of physical impairment. The Office selected the position of word processing machine operator¹⁰ as a position within appellant's work limitations. The DOT describes the position as a sedentary position, requiring occasional lifting of up to 10 pounds, as well as continuous fingering, frequent reaching and handling, occasional stooping and crouching, but no climbing, balancing, kneeling or crawling.¹¹

In the present case, the Office largely relied on work restriction evaluations from Drs. Selod and Graham, the Office referral physicians and Dr. Brodsky, appellant's treating physician. In his narrative report dated January 17, 2001, Dr. Selod, who evaluated appellant's right foot conditions, specifically opined that while appellant could not wear a closed toe shoe due to his accepted right foot condition, he could perform the job of a word processor as described in the DOT. In an accompanying work capacity evaluation form, OWCP-5, Dr. Selod specified that within an 8-hour workday, appellant was restricted from standing and reaching for

⁶ *Carla Letcher*, 46 ECAB 452 (1995).

⁷ *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

⁸ *See Dennis D. Owen*, 44 ECAB 475 (1993).

⁹ 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

¹⁰ The DOT No. 203.382-030. (4th ed. revised 1991).

¹¹ The DOT defines occasional activities as existing up to one third of the time. Frequent activities are defined as occurring one third to two thirds of the time and continuous activities are those which exist two thirds or more of the time.

more than 2 hours and from pulling, pushing or lifting more than 30 pounds for more than 2 hours. In his reports dated February 20 and 22, 2001, Dr. Graham who evaluated appellant's left shoulder and low back conditions, also stated that appellant could perform sedentary work, 8 hours a day, with restrictions on walking, standing, reaching and twisting for more than 2 hours, performing repetitive movements of the wrists and elbows for more than 6 hours and pushing, pulling or lifting more than 10 pounds for more than 2 hours. Dr. Brodsky, appellant's treating physician, opined in reports dated April 16 and May 1 and 30, 2001 that appellant had reached maximum medical improvement, still complained of pain, but that there were little objective findings to support his complaints and could work eight hours a day in a sedentary position. Dr. Brodsky clarified that appellant must wear open-toed shoes at all times to accommodate his right foot conditions and within an 8-hour workday was restricted from walking and standing for more than 4 hours and from lifting more than 10 pounds for more than 4 hours a day. The Board further notes that, in a prior report dated August 7, 2001, Dr. Brodsky had reviewed and specifically approved the Office's selected word processing machine operator position.

While the record contains additional medical reports from Drs. Kent, Bamberger-Perkins and Pond, all of whom treated appellant at one time, none of these additional medical reports supports a finding that appellant cannot perform the selected position. While Dr. Kent opined that appellant can only work four hours a day, his most recent reports of record predate those of Dr. Brodsky, who assumed appellant's care in approximately March 2000. In her most recent treatment note of record, dated August 15, 2001, Dr. Bamberger-Perkins specifically stated that appellant is able to work and do keyboarding. Finally, in his most recent report of record, dated February 8, 2002, the only report in which he offered an opinion regarding appellant's ability to work, Dr. Pond noted that he had been following appellant for his left shoulder complaints and listed his diagnoses as left rotator cuff tear and left cubital tunnel syndrome with ulnar nerve entrapment. Dr. Pond opined that "these [two] conditions make it quite difficult for [appellant] to use his left upper extremity for any type of meaningful activities. He reports to me that he has significant pain with attempting to work on computer or any type of overhead activities." While Dr. Pond's comments regarding appellant's ability to use his left upper extremity might impact appellant's ability to perform the duties of a word processing machine operator, as noted above, the medical evidence of record establishes that appellant's left shoulder condition arose subsequent to, but not as a consequence of, his accepted right foot condition. The Office is not required to consider medical conditions arising subsequent to the work-related injury or disease in determining whether a position constitutes an employee's wage-earning capacity.¹² Therefore, the Office properly found that the weight of the relevant medical evidence of record, represented by the opinions of the Office referral physicians, Drs. Graham and Selod, and appellant's treating physician, Dr. Brodsky, supports a finding that appellant has the physical capacity to perform the duties of a word processing machine operator.

The Board further finds that the evidence of record establishes that appellant is capable by virtue of his educational background and mental capacity to perform the duties of a word processing machine operator, the job selected by the Office to represent his wage-earning capacity.

¹² *Dorothy Jett*, 52 ECAB 246 (2001).

The job description of a word processing machine operator, as set forth in the DOT, states that the employee operates word processing equipment to compile, type, revise, combine, edit, print and store documents and specifically notes that variations in the means, by which tasks are accomplished result from the brand of computer, printer, other word processing equipment and software used.¹³ While the job obviously involves typing, no specific typing speed is specified in the description. In addition, the job description specifies that three to six months of specific vocational preparation is required.

The record contains a copies of appellant's resumes, on which he indicated that he studied microcomputer operations from 1987 to 1988, earning a diploma from the Educational and Business Microcomputer Institute in June 1988 and participated in vocational training, including windows based word processing applications, from 1992 to 1994, earning a certificate as an information processing specialist from DeKalb Technical Institute in March 1994. In addition, from 1981 to 1983, appellant worked as a data telecommunication center operator for the U.S. Army, worked as a clerk typist in 1985 for the Department of Housing and Urban Development, worked as a word processing technician for the Water Resources Control Board from 1989 to 1990 and had an internship as a technical information specialist in 1995 at the Centers for Disease Control. Finally, appellant indicated that he possessed excellent communication skills, typed 50 words per minute and was experienced in Wordperfect 5.1, Lotus 1-2-3, machine transcription and Microsoft (MS) Office 97. At the hearing, appellant asserted that he was unable to type 60 words a minute due to his left shoulder condition and that this speed would be necessary in order for him to obtain employment in the selected field. Appellant also stated that his training was outdated, having taken place in 1989 when computer systems used DOS, that now all computer systems use a windows environment and that he does not know anything about current software. In support of his position, appellant submitted a letter dated April 15, 2002 from Sharon Casseday, office administration coordinator for Tarrant County College, indicating that appellant's training was out of date and that he had enrolled in office administration courses in order to obtain the required software knowledge and skills using modern office technological methods, computer skills and MS Windows and MS Office software.

The Board finds, however, that appellant's testimony and the letter from Ms. Casseday are contradicted by appellant's own resume, on which he indicated that he received his last formal training in 1994, not 1989 and further indicated that he already has experience in Microsoft Office 97. Furthermore, the DOT does not specify a required typing speed for the position of word processing machine operator and further does not specify the specific software with which an employee must be proficient. The Board also notes that the vocational rehabilitation specialist submitted a labor market survey dated August 28, 2000, which indicated that all potential employers contacted in appellant's Dallas-Fort Worth commuting area indicated that appellant's qualifications were sufficient, even if he only typed 30 words per minute and that he should apply for the position. In addition, appellant's rehabilitation counselor found that the job of word processing machine operator was available in numbers sufficient to make it appropriate for appellant by consulting publications prepared by the Bureau of Labor Statistics

¹³ The DOT No. 203.382-030. (4th ed. revised 1991).

and the Texas Workforce Commission.¹⁴ Therefore, the evidence establishes that the Office properly selected the job of word processing machine operator in determining appellant's wage-earning capacity.

With respect to the actual calculation of appellant's wage-earning capacity, appellant asserted that the Office improperly calculated his wage-earning capacity. The vocational rehabilitation counselor determined, based on information published by the Bureau of Labor Statistics for the Dallas-Fort Worth area, that word processing machine operators earned, on average, \$456.00 a week. Appellant asserted that the average starting salary in his commuting area was no more than \$21,000.00 per year, approximately \$403.85 a week. In support of his assertion, appellant submitted printouts from the bureau of labor statistics website indicating that the mean annual earning for word processors and typists in 2000 was \$24,710.00 and the mean annual earning for data entry keyers was \$21,300.00. The Board notes, however, that this information pertains to the nation as a whole and not to appellant's commuting area. In addition, appellant submitted printouts from www.salaryexpert.com showing word processing machine operator salary ranges of \$20,606.00 to \$29,811.00 per year in the Fort Worth area, with an average annual salary of \$25,822.00 or \$496.58 a week and \$20,017.00 to \$31,853.00 per year in the Dallas area, with an average annual salary of \$27,590.00 or \$530.58 a week. As these figures reflect average weekly wages actually higher than that determined by the vocational rehabilitation counselor, it is unclear how they support appellant's contention. In addition, they do not support a finding that the Office erred in relying on the expert report prepared by the vocational rehabilitation counselor.

Appellant also contends that in applying the *Shadrick* formula, the Office should have used a current pay rate based upon his promotion potential had he continued to work as a custodian for the employing establishment, rather than using the current salary for a level 2, step A, custodian, appellant's grade and step on the date of injury. It is well established, however, that the *Shadrick* formula is based on a comparison between actual earnings and the current earnings of an employee in the date-of-injury position. Factors such as subsequent promotions are not considered; the only appropriate method of applying *Shadrick* is to use the date-of-injury position, updated to reflect the current earnings of an employee in that position.¹⁵

Finally, the Board finds that the Office hearing representative properly found that the Office should have computed appellant's wage-earning capacity using the pay rate at the time of appellant's recurrence as the pay rate for workers' compensation purposes. Under the *Shadrick* formula, the Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's actual earnings by the current pay rate. The employee's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes, defined in 20 C.F.R. § 10.5(s) as the pay rate at the time of injury, the time disability begins, or the time disability recurs if the recurrence is more than six months after returning to full time work, whichever is greater, by the percentage of wage-earning capacity. (Emphasis added). The resulting dollar amount is then subtracted from the pay rate for compensation

¹⁴ See *James R. Verhine*, 47 ECAB 460 (1996).

¹⁵ See *Francis J. Carter*, 53 ECAB ____ (Docket No. 00-1789, issued April 11, 2002).

purposes to obtain loss of wage-earning capacity.¹⁶ Therefore, the Office hearing representative properly modified the Office's decision to reflect appellant's recurrent pay rate. In addition, the Office hearing representative properly determined that as the Office's wage-earning capacity decision was finalized July 16, 2001, appellant is entitled to wage-loss compensation for totally disability through July 15, 2001.

The Board further finds that appellant has no more than a 21 percent permanent impairment of his right foot, for which he received a schedule award.

Under section 8107 of the Act¹⁷ and section 10.404 of the implementing federal regulations,¹⁸ schedule awards are payable for permanent impairment of specified body 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 under the law 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment*¹⁹ (hereinafter A.M.A., *Guides*) has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.²⁰ Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is utilized to calculate any awards.²¹

As noted above, in a decision dated July 13, 1990, the Office granted appellant a schedule award for a 21 percent impairment of his right foot. The decision was affirmed by an Office hearing representative, in a decision dated February 22, 1991. In support of his claim for an increased schedule award, appellant submitted a report dated May 14, 2001 from Dr. Brodsky, who opined that appellant had reached maximum medical improvement and that pursuant to the fifth edition of the A.M.A., *Guides*, he had a four percent impairment of his right foot. Dr. Brodsky based his conclusions on the fact that appellant had excellent range of motion of the ankle and hindfoot, without significant hindfoot ankylosis or ankle or hindfoot deformity, but did have ankylosis of the second, third and fourth toes in a position of function. Dr. Brodsky stated that pursuant to Table 17-30, on page 545 of the fifth edition of the A.M.A., *Guides*, this degree of ankylosis equated to a four percent impairment of the foot. Dr. Brodsky concluded that no other objective bases for impairment were found.

On June 19, 2001 an Office medical adviser reviewed Dr. Brodsky's evaluation and concurred with his findings that appellant had a four percent permanent impairment of his right

¹⁶ *Alfred C. Shadrick*, *supra* note 9; 20 C.F.R. § 10.403(e).

¹⁷ 5 U.S.C. § 8107.

¹⁸ 20 C.F.R. § 10.404 (1999).

¹⁹ A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

²⁰ See *Joseph Lawrence, Jr.*, *supra* note 19; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

²¹ FECA Bulletin No. 01-05 (issued January 29, 2001).

foot due to toe ankylosis, as set forth in Table 17-30 on page 543 of the fifth edition of the A.M.A., *Guides*.

The Board finds that as both appellant's treating physician and the Office medical adviser found that appellant has only a four percent permanent impairment of his right foot due to his accepted condition, which is less than the 21 percent previously received, he is not entitled to an additional schedule award. Therefore, the Office properly determined that appellant was not entitled to more than a 21 percent permanent impairment of the right foot.

Finally, the Board finds that the Office did not abuse its discretion in denying appellant's request for review on March 11, 2003.

Section 10.606 of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.²² Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.²³ In support of his request for reconsideration, appellant submitted a letter dated February 11, 2003, in which he reiterated his previously expressed disagreements with the Office's consequential injury, wage-earning capacity and schedule award findings. In addition, appellant submitted numerous copies of documents previously contained in the record which, therefore, are duplicative. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.²⁴ As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

²² 20 C.F.R. § 10.606(b).

²³ See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

²⁴ See *James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

The decisions of the Office of Workers' Compensation Programs dated March 11, 2003 and September 19, 2002 are hereby affirmed.

Dated, Washington, DC
October 24, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member