

This is the second appeal in this case. In a February 3, 2008 decision, the Board set aside the Office's February 8, 2005 decision and remanded the case for further development regarding

the extent of the permanent impairment to appellant's upper extremities.<sup>1</sup> The Office had granted him a schedule award on February 8, 2005 for a six percent permanent impairment of his right arm and a two percent permanent impairment of his left arm.<sup>2</sup> The Board found that the medical opinion was incomplete concerning the validity of the range of motion testing that was performed in connection with the schedule award evaluation.<sup>3</sup> The facts and the circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.

On remand the Office referred appellant to Dr. Randy Pollet, a Board-certified orthopedic surgeon, for evaluation of the permanent impairment of his arms under the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001). On May 24, 2006 Dr. Pollet discussed appellant's medical history and stated that he had reached maximum medical improvement with respect to his arms. He indicated that appellant complained of mild pain in his arms. Dr. Pollet noted that appellant did not have pain associated with any particular nerve distribution and, therefore, had no impairment due to pain associated with nerve injury. He stated that examination revealed that appellant did not have any atrophy or weakness of his arms. Dr. Pollet reported the following findings for range of motion in each shoulder: 160 degrees of flexion, 30 degrees of extension, 120 degrees of abduction, 30 degrees of adduction, 40 degrees of internal rotation and 60 degrees of external rotation. He stated, "For the right shoulder, the patient has been using appropriate tables of five percent impairment and for the left shoulder five percent impairment. The patient's total impairment for the neck and shoulder were 10 percent using the [A.M.A., *Guides*] and the appropriate tables."

On June 23, 2003 Dr. Ronald H. Blum, a Board-certified orthopedic surgeon who served as an Office medical adviser, reviewed the medical evidence. He concluded that appellant had a nine percent permanent impairment of his right arm and a nine percent permanent impairment of his left arm. Dr. Blum indicated that based on the standards of the fifth edition of the A.M.A., *Guides* appellant had a nine percent impairment to each arm due to limited shoulder motion. In each arm, appellant had a one percent impairment due to 160 degrees of flexion, a one percent impairment due to 30 degrees of extension, a three percent impairment due to 120 degrees of abduction, a one percent impairment due to 30 degrees of adduction, a three percent impairment due to 40 degrees of internal rotation and a zero percent impairment due to 60 degrees of external rotation.<sup>4</sup> Dr. Blum then added the impairment ratings in each arm.

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<sup>1</sup> Docket No. 05-834 (issued February 3, 2006).

<sup>2</sup> The Office accepted that on February 8, 1985 appellant, then a 43-year-old painter, sustained multiple injuries when a plywood ceiling panel hit him in the left side of his face and nose and left eye. It accepted that he sustained impingement of both shoulders, cervical sprain, somatoform pain disorder and various facial conditions. The Office authorized surgical procedures, including rotator cuff debridement of the right and left shoulders in April and May 1994 and several procedures of his facial area between 1985 and 1990. Appellant was terminated from the employing establishment in September 1987.

<sup>3</sup> In September 28, 1993 and December 23, 2004 decisions, the Office denied appellant's claim for a schedule award for facial disfigurement. In its February 3, 2006 decision, the Board affirmed the Office's denial of appellant's claim for a schedule award for facial disfigurement. This matter is not currently before the Board.

<sup>4</sup> Dr. Blum actually inadvertently indicated that appellant had 30 degrees of external rotation.

In a June 30, 2006 decision, the Office granted appellant a schedule award for an additional three percent permanent impairment of his right arm and an additional seven percent permanent impairment of his left arm. The award ran for 31.2 weeks from July 9, 2006 to February 12, 2007 representing nine percent permanent impairment of both upper extremities.

Appellant requested a hearing before an Office hearing representative. At the April 5, 2007 hearing, he argued that the Office should not have evaluated his arm impairment under the standards of the fifth edition of the A.M.A., *Guides*. Appellant first filed a schedule award claim for arm impairment on July 22, 1987 and subsequent claims on September 14, 1988, March 5, 1991, March 23, 1992 and June 17, 2002. He asserted that the Office should have evaluated his arm impairment under the standards of the fourth edition of the A.M.A., *Guides*.<sup>5</sup>

In a May 31, 2007 decision, the Office hearing representative affirmed the June 30, 2006 decision. She found that Dr. Blum properly determined that appellant had a nine percent permanent impairment of his right arm and a nine percent permanent impairment of his left arm. The Office hearing representative stated that he properly applied the standards of the fifth edition of the A.M.A., *Guides* because the date of the impairment computation by the Office, June 23, 2006 in the present case, determined which edition of the A.M.A., *Guides* should be used.

In a June 14, 2007 letter, appellant requested reconsideration of the Office's May 31, 2007 decision. He again argued that the permanent impairment of his arms should have been evaluated under the fourth edition of the A.M.A., *Guides*. Appellant also took issue with several statements about his facial conditions that were made by the Office hearing representative and submitted medical documents dated between February 1986 and December 2006, regarding his facial conditions. Appellant also submitted Office claim forms he completed in July 1987 and May 1988, a December 1992 letter from the Office to an attending physician, and copies of September 22, 1992 and February 3, 2006 Board decisions.

In a June 27, 2007 decision, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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

The schedule award provision of the Federal Employees' Compensation Act<sup>6</sup> and its implementing regulation<sup>7</sup> 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

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<sup>5</sup> Appellant submitted a number of medical reports concerning the treatment of his facial conditions but none of the reports addressed the impairment of his arms.

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404 (1999).

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.<sup>8</sup>

The Office adopted the third edition of the A.M.A., *Guides* effective March 8, 1989; the revised third edition of the A.M.A., *Guides* effective September 1, 1991; the fourth edition effective November 1, 1993; and the fifth edition effective February 1, 2001.<sup>9</sup> According to Office procedure, awards calculated according to any previous edition of the A.M.A., *Guides* should be evaluated according to the edition originally used, and if an error in computation is found, the award should be recomputed using the original edition. However, if new evidence is received and a *de novo* decision is to be issued, the award should be calculated on the basis of the edition currently used. The date of computation by the Office, not the date of examination by the physician, determines which edition should be used.<sup>10</sup>

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

The Office accepted that on February 8, 1985 sustained impingement of both shoulders, cervical sprain, somatoform pain disorder and various facial conditions. It granted appellant schedule awards for a nine percent permanent impairment of his right arm and a nine percent permanent impairment of his left arm. The Office based its award on the June 23, 2006 calculation of Dr. Blum, a Board-certified orthopedic surgeon who served as an Office medical adviser. Dr. Blum derived his calculations from the May 2006 examination of Dr. Pollet, a Board-certified orthopedic surgeon who served as an Office referral physician.

As noted, the date of computation by the Office determines which edition of the A.M.A., *Guides* should be used for evaluating permanent impairment.<sup>11</sup> In the present case, the Office obtained additional medical evidence and the computation for appellant's arm impairment was conducted on June 23, 2006, a date after the effective date of the fifth edition of the A.M.A., *Guides*.<sup>12</sup> Therefore, Dr. Blum used the proper edition of the A.M.A., *Guides* to evaluate the extent of impairment.

The Board finds that Dr. Blum properly determined that appellant had the following impairments in each arm due to limited shoulder motion: a one percent impairment due to 160 degrees of shoulder flexion, a one percent impairment due to 30 degrees of extension, a three percent impairment due to 120 degrees of abduction, a one percent impairment due to 30 degrees of adduction and a three percent impairment due to 40 degrees of internal rotation and a zero

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<sup>8</sup> *Id.*

<sup>9</sup> FECA Bulletin No. 89-30 (issued September 29, 1989); FECA Bulletin No. 91-27 (issued September 18, 1991); FECA Bulletin No. 94-4 (issued November 1, 1993); FECA Transmittal No. 02-12 (issued August 30, 2002).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.8c (January 1999).

<sup>11</sup> See *supra* note 10 and accompanying text.

<sup>12</sup> See *supra* note 9 and accompanying text.

percent impairment in each arm due to 60 degrees of external rotation.<sup>13</sup> Dr. Blum properly added the impairment ratings in each arm to total a nine percent permanent impairment to both upper extremities.

Appellant has not submitted any evidence to establish that he has more than a nine percent permanent impairment of his right arm or more than a nine percent permanent impairment of his left arm. As the June 23, 2006 report of Dr. Blum provided the only evaluation that conformed with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.<sup>14</sup> The Office properly granted schedule awards for appellant's permanent impairment.

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>15</sup> the Office's regulations provide that the evidence or argument submitted by 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) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>16</sup> 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.<sup>17</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>18</sup> The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record<sup>19</sup> and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>20</sup>

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<sup>13</sup> See A.M.A., *Guides* 476-79, Figures 16-40, 16-43 and 16-46. Dr. Blum properly did not include ratings for sensory or strength loss as the findings of Dr. Pollet do not support such impairment. See A.M.A., *Guides* 479-95. The Board notes that, in his May 24, 2006 report, Dr. Pollet stated, "For the right shoulder, the patient has been using appropriate tables of five percent impairment and for the left shoulder five percent impairment. The patient's total impairment for the neck and shoulder were 10 percent using the [A.M.A., *Guides*] and the appropriate tables." However, Dr. Pollet did not provide any indication how this assessment was derived under the standards of the A.M.A., *Guides*.

<sup>14</sup> See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

<sup>15</sup> 5 U.S.C. §§ 8101-8193. 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).

<sup>16</sup> 20 C.F.R. § 10.606(b)(2).

<sup>17</sup> 20 C.F.R. § 10.607(a).

<sup>18</sup> 20 C.F.R. § 10.608(b).

<sup>19</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>20</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

## **ANALYSIS -- ISSUE 2**

In connection with his June 2007 reconsideration request, appellant argued that the permanent impairment of his arms should have been evaluated under the fourth edition of the A.M.A., *Guides*. This argument does not require reopening of his claim. It is repetitious of his contention before the Office, which was considered and rejected.<sup>21</sup> Appellant submitted several medical documents, dated between February 1986 and December 2006, regarding his facial conditions. This evidence does not require reopening of his claim because it is not relevant to the underlying issue of the present case, *i.e.*, the extent of permanent impairment to his upper extremities.<sup>22</sup> Appellant also submitted Office claim forms, a letter from the Office to an attending physician, and copies of Board decisions. However, these documents are not relevant to the medical issue of this case. Moreover, the documents submitted by appellant in connection with his reconsideration request were already in the record.

Appellant has not established that the Office improperly denied his request for further review of the merits of its May 31, 2007 decision under section 8128(a) of the Act, because the evidence and argument he submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

## **CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that he has more than a nine percent permanent impairment of his right arm or more than a nine percent permanent impairment of his left arm, for which he received schedule awards. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>21</sup> See *supra* note 19 and accompanying text.

<sup>22</sup> See *supra* note 20 and accompanying text.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' June 27 and May 31, 2007 decisions are affirmed.

Issued: November 6, 2008  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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