United States Department of Labor
Employees' Compensation Appeals Board

FRANK E. MEREDITH, Appellant	)	
	)	**Docket No. 04-267**
and	)	**Issued: July 27, 2004**
DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, VA, Employer	)	

Appearances:
Frank E. Meredith, 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
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On September 8, 2003 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated November 7, 2002 and June 17, 2003 which denied appellant's claim for an additional schedule award for his upper extremity impairments. He also timely appealed the nonmerit decision dated July 23, 2003 which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these merit and nonmerit decisions.[1]

ISSUES

The issues on appeal are: (1) whether appellant has met his burden in establishing entitlement to an additional schedule award; and (2) whether the Office properly denied appellant a merit review of the prior decision on July 23, 2003.

[1] The record also contains a February 11, 2003 decision, wherein the Office denied appellant's November 18, 2002 request for reconsideration on the grounds that appellant neither raised substantive legal questions nor included new and relevant evidence with the request to warrant review.

FACTUAL HISTORY

On July 31, 1996 appellant, then a 40-year-old painter/worker, filed an occupational disease claim alleging that he sustained carpal tunnel syndrome beginning March 6, 1994, in the performance of his federal duties from 1980 through 1990.[2] The Office accepted the claim for bilateral carpal tunnel syndrome and authorized bilateral carpal tunnel releases and decompression of the median nerve of both wrists.

On March 24, 1998 the Office issued appellant a schedule award for 10 percent permanent impairment of both the right and left extremity. Appellant subsequently claimed a recurrence of his bilateral carpal tunnel syndrome symptoms which was accepted by the Office on November 2, 1999. Appellant requested reconsideration of the prior schedule award and on January 28, 2002 the Office issued appellant an additional 30 percent permanent impairment of both the right and left extremity.[3]

On February 26, 2002 appellant filed a Form CA-7 claim for an additional schedule award relying on a report from Dr. Lawrence Morales, a Board-certified orthopedic surgeon, which stated that a recent examination of appellant and review of records revealed a 41 percent permanent impairment of the left upper extremity and 24 percent permanent impairment of the right upper extremity. The record reflects that Dr. Morales had just previously sent appellant for electromyography (EMG) and nerve conduction studies (NCS) on the left upper extremity performed January 18, 2002 and those studies showed no evidence of any neuropathy or abnormality. EMG and NCS studies were later performed on the right upper extremity on May 23, 2002 which also showed no evidence of any neuropathy or abnormality.

The Office referred appellant to Dr. Edward Gold, a Board-certified orthopedic surgeon, for a second opinion on August 14, 2002. In his report, Dr. Gold discussed appellant's history of injury, medical record including test results and findings on examination. He indicated that some of appellant's problems could be attributed to carpal tunnel syndrome, however, he opined that appellant did not have a permanent partial disability that exceeded the 40 percent he had already been awarded. Dr. Gold noted that his calculations of impairment were based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] He then stated that the sensory loss of the median nerve at Grade 4 equated to a 15 percent impairment bilaterally according to Table 16-10 on page 482 and the motor function loss of the median nerve at Grade 4 also equated to a 15 percent impairment bilaterally according to Table 16-11 page 484. Dr. Gold concluded: "My estimate of his disability is 30 percent in the right and 30 percent in the left upper extremity."

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[2] Appellant resigned from his federal job in 1990 and did not incur the condition until four years later. He did not realize it was work related until May 1996.

[3] The Board notes that, although the January 28, 2002 schedule award decision of record indicates that appellant received an additional 20 percent impairment for each upper extremity, the record reflects that appellant actually received an additional 30 percent impairment based on an Office error. Consequently, the Office paid appellant a total of 40 percent for each upper extremity.

[4] A.M.A., *Guides* (5th ed. 2001).

The Office determined that a conflict of medical opinion existed between Dr. Morales and Dr. Gold and referred appellant to Dr. Jon Swenson, a Board-certified orthopedic surgeon, to resolve the conflict. In a report received October 23, 2003, Dr. Swenson provided a history of injury, his findings on physical examination and further noted that appellant had successful carpal tunnel surgical releases and decompression of the median nerve at both wrists. In the report Dr. Swenson stated that according to the A.M.A., *Guides*, appellant had a Grade 4 sensory deficit of 15 percent bilaterally based on Table 16-10 at page 482 and a motor deficit of 15 percent bilaterally based on Table 16-11 at page 484. He further noted that the maximum value for sensory deficit of the median nerve below the forearm would be 39 percent and the maximum value for motor deficit of the median nerve below the forearm would be 10 percent bilaterally, both based on Table 16-15 at page 492 respectively. He went on to state:

> "In order to achieve maximum upper extremity impairment for sensory deficit, one must multiply the 15 percent sensory deficit by 39 percent maximum upper extremity impairment due to median nerve disfunction (below the forearm). This equates to 6 percent upper extremity impairment due to sensory deficit. In order to achieve maximum upper extremity impairment for motor strength loss, one must multiply the 15 percent motor deficit by 10 percent maximum upper extremity impairment due to median nerve disfunction (below the forearm). This equates to 2 percent upper extremity impairment due to motor deficit. Using the Combined Values Chart on page 604, this equates to an overall loss of 8 percent of each upper extremity (6 percent sensory deficit + 2 percent motor deficit)."

Dr. Swenson then indicated that he agreed with Dr. Gold's assessment of sensory loss and probable loss of median nerve function however opined that the numbers derived from Tables 16-10 and 16-11 should have been multiplied by the relevant maximum upper extremity impairment values which would significantly decrease the total impairment rating for both extremities. Dr. Swenson additionally noted that carpal tunnel decompression had been obtained based on subsequent EMG/NCS studies done on January 18 and May 23, 2002 which revealed no evidence of carpal tunnel syndrome. He concluded that appellant had an eight percent permanent disability for each upper extremity.

Based on Dr. Swenson's October 23, 2003 medical report, in a decision dated November 7, 2002, the Office denied appellant's claim for an additional schedule award on the grounds that appellant had not established by the medical evidence submitted that he suffered from additional impairment to his upper extremities beyond the 40 percent previously paid.

In a letter dated November 18, 2002, appellant requested reconsideration. He requested that the Office review the reports from Drs. Morales and Gold, contained in the file. By decision dated February 11, 2003, the Office denied appellant's request on the grounds that appellant neither raised substantive legal questions nor included new and relevant evidence with the request to warrant review.

In a letter dated April 11, 2003, appellant again requested reconsideration. In support of the request, he submitted a March 10, 2003 magnetic resonance imaging (MRI) scan of the right and left wrist and February 27 and April 7, 2003 reports from Dr. Morales. The MRI scan of the left wrist scan showed focal lunate chondromalacia and small dorsal and volar radial ganglion

cysts. The MRI scan report of the right wrist also showed focal lunate chondromalacia. The April 7, 2003 report of Dr. Morales discussed appellant's complaints of aches and soreness in each wrist, some weakness in grip, pain with increased activity and weather changes and numbness and tingling. He reviewed the MRI scan findings and stated that the focal lunate chondromalacia was an additional finding and post-traumatic in nature. Dr. Morales concluded that appellant had deterioration of both wrists as manifested by the MRI scan. In his February 27, 2003 report, Dr. Morales provided a similar assessment of appellant's condition and stated: "It is somewhat strange to me that my disability rating and Dr. Gold's disability rating are somewhat similar but [the Office] has decided to accept the lower number."

By decision dated June 17, 2003, the Office reviewed the merits of the case and determined that the evidence submitted was insufficient to substantiate that he was entitled to an additional schedule award and that Dr. Swenson's report continued to carry the weight of the medical evidence.

In a letter dated June 30, 2003, appellant requested reconsideration and submitted an additional report from Dr. Morales dated June 25, 2003 and other evidence already of record. In the June 25, 2003 report, Dr. Morales outlined his calculations for rating appellant's impairment and indicated that he concurred with Dr. Gold in his August 14, 2002 report, that appellant had a total impairment of 30 percent for both the right and left upper extremity. Dr. Morales used a similar methodology to arrive at this conclusion. He indicated that based on the fifth edition of the A.M.A., *Guides*, sensory and motor function loss of the median nerve equated to a Grade 4 impairment and a bilateral 15 percent impairment respectively for a total of 30 percent in each arm according to Table 16-10 on page 482 and Table 16-11 on page 484.

By decision dated July 23, 2003, the Office declined a merit review on the grounds that the evidence submitted on reconsideration was cumulative and insufficient to warrant review. The Office found upon limited review that the report submitted from Dr. Morales dated June 25, 2003, did not overcome or add any new evidence to the record sufficient to warrant review of the prior schedule awards. The Office therefore found no evidence of record to support that appellant was entitled to an impairment award greater than that received.[5]

LEGAL PRECEDENT -- ISSUE 1

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.[6] 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 regulation have adopted the A.M.A.,

[5] The Board notes that the senior claims examiner in the July 23, 2002 decision indicated that appellant had been paid schedule awards totaling 30 percent for each upper extremity although the record establishes that appellant actually received 40 percent for each upper extremity in error. Because appellant actually received more than 30 percent and the evidence submitted by appellant indicates that he has no more than 30 percent impairment on both sides, the oversight made by the claims examiner does negatively affect appellant in this case.

[6] 5 U.S.C. § 8107.

Guides as the appropriate standard for evaluating schedule losses.[7] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[8]

ANALYSIS -- ISSUE 1

In this case, the Office determined that there was a conflict in the medical opinion evidence between Dr. Morales, appellant's attending physician and Dr. Gold, the Office referral physician, as to the degree of appellant's work-related permanent impairment to his right and left upper extremities. Section 8123(a) of the Act provides, in pertinent part, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[9] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[10]

The Board notes however that there was no conflict at the time of the referral. Dr. Morales merely concluded that appellant had a 41 percent impairment of the left arm and a 24 percent of the right arm without explanation, so his report had limited probative value. Further, Dr. Gold, the Office referral physician, incorrectly listed his calculations as he concluded appellant had a 30 percent impairment in each arm without applying Tables 16-11 and 16-15 conjunctively. Dr. Swenson, the specialist called upon to the resolve a conflict by the Office in this case properly explained Dr. Gold's error in his report and provided a proper calculation. He also detailed his own finding of impairment due to sensory deficit or pain and motor deficit of the median nerve below the forearm, explaining that utilizing Table 16-10 at page 482, the level of impairment for sensory deficit was Grade 4, which equated to 15 percent bilaterally. He then multiplied 15 percent sensory deficit by 39 percent, the maximum upper extremity impairment due to median nerve disfunction below the forearm which equated to 6 percent upper extremity impairment due to sensory deficit. Dr. Swenson further explained that utilizing Table 16-11 at page 484, the level of impairment for motor deficit was Grade 4, which also equated to 15 percent bilaterally. The physician then multiplied the 15 percent motor deficit by 10 percent maximum upper extremity impairment due to the same median nerve disfunction which equated to 2 percent upper extremity impairment due to motor deficit. Dr. Swenson then used the Combined Values Chart on page 604 and determined that appellant had an overall loss of 8 percent of each upper extremity. The Board finds that, while Dr. Swenson is not entitled to weight as an independent medical examiner, his report is the only report of record which properly determined impairment in accordance with the A.M.A., *Guides* and serves as the weight of the medical evidence in this case. Accordingly, appellant has failed to establish that he has

[7] 20 C.F.R. § 10.404 (1999).

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

[9] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB ___ (Docket No. 01-1599, issued June 26, 2002); *Rita Lusignan* (*Henry Lusignan*), 45 ECAB 207, 210 (1993).

[10] *See Roger Dingess*, 47 ECAB 123, 126 (1995); *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

more than a 40 percent permanent impairment of his left and right upper extremities already awarded.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[11] 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.[12]

ANALYSIS -- ISSUE 2

By letters received November 18, 2002 and June 30, 2003, appellant requested reconsideration of the prior decisions and by decisions dated February 11 and July 23, 2003, the Office denied appellant's requests. In the November 18, 2002 letter, appellant requested review of the November 7, 2002 denial of an additional schedule award and asked that the Office review the reports of Drs. Morales and Gold already of record. Appellant submitted no new evidence. The Board finds that appellant's November 18, 2002 letter neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered by the Office. Further, appellant's letter was not accompanied with relevant and pertinent new evidence not previously considered by the Office, thus, he was not entitled to a review of the merits of his claim pursuant to section 10.606(b)(2) with regard to his first request for reconsideration.

In the June 30, 2003 letter, appellant requested review of the June 17, 2003 denial and submitted mostly evidence already of record. Appellant also submitted a report from Dr. Morales dated June 25, 2003 which essentially noted that appellant had a total impairment of 30 percent for both the right and left upper extremity. While appellant did submit this additional report from Dr. Morales in support of his claim, the Board notes that this report is cumulative of evidence already of record and does not require reopening the claim because it contains an assessment which is similar to prior assessments such as the August 14, 2002 calculation of Dr. Gold and consequently it has similar faults. The Office properly concluded that the June 25, 2003 report from Dr. Morales did not overcome or add any new evidence sufficient to warrant a merit review of the prior impairment rating. Consequently, appellant was not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(2) with regard to his second request for reconsideration.

As appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit

[11] 20 C.F.R. § 10.606(b)(2) (1999).

[12] 20 C.F.R. § 10.608(b) (1999).

relevant and pertinent new evidence not previously considered by the Office or properly refused on both occasions to reopen appellant's claim for a review on the merits.

CONCLUSION

The Board finds that appellant failed to establish that he has more than a 40 percent permanent impairment of the left and right upper extremities. The Board further finds that the Office properly denied appellant a merit review on February 11 and July 23, 2003.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 23, June 17 and February 11, 2003 and November 7, 2002 are affirmed.

Issued: July 27, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member