

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

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**GUINN A. JACKSON, Appellant**

**and**

**TENNESSESSE VALLEY AUTHORITY,  
SEQUOYAH NUCLEAR PLANT,  
Soddy-Daisy, TN, Employer**

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**Docket No. 05-1724  
Issued: November 21, 2005**

*Appearances:*  
Guinn A. Jackson, *pro se*  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
WILLIE T.C. THOMAS, Alternate Judge

**JURISDICTION**

On August 16, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated August 23, 2004, adjudicating his claim for a schedule award and denying his request for a review of the written record of a June 21, 2001 continuation of pay decision and a December 14, 2004 decision, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the August 23 and December 14, 2004 decisions.

**ISSUES**

The issues are: (1) whether appellant is entitled to a schedule award for his accepted chest wall strain; (2) whether the Office properly denied his request for a review of the written record under 5 U.S.C. § 8124; and (3) whether the Office abused its discretion in denying appellant's request for reconsideration under 5 U.S.C. § 8128.

## **FACTUAL HISTORY**

On May 30, 2001 appellant, then a 58-year-old steamfitter, filed a traumatic injury claim alleging that on March 21, 2001 he sustained an injury to the left side of his chest wall while pulling on an air-conditioning motor. He did not stop work. The Office accepted appellant's claim for a strain of the chest wall (sternum).

An employing establishment clinic report dated March 22, 2001 indicated that appellant sustained a chest wall strain as a result of the March 21, 2001 work incident. Employing establishment clinical notes dated April 12, 2001 indicated that he had a continued problem raising his left arm in addition to his left chest wall discomfort.

By decision dated June 21, 2001, the Office denied appellant's claim for continuation of pay on the grounds that he failed to file his claim within 30 days of the March 21, 2001 injury.

In a July 5, 2001 report, Dr. Conrad H. Easley, an attending orthopedic surgeon, noted that on March 21, 2001 appellant and two other employees were replacing an air handling motor and he was lifting the motor with his left hand when one of the other men dropped his portion of the motor. This resulted in a sudden force of 250 to 300 pounds being placed on his left upper extremity and he felt his left ribs "pop." Dr. Easley diagnosed a costochondral separation (strain) of the left rib cage. In reports dated August 15 and December 17, 2001, he stated that appellant's left rib cage problem was persistent, despite work restrictions and appellant felt he was being "pushed" too much at work to get his tasks completed which aggravated his condition.

In reports dated February 18 and May 15, 2002, Dr. Easley stated that appellant continued to have pain, discomfort and popping in his left rib cage.

In a February 21, 2003 report, Dr. Easley noted that appellant continued to have left rib cage discomfort which sometimes radiated to his left shoulder blade. In a July 25, 2003 report, he noted that appellant had persistent pain in his left rib cage and was having difficulty using his left hand.

On January 5, 2004 appellant filed a claim for a schedule award.

In a November 13, 2003 report, Dr. Easley provided findings on physical examination and stated that appellant continued to have discomfort and a "popping" sensation over the anterolateral aspect of the left chest wall due to his March 21, 2001 employment injury. He stated that he had reached maximum medical improvement and had an eight percent impairment of the whole body based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>1</sup>

In a January 22, 2004 memorandum, an Office medical adviser noted that Dr. Easley calculated an eight percent impairment for chronic chest wall pain but indicated that a schedule award was not payable under the Federal Employees' Compensation Act for a nonscheduled

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

member such as the chest unless it had caused impairment to an extremity. He indicated that there was no evidence of impairment to appellant's extremities and he had no entitlement to a schedule award.

In a letter dated February 3, 2004, the Office advised appellant that the Act did not provide for a schedule award for the body as a whole and asked him to provide a supplemental medical report if there were any current objective findings of impairment to his extremities.

In a February 11, 2004 report, Dr. Easley stated that his November 13, 2003 report "ha[d] nothing to do with" appellant's extremities. He stated:

"The total [impairment] of eight percent was calculated as a ratable conventional impairment of five percent combined with a moderate pain rating of three percent. This is based upon instability involving the left rib cage/cartilage and associated pain."

By decision dated April 2, 2004, the Office denied appellant's schedule award claim on the grounds that the chest wall is not a scheduled member under section 8107 of the Act and the medical evidence did not indicate an impairment of appellant's extremities caused by the accepted chest wall condition.

On April 21, 2004 appellant requested a review of the written record regarding the June 21, 2001 continuation of pay decision<sup>2</sup> and the April 2, 2004 schedule award decision and submitted additional evidence.

In an April 15, 2004 report, Dr. Easley stated:

"[Appellant] presents today for reevaluation of his left chest wall injury that has affected his left upper extremity. He states [that] because of the pain in the chest there is limitation related to his climbing, lifting, bending and pulling. [Appellant] recalls prior to the injury being able to lift 50 pounds without any problem, but now he considers his limitation at 20 pounds. He has to be careful with turning and twisting and that includes while driving his car. [Appellant] specifically states that pulling pipe wrenches with his left upper extremity causes chest wall pain."

\* \* \*

"The injury to the chest wall has resulted in an impairment of the left upper extremity. Based on the [A.M.A., *Guides*, 5<sup>th</sup> ed.], the conversion factor results in an impairment of the left upper extremity that amounts to 13 percent."

By decision dated August 23, 2004, an Office hearing representative denied appellant's request for a review of the written record regarding the June 21, 2001 continuation of pay

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<sup>2</sup> Appellant provided an explanation as to why his claim was not filed within 30 days of the March 21, 2001 employment injury.

decision on the grounds that it was not timely filed within 30 days of the decision. He affirmed the April 2, 2004 schedule award decision.

On November 30, 2004 appellant requested reconsideration and submitted additional evidence.

In notes dated August 12 and November 9, 2004, Dr. Easley stated that there was no change in appellant's left rib cage condition or his impairment rating.

Appellant submitted employing establishment clinic forms dated March 22, 2001 to November 14, 2003 which indicated his work restrictions.

In an undated affidavit, Maurice E. Quinn, appellant's supervisor from June 2001 to January 2004, stated that appellant's accepted chest wall injury impaired the use of his left upper extremity and preventing him from performing many of his regular job activities. He indicated that appellant had physical work restrictions following his March 21, 2001 employment injury.

By decision dated December 14, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant further merit review.<sup>3</sup>

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

Section 8107 of the Act<sup>4</sup> authorizes the payment of schedule awards for the loss or loss of use, of specified members, organs or functions of the body. Such loss or loss of use, is known as "permanent impairment." 20 C.F.R. § 10.404 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, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>5</sup> The Office procedures direct the use of the fifth edition of the A.M.A., *Guides* for all decisions made after February 1, 2001.<sup>6</sup>

### **ANALYSIS- ISSUE 1**

Appellant sustained a strain of the chest wall in the performance of duty on March 21, 2001 and subsequently filed a claim for a schedule award. His attending physician, Dr. Easley opined that he had an eight percent impairment of the whole body based on the fifth edition of

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<sup>3</sup> Appellant submitted additional evidence subsequent to the Office's decision of December 14, 2004. However, the Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404(a).

<sup>6</sup> See FECA Bulletin No. 01-05, issued January 29, 2001.

the A.M.A., *Guides*. While the A.M.A., *Guides* provides for impairment to the individual member and to the whole person, the Act does not provide for impairment for the whole person.<sup>7</sup> A schedule award is not payable for the loss or loss of use, of any member of the body or function that is not specifically enumerated in section 8107 of the Act or its implementing regulation.<sup>8</sup> Therefore, appellant is not entitled to a schedule award for the whole body based on his accepted left chest wall strain.

In an April 15, 2004 report, Dr. Easley stated that appellant's chest wall injury had caused impairment in his left upper extremity. He stated that he had limitations involving work and everyday activities related to climbing, lifting, bending, pulling, turning and twisting due to chest wall pain. However, this report appears to contradict Dr. Easley's February 11, 2004 report in which he stated that his November 13, 2003 report "ha[d] nothing to do with" appellant's extremities" and was based upon instability involving the left rib cage and cartilage and associated pain. Although there is an April 12, 2001 employing establishment clinic note indicating a left upper extremity problem related to the March 21, 2001 employment-related chest wall strain and Dr. Easley mentions some left upper extremity symptoms in his July 5, 2001 and February 21 and July 25, 2003 reports, he did not opine that appellant had any left upper extremity until his April 15, 2004 report. He failed to explain how the left upper extremity impairment was caused by the March 21, 2001 employment injury and did not explain how he calculated the 13 percent impairment of the left upper extremity with reference to specific sections of the A.M.A., *Guides*. Therefore, the Office properly found that appellant was not entitled to a schedule award for left upper extremity impairment.

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

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record.<sup>9</sup> Title 20 of the Code of Federal Regulations § 10.616(a) specifically provides: "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record." The Board has previously found that the procedural requirements are the same for either choice.<sup>10</sup> A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which the hearing is sought.<sup>11</sup> A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which

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<sup>7</sup> *Phyllis F. Cundiff*, 52 ECAB 439 (2001); *John Yera*, 48 ECAB 243 (1996).

<sup>8</sup> *Leroy M. Terska*, 53 ECAB 247 (2001).

<sup>9</sup> 5 U.S.C. § 8124(b) of the Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary of Labor is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary of Labor. Section 8124(b) is unequivocal in setting forth the time limitation for requesting a hearing; a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days. See *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>10</sup> *Claudio Vasquez*, 52 ECAB 496 (2001).

<sup>11</sup> 20 C.F.R. § 10.616(a).

the hearing is sought.<sup>12</sup> The Office has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>13</sup> In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.<sup>14</sup>

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

Appellant's request for a review of the written record was dated April 21, 2004, more than 30 days after the Office's June 21, 2001 continuation of pay decision. Therefore, appellant was not entitled to a review of the written record as a matter of right. However, the Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold oral hearings or review the written record in certain circumstances where no legal provision was made for such and that the Office must exercise this discretionary authority.<sup>15</sup> In this case, the Office did not exercise its discretionary authority in considering whether to grant a review of the written record despite appellant's untimely request. Therefore, the Office abused its discretion in denying appellant's untimely request for a review of the written record in its August 23, 2004 decision.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8128(a) of the Federal Employees' Compensation Act<sup>16</sup> vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

“The Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office.<sup>17</sup> When an application for review of the merits of a claim does not meet at least one of these

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<sup>12</sup> *James Smith*, 53 ECAB 188 (2001).

<sup>13</sup> 20 C.F.R. § 10.616(b).

<sup>14</sup> *James Smith*, *supra* note 12.

<sup>15</sup> *Claudio Vasquez* *supra* note 10.

<sup>16</sup> 5 U.S.C. § 8128(a).

<sup>17</sup> 20 C.F.R. § 10.606(b)(2).

requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>18</sup>

### **ANALYSIS -- ISSUE 3**

In support of his request for reconsideration, appellant submitted notes dated August 12 and November 9, 2004 in which Dr. Easley stated that there was no change in his left rib cage condition or his impairment rating. These notes do not provide any new findings regarding his impairment and, therefore, do not constitute relevant and pertinent evidence not previously considered by the Office.

In an undated affidavit, Mr. Quinn, appellant's supervisor, stated that his accepted chest wall injury impaired the use of his left upper extremity and preventing him from performing many of his regular job activities. However, the issue in this case, is medical in nature. As Mr. Quinn is not a physician, his statement is of no probative value and does not constitute relevant and pertinent evidence not previously considered by the Office.

Appellant also submitted employing establishment medical clinic notes. These clinic notes do not address the issue of his impairment. Therefore, they do not constitute relevant and pertinent evidence not previously considered by the Office.

As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constituting relevant and pertinent evidence not previously considered by the Office, the Office did not abuse its discretion in denying his request for reconsideration.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant was not entitled to a schedule award for his accepted chest wall strain. The Board finds that the Office abused its discretion in denying his untimely request for a review of the written record regarding the June 21, 2001 continuation of pay decision. On remand the Office should exercise its discretionary authority in considering whether to grant appellant's untimely request for a written review of the record regarding the June 21, 2001 continuation of pay decision and issue an appropriate decision. The Board further finds that the Office did not abuse its discretion, in its December 14, 2004 decision, in denying his request for reconsideration of its schedule award decision.

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<sup>18</sup> 20 C.F.R. § 10.608(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 14, 2004 is affirmed. The August 23, 2004 decision is affirmed as to the denial of a schedule award, but set aside as to the denial of appellant's request for a review of the written record regarding the June 21, 2001 continuation of pay decision.

Issued: November 21, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board