

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

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<b>DALPHINE FOSTER, Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 04-2050</b>
	)	<b>Issued: March 10, 2005</b>
	)	
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Houston, TX, Employer</b>	)	
	)	

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*Appearances:*  
*Dalphine Foster, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Member  
WILLIE T.C. THOMAS, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On August 16, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 16, 2004, which granted her a schedule award. She also appealed an August 6, 2004 decision, which denied merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUES**

The issues are: (1) whether appellant has more than a six percent permanent impairment of the right upper extremity; and (2) whether the Office properly denied appellant's reconsideration request without conducting a merit review of the claim.

**FACTUAL HISTORY**

On September 30, 1997 appellant, then a 38-year-old letter carrier, filed an occupational disease claim alleging that she developed right wrist pain and swelling as a result of performing repetitive duties at work. She became aware of her condition in September 1997 and did not stop work. The Office accepted right wrist sprain and paid appropriate compensation.

Appellant submitted several treatment notes from Dr. Robert G. Thumwood, a family practitioner, from September 25, 1997 to August 13, 1999, who noted a history of her work-related injury and diagnosed right wrist sprain. He recommended a wrist splint and advised that appellant could return to work with restrictions. Also submitted were reports from Dr. Louis E. Varela, an internist, dated March 20 to September 20, 2001, who noted treating appellant for a work-related right wrist sprain and advised that she could return to light-duty work with no repetitive motion and no driving of the mail route.

On May 24, 2001 appellant filed a claim for a schedule award.

Thereafter, appellant submitted a magnetic resonance imaging (MRI) scan dated June 1, 2001, which revealed a relative thickening of the soft tissue between flexor tendons causing minimal bowing of the flexor retinaculum and a slightly increased signal portion of the median nerve which was sometimes associated with carpal tunnel syndrome. Also submitted was an attending physicians report dated July 20, 2001 from Dr. Naveen Ramineni, Board-certified in physical medicine and rehabilitation, who noted that appellant sustained a right wrist strain from a repetitive use injury and noted with a check mark “yes” that this condition was caused or aggravated by repetitive activities.

In a letter dated April 9, 2002, the Office requested that Dr. Thumwood submit an impairment determination with regard to appellant’s right upper extremity in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>1</sup>

On July 26, 2002 appellant filed a claim for a schedule award.

In a decision dated October 3, 2002, the Office denied appellant’s claim for a schedule award. The Office indicated that Dr. Thumwood did not reply to the Office’s April 9, 2002 request for an impairment rating and has not advised that appellant reached maximum medical improvement such that a schedule award could be granted.

Thereafter, appellant requested reconsideration and submitted an impairment rating dated March 18, 2003 from a licensed physical therapist. The physical therapist opined that, based on the A.M.A., *Guides* appellant sustained an 18 percent impairment of the right upper extremity. He advised that flexion was measured at 28 degrees for a 7 percent impairment,<sup>2</sup> extension was measured at 60 degrees for a 0 percent impairment,<sup>3</sup> ulnar deviation was measured at 42 degrees

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<sup>1</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>2</sup> Table 16-28, page 467 (A.M.A., *Guides*).

<sup>3</sup> *Id.*

for a 0 percent impairment,<sup>4</sup> radial deviation was measured at 17 degrees for a 1 percent impairment<sup>5</sup> and a 10 percent impairment for loss of grip strength.<sup>6</sup>

On April 8 and June 7, 2003 appellant filed claims for a schedule award.

In a decision dated July 25, 2003, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. The Office specifically noted that physical therapist report dated March 18, 2003 was unacceptable because it was not signed by a physician and failed to provide a date of maximum medical improvement.

On September 4, 2003 appellant requested reconsideration and submitted additional medical evidence. She submitted a report from Dr. Varela dated March 18, 2003, which determined that in accordance with the A.M.A., *Guides* appellant sustained an 18 percent impairment of the right upper extremity. He advised that flexion was measured at 28 degrees for a 7 percent impairment,<sup>7</sup> extension was measured at 60 degrees for a 0 percent impairment,<sup>8</sup> ulnar deviation was measured at 42 degrees for a 0 percent impairment,<sup>9</sup> radial deviation was measured at 17 degrees for a 1 percent impairment<sup>10</sup> and a 10 percent impairment for loss of grip strength.<sup>11</sup> The record reflects that this report was identical to that of the physical therapists dated March 18, 2003, but was signed by Dr. Varela.

On September 30, 2003 Dr. Varela's report and the case record were referred to the Office medical adviser, who in a report dated October 9, 2003, determined that appellant sustained a six percent impairment of the right upper extremity. The Office medical adviser noted that flexion was measured at 28 degrees for a 5 percent impairment,<sup>12</sup> extension was measured at 60 degrees for a 0 percent impairment,<sup>13</sup> ulnar deviation was measured at 42 degrees for a 0 percent impairment,<sup>14</sup> radial deviation was measured at 17 degrees for a 1 percent

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<sup>4</sup> Table 16-31, page 469 (A.M.A., *Guides*).

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

<sup>6</sup> Table 16-34, page 509 (A.M.A., *Guides*).

<sup>7</sup> *Supra* note 2 at 467.

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

<sup>9</sup> *Supra* note 4 at 469.

<sup>10</sup> *Id.*

<sup>11</sup> *Supra* note 6 at 509.

<sup>12</sup> *Supra* note 2 at 467.

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

<sup>14</sup> *Supra* note 4 at 469.

impairment.<sup>15</sup> He advised that Dr. Varela provided a 7 percent impairment for flexion measured at 28 degrees; however, this figure does not comply with Table 16-28 of the A.M.A., *Guides*. The Office medical adviser further noted that Dr. Varela recommended an additional 10 percent impairment for grip strength loss; however, the medical adviser noted that section 16.8a, page 508 of the A.M.A., *Guides* provides that decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximal force in the region being evaluated and, therefore, could not be counted in the impairment rating.

In a decision dated November 5, 2003, the Office granted appellant a schedule award for six percent permanent impairment of the right upper extremity. The period of the schedule award was from April 2 to August 11, 2003. The schedule award noted that the number of weeks of compensation was 131.04.

In a letter dated November 23, 2003, appellant requested a review of the written record.

In a decision dated April 16, 2004, the hearing representative affirmed the decision of the Office dated November 5, 2003. The hearing representative noted that the notice of award of compensation incorrectly listed the number of weeks of compensation as 131.04, rather than the correct figure of 18.72. The hearing representative noted that the award incorrectly stated that it was for 131.04 days; however, the award should have been set forth in terms of weeks, in this case, 18.72 weeks. The hearing representative advised that there was no basis for adjustment of the schedule award amount as the calculations confirm that the Office accurately computed the award.

In an amended award of compensation dated May 3, 2004, the Office granted appellant a six percent impairment of the right upper extremity. The period of the award was April 2 to August 11, 2003 and the number of weeks of compensation was 18.72.

In a letter dated July 23, 2004, appellant requested reconsideration of the Office decision dated April 16, 2004 and submitted a duplicate copy of the March 18, 2003 impairment rating prepared by Dr. Varela.

By decision dated August 6, 2004, the Office denied appellant's reconsideration request on the grounds that her letter neither raised substantive legal questions nor included new and relevant evidence and was, therefore insufficient to warrant review of the prior decision.

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

The schedule award provision of the Federal Employees' Compensation Act<sup>16</sup> and its implementing regulation<sup>17</sup> set forth the number of weeks of compensation payable to employees

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

<sup>16</sup> 5 U.S.C. § 8107.

<sup>17</sup> 20 C.F.R. § 10.404 (1999).

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.

### ANALYSIS -- ISSUE 1

On appeal appellant believes that she is entitled to an impairment rating of 18 percent as set forth by Dr. Valera in his report of March 18, 2003.

In his report dated March 18, 2003, Dr. Valera noted that flexion was measured at 28 degrees for a 7 percent impairment,<sup>18</sup> extension was measured at 60 degrees for a 0 percent impairment,<sup>19</sup> ulnar deviation was measured at 42 degrees for a 0 percent impairment,<sup>20</sup> radial deviation was measured at 17 degrees for a 1 percent impairment<sup>21</sup> and a 10 percent impairment for loss of grip strength.<sup>22</sup> He opined that based on the A.M.A., *Guides* appellant would have an 18 percent impairment of the right upper extremity. However, Dr. Valera incorrectly noted that flexion was measured at 28 degrees for a 7 percent impairment, as this figure does not conform with the A.M.A., *Guides* which provides for a 5 percent impairment rating for 28 degrees of flexion.<sup>23</sup> With regard to grip strength deficit, Dr. Valera calculated a 10 percent deficit and cited to Table 16-34, page 509 of the A.M.A., *Guides*. However, the A.M.A., *Guides*, as noted by the Office medical adviser, provide that decreased strength cannot be rated in the presence of decreased motion.<sup>24</sup> Consequently, no impairment is attributable for grip strength as decreased motion is present in appellant's case.

The Office medical adviser correlated Dr. Valera's findings to specific provisions in the A.M.A., *Guides*, as noted above. The Office medical adviser noted that flexion was measured at 28 degrees for a 5 percent impairment,<sup>25</sup> extension was measured at 60 degrees for a 0 percent impairment,<sup>26</sup> ulnar deviation was measured at 42 degrees for a 0 percent impairment,<sup>27</sup> radial

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<sup>18</sup> *Supra* note 2 at 467.

<sup>19</sup> *Id.*

<sup>20</sup> *Supra* note 4 at 469.

<sup>21</sup> *Id.*

<sup>22</sup> *Supra* note 6 at 509.

<sup>23</sup> *Supra* note 2 at 467.

<sup>24</sup> *Id.* at section 16.8a, page 508.

<sup>25</sup> *Supra* note 2 at 467.

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

<sup>27</sup> *Supra* note 4 at 469.

deviation was measured at 17 degrees for a 1 percent impairment,<sup>28</sup> for a total impairment rating of 6 percent impairment of the right upper extremity.

The Office medical adviser properly applied the A.M.A., *Guides* to the information provided in Dr. Valera's March 18, 2003 report and determined that appellant had a six percent permanent impairment of the right upper extremity. No other evidence conforming with the A.M.A., *Guides* establishes any greater impairment.

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

Under section 8128(a) of the Act,<sup>29</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 regulation,<sup>30</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:

- “(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 [the Office]; or
- (iii) 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>31</sup>

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

Appellant's July 23, 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. 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 a copy of the March 18, 2003 report from Dr. Valera. This evidence was duplicative of evidence previously submitted by her and considered by the Office in

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

<sup>29</sup> 5 U.S.C. § 8128(a).

<sup>30</sup> 20 C.F.R. § 10.606(b).

<sup>31</sup> 20 C.F.R. § 10.608(b).

decisions dated November 5, 2003 and April 16, 2004 and found to be deficient.<sup>32</sup> The Board, therefore, finds that the Office properly determined that 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) and properly denied her July 23, 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 a six percent impairment of the right upper extremity. The Board further finds that the Office properly denied her request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 6 and April 16, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 10, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>32</sup> See *James E. Norris*, 52 ECAB 93 (2000) (where the Board held that evidence that repeats or duplicates evidence already in the case record does not constitute a basis for reopening a claim for merit review).