

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GEORGE R. OBERSKI and DEPARTMENT OF THE ARMY,  
DIRECTORATE OF PUBLIC WORKS, Fort Dix, NJ

*Docket No. 99-2279; Submitted on the Record;  
Issued November 7, 2000*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for reconsideration.

On March 17, 1995 appellant, then a 35-year-old maintenance mechanic, filed a claim for traumatic injury alleging that he broke his right wrist on March 11, 1995, while in the performance of duty. The Office accepted appellant's claim for fractures of the distal radius and carpus.

On April 18, 1997 appellant filed a claim for a schedule award.

In a medical report dated October 25, 1996, Dr. Ronald J. Potash, a Board-certified surgeon, stated that he had examined appellant's right wrist injury and reported the following: "Grip strength testing, performed via Jamar Hand Dynamometer, reveals 7 pounds of force strength in the right dominant hand versus 104 pounds of force strength in the left hand." He then rated appellant's percentage impairment based on loss of grip strength for the right upper extremity at 30 percent based on Tables 32 and 34 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993).<sup>1</sup> Based on the Combined Values Chart, he found that appellant had a 35 percent permanent impairment of the right upper extremity.<sup>2</sup>

On January 16, 1997 an Office medical adviser reviewed Dr. Potash's report and stated that it was unlikely that appellant's grip strength evaluations of right grip strength of 7 pounds and left of 104 pounds were valid in that the A.M.A., *Guides* note that "the average strength of a

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<sup>1</sup> A.M.A., *Guides* (4<sup>th</sup> ed. 1993), 65, Table 32 and Table 34.

<sup>2</sup> *Id.* at 322.

male, aged 40 to 49, would be 49 (dominant) and 47.3.”<sup>3</sup> He suggested a second opinion evaluation.

In a medical report dated February 17, 1997, Dr. Potash stated that he had conducted a second grip strength test on February 13, 1997, using a different Jamar Grip Tester and found that appellant’s average right hand grip strength was 8 pounds and his left hand was 165 pounds. He then noted results of a Dynatron examination also conducted on February 13, 1997, which revealed “weakness in the right hand grip as opposed to the nondominant left hand grip.”

In a medical report dated August 22, 1997, Dr. Irving P. Ratner, an Office referral physician Board-certified in orthopedic surgery, stated:

“[G]rip strength measured by Jamar apparatus is considered to be nonanatomic and deliberately guarded or falsified on the basis of the numbers obtained, based on appellant’s allegation that he was putting out a maximum effort. The actual numbers are included in the body of my hand-written report. On manual testing there was an overt effort to either deliberately minimize the grip strength or to guard the grip strength for enhancement of this examiner’s examination.”

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“[There is] subjective tenderness around the right wrist, without evidence of swelling or instability.... In comparison to the normal left side, there is a 5 degree loss of extension of the wrist and a 5 degree of loss of radial deviation. All other range of motion measurements are within normal limits. There is no evidence of neurologic deficit or involvement of the carpal tunnel or median nerve.”

Dr. Ratner obtained the following range of motion findings for appellant’s right wrist: 40 degrees radial deviation; 45 degrees ulnar deviation; 70 degrees dorsiflexion; 70 degrees palmar flexion; 85 degrees pronation; and 85 degrees supination. He calculated that appellant had “a five degree deficit in extension of his right wrist and a five degree deficit in radial deviation, the former calculated to be a two percent deficit of the upper extremity and the latter a one percent deficit, for a total of three percent deficit in the upper extremity.” Dr. Ratner also calculated a five degree deficit on the basis of slight/frequent pain, which he added to the three percent “for a total of an eight percent deficit for the total upper extremity.”

In a report dated September 3, 1997, the Office medical adviser noted that he had reviewed Dr. Ratner’s report and found that, in accordance with the A.M.A., *Guides*, wrist extension of 70 degrees equated to a 0 percent impairment<sup>4</sup> and wrist flexion of 70 degrees equated to a 0 percent impairment.<sup>5</sup> He further found that 40 degrees of radial deviation equated

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<sup>3</sup> *Id.* at 65, Table 32.

<sup>4</sup> *Id.* at 36, Table 26.

<sup>5</sup> *Id.*

to a 0 percent impairment<sup>6</sup> and that 45 degrees of ulnar deviation equated to a 0 percent impairment,<sup>7</sup> for a total impairment for range of motion of 0 percent. The Office medical adviser determined that appellant had no impairment to the right wrist.

By decision dated April 6, 1998, the Office denied appellant's claim for a schedule award on the grounds that the medical evidence failed to establish that his "claimed permanent impairment was severe enough to be considered ratable." The Office noted, however, that appellant was entitled to medical benefits for the effects of his March 26, 1999 work-related injury.

On February 8, 1999 appellant, through counsel, requested reconsideration contending there was a conflict in medical opinion. By nonmerit decision dated April 21, 1999, the Office denied appellant's request for reconsideration on the grounds that his February 8, 1999 letter did not raise a substantive legal questions or include new and relevant evidence.

The only decision before the Board on this appeal is the Office's April 21, 1999 decision denying appellant's application for a review of its April 6, 1998 decision. Because more than one year has elapsed between the issuance of the Office's April 6, 1998 merit decision and July 19, 1999, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the April 6, 1998 decision.<sup>8</sup>

The Board finds that the Office abused its discretion in denying appellant's request for reconsideration.

To require the Office to open a case for reconsideration, section 10.606 of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office, by setting forth arguments and containing 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.<sup>9</sup> Section 10.608 provides that any application for review of the merits of the claim which does not meet at least one of the three requirements will be denied by the Office without review of the merits of the claim.<sup>10</sup>

On reconsideration appellant's attorney argued that the medical evidence of record revealed a conflict of medical opinion between appellant's treating physician, Dr. Potash, who found a 35 percent impairment of the right upper extremity, and the Office referral physician,

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<sup>6</sup> *Id.* at 38, Table 29.

<sup>7</sup> *Id.*

<sup>8</sup> *See* 20 C.F.R. § 501.3(d)(2). The Board further notes that appellant's representative stated in the appeal that he was appealing only the Office's April 21, 1999 nonmerit decision.

<sup>9</sup> 20 C.F.R. § 10.606(b)(2).

<sup>10</sup> 20 C.F.R. § 608.

Dr. Ratner, who found an 8 percent impairment. The Board finds that appellant's counsel advanced a relevant legal argument not previously consideration by the Office. Therefore, the refusal of the Office to reopen appellant's claim for further consideration of the merits constituted an abuse of discretion. The Board finds that appellant has made a relevant legal argument pursuant to 20 C.F.R. § 10.606(b)(2) and will remand the case for review of the merits of his claim.

The decision of the Office of Workers' Compensation Programs dated April 6, 1998 is hereby set aside, and the case remanded to the Office for further development consistent with this decision and order.

Dated, Washington, DC  
November 7, 2000

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member