

FACTUAL HISTORY

On August 20, 2003 appellant, then a 33-year-old clerk, filed a Form CA-2, occupational disease claim, alleging that factors of employment caused bilateral carpal tunnel syndrome (CTS). She did not stop work. In support of her claim, appellant submitted medical evidence including electromyography (EMG) dated April 2, 2003.¹ On October 15, 2003 the Office accepted that her bilateral CTS was employment related and she underwent right carpal tunnel release, performed by Dr. Johnny Mitias, Board-certified in orthopedic surgery, on November 10, 2003. Appellant returned to full duty on December 28, 2003. In a report dated January 15, 2004, Dr. Mitias stated that Tinel's and Phalen's signs at the wrist and elbow were negative and that appellant had some residual numbness on the right. He advised that she did not want surgery on the left, stated that she had a five percent impairment rating and discharged her from his care. On February 25, 2004 Dr. Mitias reported that maximum medical improvement had been reached on January 15, 2004 and on that day appellant filed a schedule award claim.

The Office forwarded the medical record to an Office medical adviser for review and in a March 4, 2004 report, the Office medical adviser indicated that maximum medical improvement was reached on January 15, 2004 and agreed with Dr. Mitias' impairment rating, noting that under scenario 2, found at page 495 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,² appellant was entitled to a five percent impairment of the right upper extremity.

By decision dated March 12, 2004, the Office granted appellant a schedule award for a five percent loss of use of the right upper extremity, for a total of 15.6 weeks, to run from January 15 to May 3, 2004. On May 11, 2004 she requested reconsideration asserting that she disagreed with the impairment rating because she continued to have problems with her right hand and resubmitted the April 2, 2003 EMG. In a decision dated May 19, 2004, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulation⁴ 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. The Act, however, 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

¹ The study was consistent with severe bilateral median neuropathy. The left and right ulnar motor nerve conduction study was reported to be normal.

² A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.404.

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.⁵

Regarding CTS, the A.M.A., *Guides* provides:

“If, after an *optimal recovery time* following surgical decompression, an individual continues to complain of pain, paresthesias and/or difficulties in performing certain activities, three possible scenarios can be present:

- (1) Positive clinical findings of median nerve dysfunction and electrical conduction delay(s): the impairment due to residual CTS is rated according to the sensory and/or motor deficits as described earlier.
- (2) Normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal EMG testing of the thenar muscles: a residual CTS is still present and an impairment rating not to exceed 5 percent of the upper extremity may be justified.
- (3) Normal sensibility (two-point discrimination and Semmes-Weinstein monofilament testing), opposition strength and nerve conduction studies: there is no objective basis for an impairment rating.”⁶

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained employment-related bilateral CTS and determined that, following decompressive surgery, she sustained a five percent impairment of the right upper extremity. Her attending orthopedist, Dr. Mitias, advised that she reached maximum medical improvement on January 15, 2004 and opined that she had a five percent right upper extremity impairment. Dr. Mitias, however, did not provide an explanation regarding how he reached this rating. To determine the percentage of impairment pursuant to the A.M.A., *Guides*, the Office referred the medical record to an Office medical adviser, who stated in a March 4, 2004 report, that he agreed with Dr. Mitias’ impairment rating and specifically advised that appellant’s right upper extremity impairment fit under the second scenario for evaluating CTS in the A.M.A., *Guides*. He concluded that appellant was entitled to a five percent impairment rating on the right.

As described above, the A.M.A., *Guides* provides three scenarios for interpreting CTS.⁷ Appellant’s findings on the right fall into the second scenario. The only physical finding noted by Dr. Mitias regarding her right upper extremity was some residual numbness. The second scenario for evaluating CTS provide that with normal sensibility and strength but abnormal sensory testing, a maximum five percent impairment rating, as awarded here, may be justified. While the record contains an April 20, 2003 EMG study that demonstrated abnormal median

⁵ Ronald R. Kraynak, 53 ECAB ___ (Docket No. 00-1541, issued October 2, 2001).

⁶ A.M.A., *Guides*, *supra* note 2 at 495.

⁷ *Id.*

neuropathy, the study's findings are of diminished probative value, as it was performed prior to appellant's right carpal tunnel release on November 10, 2003.⁸ The Board, therefore, finds that, as the Office medical adviser provided an explanation for his reasoning in applying the values found in the A.M.A., *Guides*, appellant had not established entitlement to greater than a five percent permanent impairment at the time the Office issued the March 12, 2004 schedule award. There are no medical reports, in conformance with the A.M.A., *Guides*, indicating a greater degree of impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 10.608(a) of the Code of Federal Regulation provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).⁹ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific 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.¹⁰ Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹¹

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record¹² or evidence which does not address the particular issue involved¹³ does not constitute a basis for reopening a case. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹⁴

⁸ The record does not indicate that nerve conduction studies were conducted following appellant's right carpal tunnel release.

⁹ 20 C.F.R. § 10.608(a).

¹⁰ 20 C.F.R. § 10.608(b)(1) and (2).

¹¹ 20 C.F.R. § 10.608(b).

¹² *James E. Norris*, 52 ECAB 93 (2000).

¹³ *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁴ *Robert P. Mitchell*, 52 ECAB 116 (2000).

ANALYSIS -- ISSUE 2

The Board initially notes that this is not a case where appellant is requesting an increased schedule award because her conditions had worsened.¹⁵ Rather, in her letter requesting reconsideration, she merely asserted that she disagreed with the impairment rating because she continued to have problems with her right hand. She also resubmitted the April 2, 2003 EMG test. As this report had been previously considered and was also irrelevant regarding the degree of impairment of her right upper extremity in May 2004, the Board finds that appellant did not submit new, relevant evidence not previously considered by the Office. The Board further finds that appellant failed to advance a new legal argument or show the Office erroneously applied or interpreted a point of law. While appellant asserted that she disagreed with the impairment rating because she continued to have problems with her right hand, she submitted no medical evidence to show that her condition had worsened. Thus, this contention does not have a reasonable color of validity.¹⁶ As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied her May 11, 2004 request for reconsideration.

CONCLUSION

The Board finds that appellant has not established that she is entitled to greater than a five percent impairment of the right upper extremity. The Board also finds that the Office properly denied appellant's request for merit review.

¹⁵ Office procedures state that claims for increased schedule awards may be based on incorrect calculation of the original award or new exposure. To the extent that a claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this would be a request for reconsideration. A claim for an increased schedule award may be based on new exposure or on medical evidence indicating the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown*, 51 ECAB 115 (1999).

¹⁶ *Mitchell*, *supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 19 and March 12, 2004 be affirmed.

Issued: November 19, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member