

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TERRY B. OWENS and DEPARTMENT OF THE NAVY,  
PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

*Docket No. 00-2538; Submitted on the Record;*  
*Issued June 22, 2000*

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DECISION and ORDER

Before BRADLEY T. KNOTT, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained more than a 10 percent impairment of his right upper extremity, for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's November 19, 1999 request for reconsideration.

The Office accepted that, on August 28, 1998, appellant, then a 44-year-old pipefitter, sustained a biceps tendon rupture at the right elbow while lifting heavy pipes. Dr. Peter T. Simonian, an attending Board-certified orthopedic surgeon of professorial rank, released appellant to light-duty "desk work" with no lifting on November 23, 1998.<sup>1</sup> He continued to submit progress notes through May 6, 1999 noting weakness in appellatn's right upper extremity.

In a June 26, 1999 report, Dr. Scott Van Linder, a Board-certified orthopedic surgeon and second opinion physician, provided a history of injury and treatment and reviewed the medical record. He noted that appellant's date-of-injury position as a pipefitter required "consistent lifting of up to 60 pounds, with consistent pulling and pushing for up to four hours at a time." On examination, Dr. Van Linder found a Grade 4 out of 5 weakness in the right upper extremity, without atrophy, loss of grip strength or restricted motion and "discomfort" with certain maneuvers. He opined that appellant was "totally disabled from work as a pipefitter based upon review of the job analysis and the forces required...." Dr. Van Linder concluded that appellant had a 15 percent permanent impairment of his right arm due to loss of strength, noting that he was "near" maximum medical improvement.

In a July 25, 1999 report, an Office medical adviser applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fourth edition (hereinafter, the

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<sup>1</sup> Appellant received physical therapy from November to December 1998 and vocational rehabilitation services from November 1998 to May 1999.

“A.M.A., *Guides*”) to Dr. Van Linder’s June 26, 1999 evaluation. The medical adviser opined that appellant had reached maximum medical improvement as of June 26, 1999. He noted that the biceps was enervated by nerves in the C5 and C6 distribution. The medical adviser estimated that “about one half” or 50 percent, “of the overall function is related to the biceps....” Referring to Table 14, page 52,<sup>2</sup> the medical adviser found that “the Erb/Duchenne type injury to C5-6 results in a 75 percent impairment of the upper extremity.” Multiplying the maximum 75 percent motor deficit by 50 percent, the medical adviser determined that “the impairment to the upper extremity due to loss of the biceps muscle would be no more than 37.5 percent.” Referring to Table 12, page 49,<sup>3</sup> the medical adviser opined that appellant had a 4/5 strength grade, denoting a “maximum of 25 percent motor impairment. Therefore, Grade 4/5 strength of the biceps muscle would result in no more than 9.375 percent impairment of the upper extremity,” the result of multiplying 37.5 percent by 25 percent, which was rounded up to 10 percent.<sup>4</sup> The medical adviser noted that the 15 percent impairment rating suggested by Dr. Van Linder was “excessive.”

In a September 9, 1999 letter and attached job description form, Dr. Simonian stated that appellant was permanently disabled from his job as a pipefitter.<sup>5</sup>

By decision dated November 4, 1999, the Office awarded appellant a schedule award for a 10 percent permanent impairment of his right upper extremity.<sup>6</sup>

Appellant requested reconsideration and asserted that the Office had not followed the A.M.A., *Guides*. Appellant also submitted a September 9, 1999 report from Dr. Simonian stating that appellant showed loss of strength in the right biceps and was “permanently disabled from work as a pipefitter.”

By decision dated January 14, 2000, the Office denied reconsideration on the grounds that the evidence submitted in support of appellant’s request was insufficient to warrant a review of its prior decision on the merits.

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<sup>2</sup> Table 14, page 52 is entitled “Maximum Upper Extremity Impairments Due to Unilateral Sensory or Motor Deficits of Brachial Plexus, or to *Combined* Deficits.” (Emphasis in original). Motor deficits of the “upper trunk” enervated by C5 and C6 are given a maximum rating of a 75 percent maximum impairment of the upper extremity.

<sup>3</sup> Table 12, page 49 is entitled “Determining Impairment of the Upper Extremity Due to Loss of Power and Motor Deficits Resulting from Peripheral Nerve Disorders Based on Individual Muscle Rating.” According to Table 12, a Grade 4 out of 5 denoted “[a]ctive movement against gravity with some resistance,” equaling a motor deficit of between 1 and 25 percent.

<sup>4</sup> The medical adviser noted that the “maximum rating of 18.75 percent impairment upper extremity would be allowed for loss of all C5-6 enervated muscles to a strength of 4/5 (.25 times .75 equals 18.75 percent).”

<sup>5</sup> In a September 9, 1999 form, Dr. Rolando P. Dulay, an employing establishment physician, permanently restricted appellant to lifting less than 30 pounds, minimal use of the right hand, minimal use of scaffolding and no work involving vertical ladders.

<sup>6</sup> The schedule award was equivalent to 31.20 weeks of compensation, with the period of the award running from June 26, 1999 to January 30, 2000.

The Board finds that appellant has not established that he sustained more than a 10 percent permanent impairment of the right upper extremity.

The schedule award provisions of the Federal Employees' Compensation Act<sup>7</sup> and its implementing regulations<sup>8</sup> set forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. However, the Act does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office.<sup>9</sup> The Board has held, however, that for consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitate the use of a single set of tables so that there may be uniform standards applicable to all claimants. The Office has adopted the A.M.A., *Guides* as an appropriate standard for evaluating schedule losses and to ensure equal justice for all claimants.<sup>10</sup> The Board has concurred with the adoption of these A.M.A., *Guides*.

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.<sup>11</sup> All factors that prevent a limb from functioning normally should be considered, such as pain and weakness, together with loss of motion, in evaluating the degree of permanent impairment.

In this case, the Office medical adviser correctly considered these factors in calculating the percentage of permanent impairment. In a July 25, 1999 report, the Office medical adviser reviewed the medical record, noted relevant findings regarding muscle weakness and provided a detailed explanation of how those findings were graded according to the A.M.A., *Guides*. The medical adviser first determined that the biceps was enervated by the C5 and C6 nerve distributions, that 50 percent of function was as attributable to the biceps and that a total motor deficit of the biceps resulted in a 75 percent impairment of the upper extremity. He then multiplied the 75 percent motor deficit by the 50 percent functional ratio to arrive at a 37.5 percent impairment.

Referring to the appropriate tables for evaluating upper extremity impairments, the Office medical adviser determined that the Grade 4/5 right biceps weakness observed by Dr. Van Linder, the second opinion physician, represented a 25 percent motor impairment. He then

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<sup>7</sup> 5 U.S.C. §§ 8107-8109.

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> *Daniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

<sup>10</sup> FECA Bulletin No. 89-30 (issued September 28, 1990).

<sup>11</sup> *William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

multiplied the 37.5 percent impairment by the 25 percent motor impairment, to arrive at 9.375 percent, which he rounded up to 10 percent.

Although Dr. Van Linder opined in his June 26, 1999 report that appellant had a 15 percent permanent impairment of the right upper extremity due to loss of strength, he did not refer to the A.M.A., *Guides* to support this percentage of impairment. Therefore, Dr. Van Linder's opinion is outweighed by that of the Office medical adviser, who provided a detailed calculation with correct reliance on the A.M.A., *Guides*. Also, Dr. Simonian, appellant's attending Board-certified orthopedic surgeon, opined that the loss of biceps strength demonstrated by computerized testing represented a significant loss of function, but did not specify a percentage of permanent impairment.

Consequently, appellant has not established that he sustained more than a 10 percent impairment of the right upper extremity.

The Board finds that the Office properly denied appellant's November 19, 1999 request for reconsideration.

Under section 8128(a) of the Act,<sup>12</sup> the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,<sup>13</sup> which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

“(i) Shows that OWCP erroneously applied or interpreted a point of law; or

“(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].”<sup>14</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>15</sup>

In support of his request for reconsideration, appellant submitted a September 9, 1999 report from Dr. Simonian stating that appellant had right biceps weakness and was “permanently disabled from work as a pipefitter. The Board finds that Dr. Simonian's report is repetitive of his September 9, 1999 letter and work restriction form finding appellant permanently disabled

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<sup>12</sup> 5 U.S.C. § 8128(a).

<sup>13</sup> 20 C.F.R. § 10.606(b) (1999).

<sup>14</sup> 20 C.F.R. § 10.138(b)(1).

<sup>15</sup> 20 C.F.R. § 10.608(b).

from work as a pipefitter, evidence already of record at the time of the November 4, 1999 decision. The Board has held that 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.<sup>16</sup>

In addition to being repetitive of evidence already of record, Dr. Simonian's September 9, 1999 report does not address the percentage of permanent impairment due to the accepted biceps tendon rupture, which was the critical issue in the case at the time of appellant's November 19, 1999 request for reconsideration. Therefore, the September 9, 1999 report is not relevant.

The January 14, 2000 and November 14, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.<sup>17</sup>

Dated, Washington, DC  
June 22, 2000

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member

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<sup>16</sup> *James A. England*, 47 ECAB 115 (1995).

<sup>17</sup> On appeal appellant submitted additional evidence. The Board's jurisdiction to review evidence is limited to that which was before the Office at the time of its final decision, in this case, the January 14, 2000 decision. *See* 20 C.F.R. § 501.2(c). Further, the Board finds that the Office's August 23, 2000 decision is null and void inasmuch as the Office and the Board may not have jurisdiction over the same issue in the same case simultaneously and appellant filed his appeal with the Board on July 25, 2000. *Russell E. Lerman*, 43 ECAB 770, 772(1992).