United States Department of Labor
Employees' Compensation Appeals Board

CLEVELAND C. BAKER, Appellant	)	
and	)	**Docket No. 04-1140**
	)	**Issued: August 20, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Bolton, NC, Employer	)	

Appearances:
Andrew Hanley, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 18, 2004 appellant filed a timely appeal of the December 16, 2003 decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration. Appellant also timely appealed the March 18, 2003 merit decision, that denied modification of the February 1, 2002 schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim for a schedule award.

ISSUES

The issues are: (1) whether appellant has greater than one percent impairment of his left upper extremity, for which he received a schedule award; and (2) whether the Office properly denied appellant's request for a review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 13, 1999 appellant, then a 58-year-old rural carrier, was involved in an employment-related motor vehicle accident (MVA). The Office accepted appellant's claim for severe hematoma of the right leg, lacerations to the low back, both legs, right arm, right shoulder

and loose bodies in the left elbow. Additionally, the Office authorized left elbow arthroscopy, which was performed by Dr. James D. Hundley on April 18, 2000.[1] The Office also authorized a January 10, 2001 lumbar laminectomy at L4-5. Appellant received appropriate wage-loss compensation and he returned to work in a part-time, limited-duty capacity on June 19, 2001. He resumed his full duties on July 30, 2001.

On August 19, 2001 appellant requested a schedule award for the injury sustained to his left elbow. The request was accompanied by a June 14, 2001 report from Dr. Hundley, who indicated that appellant had 10 percent impairment of the left arm.[2]

The Office medical adviser reviewed the record, including Dr. Hundley's June 14, 2001 examination findings and in a report dated January 24, 2002, determined that appellant had one percent impairment of the left upper extremity.

On February 1, 2002 the Office granted appellant a schedule award for one percent impairment of the left upper extremity. The award covered a period of 3.12 weeks.

On January 17, 2003 appellant requested reconsideration. The Office reviewed the schedule award claim on the merits and in a decision dated March 18, 2003, denied modification.

On September 24, 2003 appellant's counsel requested reconsideration. Counsel submitted, among other things, an undated report from Dr. Hundley, who indicated that he utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) in determining that appellant had 10 percent impairment of his left elbow. By decision dated December 16, 2003, the Office denied appellant's request for reconsideration.

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.[3] 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.,

[1] Dr. Hundley, a Board-certified orthopedic surgeon, performed an arthroscopic removal of loose bodies and debridement of the left elbow.

[2] Dr. Hundley provided a second report dated June 27, 2001, that referenced the June 14, 2001 ten percent impairment rating.

[3] The Act provides that for a total, or 100 percent loss of use of an arm, an employee shall receive 312 weeks compensation. 5 U.S.C. § 8107(c)(1).

Guides as the appropriate standard for evaluating schedule losses.[4] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[5]

ANALYSIS -- ISSUE 1

Appellant contends that he has 10 percent impairment of his left arm based on Dr. Hundley's June 14 and 27, 2001 reports. Dr. Hundley's reports, however, are insufficient to establish the extent of appellant's impairment because the doctor did not provide a rating in accordance with the A.M.A., *Guides*.[6] Dr. Hundley did not describe the basis for the 10 percent impairment rating nor did he reference specific tables in the A.M.A., *Guides.* Consequently, Dr. Hundley's June 14 and 27, 2001 reports are of limited probative value.[7]

The Office medical adviser reviewed Dr. Hundley's examination findings for June 14, 2001 and found that appellant had one percent impairment of the left upper extremity. He stated that appellant was still having pain in his elbow and that the elbow reportedly snaps and pops. Dr. Hundley also reported that appellant complained of pain deep in the elbow anteriorly, laterally and posteriorly. On physical examination he noted slight crepitus with motion and no visible atrophy about the elbow or forearm. Appellant was able to hyperextend his left elbow to 5 degrees and flex 140 degrees. Dr. Hundley also measured 90 degrees supination and 70 degrees pronation. The Office medical adviser correctly noted that appellant's 140 degrees of flexion and 5 degrees of extension (hyperextension) represented 0 impairment according to Figure 16-34, A.M.A., *Guides* 472. He also correctly noted that 90 degrees supination represented 0 impairment and 70 degrees pronation represented 1 percent impairment under Figure 16-37, A.M.A., *Guides* 474. Lastly, the Office medical adviser noted no atrophy based on Dr. Hundley's examination findings. Accordingly, the Office medical adviser found one percent impairment based on appellant's loss of range of motion in the left elbow. Inasmuch as the Office medical adviser's January 24, 2002 calculation conforms to the A.M.A., *Guides* (5th ed. 2001), his finding constitutes the weight of the medical evidence.[8] Appellant has not submitted any credible medical evidence indicating that he has greater than one percent impairment of the left upper extremity.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits.[9] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set

[4] 20 C.F.R. § 10.404 (1999).

[5] FECA Bulletin No. 01-05 (January 29, 2001); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

[6] *See* 20 C.F.R. § 10.333 (1999);

[7] *Mary L. Henninger,* 52 ECAB 408, 409 (2001).

[8] *See Bobby L. Jackson,* 40 ECAB 593, 601 (1989).

[9] 5 U.S.C. § 8128(a).

forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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.[10] 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.[11]

ANALYSIS -- ISSUE 2

Appellant's September 24, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[12]

With respect to the third requirement, that the information submitted constitute relevant and pertinent new evidence not previously considered by the Office, appellant submitted, among other things, Dr. Hundley's undated report indicating that he used the A.M.A., *Guides* (5th ed. 2001) to calculate appellant's 10 percent impairment of the left elbow. He further stated that the rating was due to loss of active motion, atrophy, decrease in strength and pain. Although Dr. Hundley mentioned the A.M.A., *Guides* and provided some additional information regarding the basis for his rating, this undated report continues to lack the specificity necessary to establish appellant's entitlement to a schedule award. The doctor's two earlier reports dated June 14 and 27, 2001, merely note that appellant has 10 percent impairment of the left arm. Dr. Hundley's latest submission, while containing some additional information, is nonetheless repetitious of his earlier reports. As such, the doctor's undated report is insufficient to warrant reopening the claim for merit review.[13]

Appellant's counsel also submitted a September 7, 2001 Form OWCP-5c from Dr. Neill H. Musselwhite, III, a family practitioner, who identified appellant's physical limitations due to his accepted employment injury. Counsel also submitted a December 6, 2002 report from Dr. Aaron R. Twigg, a Board-certified physiatrist, regarding appellant's back condition and lower extremity impairment. Counsel argues that this evidence is relevant because it demonstrates the severity of appellant's September 13, 1999 MVA and his continuing disability. Neither document provides pertinent information regarding the extent of appellant's permanent impairment of the left upper extremity. Therefore, this information is not relevant to the issue on reconsideration. Furthermore, this information was previously of record and

[10] 20 C.F.R. § 10.606(b)(2) (1999).

[11] 20 C.F.R. § 10.608(b) (1999).

[12] 20 C.F.R. §§ 10.608(b)(2)(i) and (ii) (1999).

[13] Evidence that 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 the claim. *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

considered by the Office in the March 18, 2003 merit decision. Inasmuch as appellant did not submit any relevant and pertinent new evidence, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[14]

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied the September 24, 2003 request for reconsideration.

CONCLUSION

The Board finds that appellant failed to establish that he has greater than one percent impairment of his left upper extremity. The Board further finds that the Office properly denied appellant's September 24, 2003 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 16 and March 18, 2003 are affirmed.

Issued: August 20, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] 20 C.F.R. § 10.608(b)(2)(iii) (1999).