

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

<p>J.L., Appellant</p> <p>and</p> <p>DEPARTMENT OF THE NAVY, GREAT LAKES SERVICE CENTER, Great Lakes, IL</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 06-1755 Issued: December 29, 2006</p>
---	--	---

Appearances:
Appellant, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 26, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 20, 2006 granting a schedule award for a 30 percent impairment to his right upper extremity. He also filed a timely appeal of the May 31, 2006 decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant has established more than a 30 percent impairment of his right upper extremity, for which he received a schedule award; and (2) whether the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 2, 2003 appellant, then a 62-year-old electrical helper, filed a traumatic injury claim alleging that on August 25, 2003 he missed a step on a ladder and sustained an injury to his right knee, right shoulder and back. By letter dated October 17, 2003, the Office

accepted his claim for a right knee sprain. On July 29, 2004 appellant filed a claim for a schedule award.

By letter dated August 16, 2004, the Office asked Dr. Norman J. Cohen, appellant's Board-certified orthopedic surgeon, to determine appellant's impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th edition). In a report dated January 24, 2005, Dr. Cohen evaluated appellant's impairment as including a 45 percent impairment of his right lower extremity, which he calculated as equaling an 18 percent whole person impairment. His worksheet indicated that, in rating impairment of the right leg, he allotted 3 percent for atrophy of 1 centimeter in the quads, 12 percent for weakness in the quads (knee extension 4/5) 10 percent for flexion of 95 percent (or mild) and 20 percent for 10 degrees of flexion contracture of the knee.

By memorandum dated March 30, 2005, the Office asked an Office medical adviser to review Dr. Cohen's report. On April 5, 2005 the Office medical adviser determined that appellant had a permanent impairment of 30 percent to his right lower extremity. He noted:

“[Appellant] underwent a quadriceps tendon repair. A meniscal repair was also reportedly performed. No operative report is available regarding this procedure.

“There is minimal information regarding the claimant's subjective complaints. A thorough physical examination is also missing. There are some pertinent findings listed by Dr. Cohen. These include atrophy of the quadriceps of 1 [centimeter], quadriceps weakness 4/5 and [range of motion] of the knee from 10 to 95 [percent]. Dr. Cohen rated a 45 [percent] right lower extremity impairment on [August 16, 2004].

“The following [permanent impairment] will be referenced from the [A.M.A., *Guides*]. According to Table 17-2, [page] 526, muscle atrophy cannot be combined with ratings of muscle strength. The claimant is awarded 12 [percent] right lower extremity impairment for [G]rade [4] strength of knee extension (Table 17-8, [page] 532). The claimant is awarded 11 [percent] right lower extremity impairment for a flexion contracture of 10 [degrees] (Table 17-10, [page] 537). The claimant is awarded 10 [percent] right lower extremity for flexion to 95 [degrees] (Table 17-10, [page] 537). Using the Combined Values Chart, [page] 604 of the [A.M.A.,] *Guides* the claimant is awarded 30 [percent right upper extremity permanent impairment] for the above-mentioned claim.”

By decision dated March 30, 2006, the Office granted a schedule award for a 30 percent impairment of the right lower extremity.

On May 16, 2006 appellant requested reconsideration. He submitted no new evidence with his request. By decision dated May 31, 2006, the Office denied appellant's request without reviewing the case on the merits.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² 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.³

ANALYSIS -- ISSUE 1

Appellant received a schedule award for a 30 percent impairment to his right lower extremity based on the opinion of the Office medical adviser. Although Dr. Cohen indicated that appellant had a 45 percent impairment of his right lower extremity, he did not adequately explain his impairment rating. He attached a worksheet indicating the percentage of impairment for atrophy of the quads, quad weakness in knee extension, flexion and flexion contracture of the knee. However, Dr. Cohen did not explain how he determined these values. He did not indicate whether he applied the A.M.A., *Guides* or referred to specific tables of the A.M.A., *Guides* in support of his calculations. Furthermore, Dr. Cohen combined impairment for muscle atrophy with loss of strength. However, as noted by the Office medical adviser, the A.M.A., *Guides* prohibit combining these two impairments.⁴

The Office medical adviser determined that appellant had a 30 percent impairment of the right lower extremity based on the A.M.A., *Guides*. He found a 12 percent impairment of the right lower extremity based on a Grade 4 strength of knee extension.⁵ This is consistent with Dr. Cohen's finding of Grade 4 strength of knee extension. The Office medical adviser found an 11 percent right lower extremity impairment for flexion contracture of 10 degrees.⁶ This is consistent with Dr. Cohen's finding of 10 degrees flexion contracture. Finally, the Office medical adviser found a 10 percent impairment of the right lower extremity for flexion to 95 degrees, which is also consistent with Dr. Cohen's report.⁷ Utilizing the Combined Values Charts, the Office medical adviser determined that appellant was entitled to a 30 percent impairment of the right lower extremity. As the Office medical adviser is the only physician to

¹ 5 U.S.C. §§ 8101-8193.

² 20 C.F.R. § 10.404.

³ See *id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁴ A.M.A., *Guides* 526, Table 17-2.

⁵ *Id.* at 532, Table 17-8.

⁶ *Id.* at 537, Table 17-10.

⁷ *Id.*

properly apply the A.M.A., *Guides*, his opinion constitutes the weight of the evidence.⁸ Consequently, appellant has not established that he is entitled to a schedule award greater than what he received.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (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.⁹

ANALYSIS -- ISSUE 2

Appellant does not make any argument that the Office erroneously applied or interpreted a specific point of law or advance a legal argument not previously considered by the Office. Furthermore, appellant has not submitted any evidence on reconsideration. Accordingly, the Office properly denied appellant's request for reconsideration without reviewing the case on the merits.

CONCLUSION

The Board finds that appellant has not established greater than a 30 percent impairment of his right upper extremity. The Board further finds that the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

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

⁹ 20 C.F.R. § 10.606(b)(2)(i-iii).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 31 and March 20, 2006 are affirmed.

Issued: December 29, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board