

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**EUGENE J. LUCKETT, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Los Angeles, CA, Employer**

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**Docket No. 05-648  
Issued: June 23, 2005**

*Appearances:*  
*Eugene J. Luckett, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On January 24, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 17, 2004. Appellant also appealed a December 15, 2004 decision denying merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of the case.

**ISSUES**

The issues on appeal are: (1) whether appellant has more than a nine percent permanent impairment of the left upper extremity for which he received a schedule award; and (2) whether the Office properly denied appellant's request for reconsideration without further merit review.

**FACTUAL HISTORY**

On September 17, 1997 appellant, then a 51-year-old letter carrier, filed an occupational disease claim alleging that he developed pain and limitation in his shoulders as a result of performing repetitive duties at work. The Office accepted cervical facet syndrome and bilateral

shoulder impingement syndrome. Appellant stopped work on August 7, 1997 and worked intermittently thereafter until retiring on July 31, 2001.

Appellant came under the treatment of Dr. Daniel Paveloff, Board-certified in physical medicine and rehabilitation, who noted treating appellant from September 3, 1997 to May 15, 1998, for cervical radiculitis secondary to straining in the workplace. He diagnosed cervical spine facet syndrome and bilateral shoulder impingement and indicated that appellant could return to work subject to various lifting restrictions. An electromyography dated December 4, 1997 revealed right C5 cervical radiculopathy affecting the right upper extremity.

On June 16, 1998 the Office referred appellant for a second opinion to Dr. H. Harlan Bleecker, a Board-certified orthopedic surgeon, for an evaluation. The Office provided Dr. Bleecker with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties. In a medical report dated July 1, 1998, Dr. Bleecker indicated that he reviewed the records provided to him and performed a physical examination of the appellant. He reviewed the history of appellant's work-related injury. He diagnosed right C4-5 degenerative disc disease with radiculopathy, which was causally related to factors of appellant's employment. Dr. Bleecker noted that a magnetic resonance imaging (MRI) scan dated April 21, 1998, revealed C3-4 moderate diffuse disc bulge, mild to moderate C4-5 disc bulge, C5-6 mild diffuse disc bulge and C2-3 minimal diffuse disc bulge. He opined that appellant continued to have residuals of his work-related injury.

Appellant continued to submit reports from Dr. Paveloff dated January 30, 1998 to May 24, 1999, who noted that appellant continued to experience constant pain in the neck and right shoulder. On June 12, 1998 he advised that, although appellant had a lack of neurologic abnormalities, his subjective complaints and objective findings correlated with findings of multilevel cervical spondylosis, which became aggravated by his duties as a letter carrier. He opined that appellant sustained a permanent aggravation of his condition and would require permanent modified duty. On June 22, 1999 Dr. Paveloff diagnosed cervical spine spondylosis, associated facet syndrome, chronic residuals of pain and a history of bilateral shoulder bursitis impingement resolved. He noted that appellant had reached maximum medical improvement. He noted findings upon examination of left shoulder flexion of 180/180 degrees, abduction of 180/180 degrees, external rotation of 90/90 degrees, internal rotation of 80 degrees. The right shoulder revealed range of motion of flexion of 120/180 degrees, abduction of 100 degrees, external rotation of 70 degrees, internal rotation of 30 degrees. Upon testing of the right shoulder there was pain in all ranges of motion.

In a letter dated September 3, 1999, the Office requested that appellant's treating physician provide an evaluation as to the extent of permanent impairment of the left and right upper extremity in accordance with the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>1</sup> (A.M.A., *Guides*). In a report dated December 1, 1999, Dr. Paveloff determined that appellant sustained a 22 percent impairment of the right upper extremity.

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<sup>1</sup> A.M.A., *Guides* (4<sup>th</sup> ed. 1993).

The Office referred the case record to an Office's medical adviser who, in a report dated January 9, 2000, in accordance with the fourth edition of the A.M.A., *Guides*,<sup>2</sup> advised that appellant sustained a 34 percent permanent impairment for the right upper extremity and a 0 percent impairment of the left upper extremity.

In a decision dated March 7, 2000, appellant was granted a schedule award for 34 percent permanent impairment of the right upper extremity. The period of the award was from June 22, 1999 to July 4, 2001. Appellant requested a lump sum payment.

Thereafter, appellant came under the treatment of Dr. Paul J. Papanek, Jr., a Board-certified family practitioner, who treated him from December 5, 2002 to November 25, 2003, for chronic cervical radiculitis, degenerative changes and right shoulder rotator cuff tendinitis. He noted that appellant retired on July 31, 2001 and had increased radiating pain in the right shoulder. He advised on July 22, 2003 that appellant underwent subacromial injections into the right shoulder without relief.

In a letter dated December 9, 2003, the Office requested that appellant's treating physician provide an evaluation as to the extent of permanent impairment of the left and right upper extremity in accordance with the fifth edition of the A.M.A., *Guides*.<sup>3</sup>

By a letter dated December 22, 2003, Dr. Papanek provided a comprehensive summary of appellant's treatment and noted findings upon physical examination of forward flexion on the right of 160 degrees and on the left 160 degrees, extension on the right of 40 degrees and on the left of 40 degrees, abduction on the right of 150 degrees and on the left of 150 degrees, adduction on the right of 30 degrees and on the left of 30 degrees, internal rotation of 80 degrees on the right and 80 degrees on the left, external rotation of 80 degrees on the right and 80 degrees on the left. He noted that appellant experienced pain of the neck and shoulders, which was characterized as constant and moderate and increasing to a level of moderate to severe with activity. He indicated that appellant reached maximum medical improvement. Dr. Papanek opined that there were abnormalities related to the left shoulder representing additional impairment; however, noted that there did not appear to have been substantial worsening of the right shoulder.

On February 13, 2004 Dr. Papanek's report and the case record were referred to Dr. Ellen Pichey, an Office medical adviser and orthopedic surgeon. In a report dated February 13, 2004, she determined that appellant sustained a nine percent impairment of the left upper extremity and a nine percent impairment of the right upper extremity in accordance with the fifth edition of the of the A.M.A., *Guides*.<sup>4</sup> She noted that appellant reached maximum medical improvement on June 22, 1999 for the right upper extremity and December 22, 2003 for the left upper extremity. She calculated that impairment due to sensory deficit or pain of the right and left shoulder was a Grade 4 impairment of the suprascapular nerve or a 25 percent

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

<sup>3</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>4</sup> *Id.*

sensory deficit which has an impairment value of 20 percent upper extremity impairment due to unilateral or sensory deficits of the suprascapular nerve for a 5 percent impairment of each the left and right upper extremity.<sup>5</sup> She further noted that impairment due to loss of range of motion for both shoulders was as follows: forward flexion on the right was 160 degrees for a 1 percent impairment,<sup>6</sup> and 160 degrees on the left for a 1 percent impairment,<sup>7</sup> extension on the right was 40 degrees for a 1 percent impairment<sup>8</sup> and 40 degrees on the left for a 1 percent impairment,<sup>9</sup> abduction on the right was 150 degrees for a 1 percent impairment<sup>10</sup> and on the left 150 degrees for a 1 percent impairment,<sup>11</sup> adduction on the right was 30 degrees for 1 percent impairment<sup>12</sup> and on the left was 30 degrees for a 1 percent impairment,<sup>13</sup> internal rotation on the right was 80 degrees for a 0 percent impairment<sup>14</sup> and on the left 80 degrees for a 0 percent impairment,<sup>15</sup> external rotation on the right was 80 degrees for a 0 percent impairment<sup>16</sup> and on the left 80 degrees for a 0 percent impairment.<sup>17</sup> Dr. Pichey noted that the total impairment for the right upper extremity equaled nine percent and the left upper extremity equaled nine percent. Dr. Pinchey advised that there was no additional impairment for the right upper extremity as appellant was previously granted a 34 percent impairment on March 7, 2000.

In a decision dated March 17, 2004, the Office granted appellant a schedule award for nine percent permanent impairment of the left upper extremity. The period of the schedule award was from December 22, 2003 to July 5, 2004.

By a letter dated December 6, 2004, appellant requested reconsideration and submitted additional medical evidence. Appellant submitted reports from Dr. Papanek dated April 27 to October 15, 2004, who noted treating appellant for cervical radiculitis and bilateral rotator cuff tendinitis. He advised that on July 2, 2004 appellant experienced a flare-up of pain in the right shoulder and that range of motion for abduction was 120 degrees on the right and 160 degrees on

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<sup>5</sup> Table 16-10, 16-11, 16-15, page 482, 484, 492 (A.M.A., *Guides*).

<sup>6</sup> Figure 16-40, page 476 (A.M.A., *Guides*).

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

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

<sup>9</sup> *Id.*

<sup>10</sup> Figure 16-43, page 477 (A.M.A., *Guides*).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Figure 16-46, page 479 (A.M.A., *Guides*).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

the left. He noted that his opinion on permanent disability remained the same. On August 20, 2004 he indicated that appellant underwent an MRI scan of the right shoulder, which revealed a partial tear of the supraspinatus and infraspinatus with findings of tendonopathy through the rotator cuff. Dr. Papanek noted that the partial tears were not present at the time of his MRI scan in 1999. He opined that the current rotator cuff tear represented the progression of the underlying rotator cuff tendinitis. He further opined that there were no additional ratable factors of disability using the A.M.A., *Guides* and noted that the level of ratable disability described in his report of December 22, 2003 was still concurrent. In a report of October 15, 2004, he indicated that any changes in his current examination would not reasonably lead to a change in the permanent disability status or schedule award previously granted.

In a decision dated December 15, 2004, the Office denied further merit review on the grounds that the evidence submitted was insufficient to warrant review of the March 17, 2004 decision.

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

The schedule award provision of the Federal Employees' Compensation Act<sup>18</sup> and its implementing regulation<sup>19</sup> sets 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 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>20</sup>

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

Appellant's attending physician, Dr. Papanek completed a report on December 22, 2003 noting appellant's history of injury and medical history. He noted findings upon physical examination of forward flexion on the right of 160 degrees and on the left 160 degrees, extension on the right of 40 degrees and on the left of 40 degrees, abduction on the right of 150 degrees and on the left of 150 degrees, adduction on the right of 30 degrees and on the left of 30 degrees, internal rotation of 80 degrees on the right and 80 degrees on the left, external rotation of 80 degrees on the right and 80 degrees on the left. He opined that there were abnormalities related to the left shoulder representing additional impairment; however, noted that there did not appear to have been substantial worsening of the right shoulder. Dr. Papanek advised that appellant reached maximum medical improvement and was permanent and stationary.

Dr. Pichey reviewed Dr. Papanek's report and correlated his findings to the specific tables in the A.M.A., *Guides*. She determined that appellant sustained a nine percent impairment

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<sup>18</sup> 5 U.S.C. § 8107.

<sup>19</sup> 20 C.F.R. § 10.404 (1999).

<sup>20</sup> *Id.*

of the left upper extremity and had a nine percent impairment of the right upper extremity in accordance with the fifth edition of the A.M.A., *Guides*.<sup>21</sup> She noted that appellant reached maximum medical improvement on June 22, 1999 for the right upper extremity and December 22, 2003 for the left upper extremity. Dr. Papanek calculated that right and left shoulder pain was a Grade 4 impairment of the suprascapular nerve or a 25 percent sensory deficit which has an impairment value of 20 percent upper extremity impairment due to unilateral or sensory deficits of the suprascapular nerve for a 5 percent impairment of each the left and right upper extremity.<sup>22</sup> She further noted that range of motion for forward flexion on the right was 160 degrees for a 1 percent impairment<sup>23</sup> and 160 degrees on the left for a 1 percent impairment,<sup>24</sup> extension on the right was 40 degrees for a 1 percent impairment<sup>25</sup> and 40 degrees on the left for a 1 percent impairment,<sup>26</sup> abduction on the right was 150 degrees for a 1 percent impairment<sup>27</sup> and on the left 150 degrees for a 1 percent impairment,<sup>28</sup> adduction on the right was 30 degrees for 1 percent impairment<sup>29</sup> and on the left was 30 degrees for a 1 percent impairment,<sup>30</sup> internal rotation on the right was 80 degrees for a 0 percent impairment<sup>31</sup> and on the left 80 degrees for a 0 percent impairment,<sup>32</sup> external rotation on the right was 80 degrees for a 0 percent impairment<sup>33</sup> and on the left 80 degrees for a 0 percent impairment.<sup>34</sup> The medical adviser noted that the total impairment for the right upper extremity was 9 percent and for the left upper extremity 9 percent. She advised that there was no additional impairment for the right upper extremity as appellant was previously granted a 34 percent impairment on March 7, 2000.

The Office medical adviser properly applied the A.M.A., *Guides* to the information provided in Dr. Papanek's December 22, 2003 report and determined that appellant had nine percent permanent impairment of the right upper extremity, for which he already received a schedule award, and a nine percent permanent impairment of the left upper extremity. This

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<sup>21</sup> *Supra* note 3.

<sup>22</sup> *Supra* note 5.

<sup>23</sup> *Supra* note 6.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Supra* note 10.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Supra* note 14.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

evaluation conforms to the A.M.A., *Guides* and establishes that appellant has a nine percent permanent impairment of the right upper extremity and a nine percent permanent impairment of the left upper extremity.

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

Under section 8128(a) of the Act,<sup>35</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>36</sup> which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

- “(1) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
- (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].”

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>37</sup>

### **ANALYSIS -- ISSUE 2**

Appellant’s December 6, 2004 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. Appellant did not show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact 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). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted reports from Dr. Papanek dated April 27 to October 15, 2004, which noted treating appellant for cervical radiculitis and bilateral rotator cuff tendinitis. On August 20, 2004 he noted that appellant underwent an MRI scan of the right shoulder which revealed a partial tear of the supraspinatus and infraspinatus with findings of tendonopathy through the rotator cuff. He advised that the partial tears were not present at the time of his MRI scan in 1999. Dr. Papanek opined that there were no additional ratable factors of impairment using the A.M.A., *Guides* and noted that the level of ratable disability described in his report of

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<sup>35</sup> 5 U.S.C. § 8128(a).

<sup>36</sup> 20 C.F.R. § 10.606(b).

<sup>37</sup> 20 C.F.R. § 10.608(b).

December 22, 2003 was still current. His report of October 15, 2004 noted that any changes in his current examination would not reasonably lead to a change in the permanent disability status or schedule award previously granted. Although this evidence is new, it is not relevant because Dr. Papanek specifically stated that any changes in his current examination would not lead to a change in the disability status or schedule award impairment previously granted. Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office.”<sup>38</sup> Therefore, appellant did not submit relevant evidence not previously considered by the Office.

The Board finds that the Office properly determined that 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) and properly denied his December 6, 2004 request for reconsideration.

**CONCLUSION**

The Board therefore finds that the weight of the evidence rests with the determination of the Office medical adviser. Appellant is therefore entitled to a schedule award for no more than a nine percent permanent impairment of the left upper extremity. The Board further finds that the Office properly denied appellant’s request for a merit review.

**ORDER**

**IT IS HEREBY ORDERED** that the December 15 and March 17, 2004 decisions of the Office of Workers’ Compensation Programs are affirmed.

Issued: June 23, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>38</sup> *Supra* note 36.