United States Department of Labor
Employees' Compensation Appeals Board

HOMERO G. GONZALEZ, Appellant	)	
and	)	**Docket No. 06-690**
	)	**Issued: July 14, 2006**
DEPARTMENT OF THE ARMY, CORPUS CHRISTI ARMY DEPOT, Corpus Christi, TX, Employer	)	

Appearances:
Homero G. Gonzalez, 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 January 30, 2006 appellant filed a timely appeal from an August 31, 2005 merit decision of the Office of Workers' Compensation Programs, which granted an increased schedule award for his right upper extremity and a decision dated December 21, 2005 denying his request for reconsideration under 5 U.S.C. § 8128. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review both schedule award and nonmerit issues.

ISSUES

The issues are: (1) whether appellant has more than the additional 3 percent impairment granted for his right upper extremity, resulting in a total impairment of 12 percent; and (2) whether the Office properly denied appellant's request for review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a 52-year-old aircraft sheet metal repair inspector, filed a traumatic injury claim alleging that on February 1, 1996 he ruptured a ligament in his right shoulder while lifting up a damaged aircraft tail boom.[1] The Office accepted the claim for a right shoulder strain, which was later expanded to include right rotator cuff tear and repair surgery, which occurred on April 15, 1996.[2] Appellant stopped work on April 11, 1996 and was released to work with restrictions effective July 8, 1996.[3]

In a report dated January 27, 1997, an Office medical adviser determined appellant had a nine percent permanent impairment of the right upper extremity. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (A.M.A., *Guides*) (4th ed. 2001), the Office medical adviser determined that appellant had a three percent impairment for loss of motion and a six percent impairment for crepitus, which resulted in a combined permanent impairment of nine percent.

On February 5, 1997 the Office issued a schedule award for a nine percent permanent impairment of the right upper extremity.

In an April 5, 2004 report, Dr. Rufino H. Gonzalez, a treating a Board-certified orthopedic surgeon, addressed the progress of appellant's condition and diagnosed right shoulder recurrent rotator cuff tear. A physical examination revealed crepitus, "weakness of the rotator cuff, with the patient showing very elaborated abduction and external rotation against resistance." In a September 22, 2004 report, he diagnosed right shoulder recurrent rotator cuff tear. He reported appellant's range of motion as 60 degrees external rotation, 90 degrees abduction, 30 degrees internal rotation and 90 degrees flexion.

In a report dated November 30, 2004, Dr. Jorge E. Tijmes, a Board-certified orthopedic surgeon, diagnosed right shoulder pain and rotator cuff tear. A physical examination revealed right shoulder "mild tenderness to deep palpation along the anterolateral aspect" and muscle atrophy of the right shoulder. Range of motion for the right shoulder was 30 degrees internal rotation, 60 degrees external rotation, 120 degrees abduction and 100 degrees flexion. He concluded that appellant had a five percent impairment for loss of shoulder flexion (Table 16-40, page 476), a four percent impairment for loss of shoulder internal rotation (Table 16-46, page 479) and a three percent impairment for loss of shoulder abduction (Table 16-43, page 477). Adding the range of motion impairments, Dr. Tijmes found that appellant had a total 12 percent impairment to his right upper extremity.

In a report dated March 8, 2005, the Office medical adviser reviewed the record and opined that appellant had a 12 percent total impairment to his right upper extremity. He

[1] Appellant left blank the date the notice was filed, but on the back of the form the supervisor indicated that notice was received on February 5, 1996.

[2] Appellant retired in 1997.

[3] On September 9, 1996 the Office issued a loss of wage-earning capacity decision, which found that appellant had no lost wages based upon his actual earnings as a sheet metal repair inspector work leader.

concurred with Dr. Tijmes that appellant had a five percent impairment for loss of shoulder flexion (Table 16-40, page 476), a four percent impairment for loss of shoulder internal rotation (Table 16-46, page 479) and a three percent impairment for loss of shoulder abduction (Table 16-43, page 477). Adding the range of motion impairments resulted in a 12 percent impairment to appellant's right upper extremity. The Office medical adviser found that appellant was entitled to an additional award of three percent as he had previously been awarded a nine percent impairment for his right upper extremity.

On August 31, 2005 the Office issued a schedule award for an additional 3 percent impairment of the right upper extremity, for a total 12 percent permanent impairment of the right upper extremity.

On October 18, 2005 the Office received appellant's request for reconsideration. Appellant submitted a May 1, 1996 report by Monica Greene, physical therapist; April 15, 1996 surgery report; releases to work dated July 1 and December 12, 1996; reports dated March 11, June 6 and October 25, 1996, July 12, 1999, December 1, 2000, August 15, 2001, June 12, 2002, June 10, 2003, April 5 and September 22, 2004 by Dr. Gonzalez; an April 15, 1996 pathology report for tissue and bone removed from the right shoulder; a December 24, 2003 magnetic resonance imaging scan; and x-ray interpretations dated March 5 and July 12, 1999.

By decision dated December 21, 2005, the Office denied to reopen appellant's case for further review of the merits of his claim, finding that he had not shown that the Office erroneously applied or interpreted a specific point of law, he had not advanced a legal argument not previously considered by the Office and he had not submitted relevant and pertinent new evidence not previously considered by the Office.[4] The Office noted that the submitted evidence was duplicative of evidence previously submitted and reviewed by the Office.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulation[6] 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* (5th ed. 2001) has been

[4] The Board notes that appellant filed a claim for a recurrence of disability on February 27, 2001. The record does not contain a final decision regarding appellant's recurrence claim. Therefore, the Board does not have jurisdiction over the merits of the claim. *See* 20 C.F.R. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case).

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[7]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for right shoulder strain and expanded to right rotator cuff tear. He received a schedule award on February 5, 1997 for nine percent impairment of his right upper extremity.

In a report dated November 30, 2004, Dr. Tijmes provided physical findings on examination and determined that appellant had 12 percent impairment of the right upper extremity due to loss of range of motion of the shoulder according to the fifth edition of the A.M.A, *Guides*. He provided the following range of motion findings: 100 degrees flexion, 30 degrees internal rotation, 60 degrees external rotation and 120 degrees abduction. In a report dated March 8, 2005, the Office medical adviser reviewed Dr. Tijmes' findings and agreed that appellant had a total 12 percent impairment of the left upper extremity. Figure 16-40 provides 5 percent impairment for 100 degrees of flexion, Figure 16-43 provides 3 percent impairment for 120 degrees of abduction and Table 16-46 provides 4 percent impairment for 30 degrees of internal rotation and 0 percent for 60 degrees of external rotation or a total 12 percent impairment of the right upper extremity.

There is no other medical evidence of record, conforming with the A.M.A., *Guides*, that supports greater impairment. The various reports by Dr. Gonzalez do not provide any impairment rating using the A.M.A., *Guides.* Moreover, in a September 22, 2004 report, Dr. Gonzalez merely stated that appellant required a new impairment rating. The Board finds that the weight of the medical evidence established that appellant has no more than 12 percent impairment of the right upper extremity, for which he received schedule awards.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[8] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[9] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[10] When a claimant fails to meet one of the above

[7] *Willie C. Howard*, 55 ECAB ___ (Docket No. 04-342 & 04-464, issued May 27, 2004).

[8] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.

[9] 20 C.F.R. § 10.606(b)(2).

[10] 20 C.F.R. § 10.607(a).

standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[11]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[12] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[13]

ANALYSIS -- ISSUE 2

Appellant submitted a timely request for reconsideration of the Office's August 31, 2005 decision on October 18, 2005. Appellant's request for reconsideration was not accompanied by any evidence not previously considered by the Office. Appellant neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law in denying him an additional schedule award. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, he is not entitled to a review of the merits of his schedule award claim based on the first and second above-noted requirements under section 10.606(b)(2).[14] Appellant also failed to satisfy the third requirement under section 10.606(b)(2). He did not submit any evidence not previously considered by the Office with his request for reconsideration. The several reports of Dr. Gonzalez were previously of record and considered by the Office and thus do not constitute a basis for reopening a claim.[15] Moreover, the work releases and surgical physical therapy and pathology reports, as well as the reports of diagnostic testing, are not relevant to the issue of whether appellant has more than 12 percent impairment of his right upper extremity. As there was no pertinent new and relevant evidence for the Office to consider, appellant is not entitled to a review of the merits based on the third requirement under section 10.606(b)(2).[16] Because he was not entitled to a review of the merits of his schedule award claim pursuant to any of the three requirements under section 10.606(b)(2), the Office properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant is not entitled to more than the additional 3 percent impairment granted for his right upper extremity, for a total impairment of 12 percent for the right upper extremity. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim.

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[11] 20 C.F.R. § 10.608(b).

[12] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[13] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[14] 20 C.F.R. §§ 10.606(b)(2)(i) and (ii).

[15] *See supra* note 12.

[16] 20 C.F.R. § 10.606(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 21 and August 31, 2005 are affirmed.

Issued: July 14, 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