United States Department of Labor
Employees' Compensation Appeals Board

R.V., Appellant	)	
and	)	**Docket No. 06-1119**
	)	**Issued: November 3, 2006**
DEPARTMENT OF THE ARMY, MALONE VILLAGE COMMISSARY, Fort Bragg, NC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 12, 2006 appellant filed a timely appeal of an October 25, 2005 decision of the Office of Workers' Compensation Programs denying his claim for an augmented schedule award and a February 2, 2006 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has established that he sustained greater than a 37 percent impairment of the left thumb, for which he received a schedule award; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

The Office accepted that on November 13, 1986 appellant, then a 30-year-old store worker, sustained a torn ulnar collateral ligament of the metacarpophalangeal (MCP) joint when a 30-pound case of toilet tissue fell on his left thumb. The Office later accepted degenerative arthritis of the MCP joint of the left thumb.

Appellant was followed by Dr. Louis P. Clark, Jr., an attending Board-certified orthopedic surgeon specializing in surgery of the hand. He diagnosed an ulnar collateral ligament tear of the MCP joint of the left thumb ("gamekeeper's thumb"). On December 17, 1986 Dr. Clark performed a repair of the ulnar collateral ligament of the left thumb. Appellant returned to light duty from March 15 to June 17, 1987 then stopped work due to continued problems with his left thumb. On October 15, 1987 Dr. Clark performed a surgical reconstruction of a volar subluxation of the MCP joint of the left thumb. He also diagnosed severe degenerative arthritis of the MCP joint of the left thumb. Appellant returned to light-duty work on February 16, 1988.

Dr. Clark submitted progress notes through July 1988 finding severe degenerative arthritis of the MCP joint, restricted range of left thumb motion in all joints, decreased joint space, crepitation, osteoporosis across the thumb and significant chondromalacia with loss of cartilage.

In a September 7, 1988 report, Dr. Clark opined that appellant had reached maximum medical improvement as of July 8, 1988. He provided the following measurements for the left thumb: 60 degrees retained active flexion of the interphalangeal (IP) joint; 43 degrees retained active flexion of the MCP joint; 28 degrees retained active flexion of the carpometacarpal joint; 0 degrees retained active extension of the carpometacarpal joint. Dr. Clark assessed an additional but unspecified impairment for sensory deficit, pain, weakness, joint surface erosions and chondromalacia. He recommended an impairment rating of 50 percent for the left thumb.

The Office referred Dr. Clark's report to an Office medical adviser for calculation of a schedule award. In a September 9, 1988 report, an Office medical adviser reviewed Dr. Clark's findings. He opined that appellant had the following impairments according to unspecified portions of the second edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*): 11 percent for retained active flexion of the IP joint limited to 60 degrees; 16 percent for retained active flexion of the MCP joint limited to 43 degrees; 0 percent for retained active flexion of the carpometacarpal joint limited to 28 degrees; 15 percent for retained active extension of the carpometacarpal joint limited to 0 degrees. The Office medical adviser also found a two percent impairment for sensory loss in the ulnar nerve distribution of the mid forearm, according to Table 4, page 73 and Table 9, page 77 of the second edition of the A.M.A., *Guides*. The Office medical adviser then combined the range of motion impairments of 11, 16 and 15 percent with the 2 percent impairment for sensory

loss to equal 38 percent. He then multiplied the 38 percent impairment by "5 percent (nonpreferred upper extremity)" to a equal 37 percent impairment of the left thumb.[1]

By decision dated September 23, 1988, the Office granted appellant a schedule award for a 37 percent permanent impairment of the left thumb. The period of the award ran for 27.75 weeks, from July 8, 1988 to January 18, 1989.

On November 3, 1993 appellant claimed a recurrence of disability commencing November 3, 1993 while on light duty. He attributed his left thumb pain to his current duties as a medical clerk, including filing and data entry. Appellant submitted a March 3, 1994 chart note from Dr. Clark, finding severe loss of cartilage in the left thumb, irregularity of the metacarpal heads and limited range of motion.

On February 25, 2005 appellant filed a claim for a recurrence of disability commencing December 21, 2004 while on light duty as a medical clerk.[2] He specified that the claim was for medical treatment only. Appellant attributed the claimed recurrence of disability to a December 21, 2004 incident in which he transferred a patient from a wheelchair to a bed. He submitted new medical evidence.

In a January 11, 2005 report, Dr. Clark noted that x-rays showed marked degenerative arthritis with joint space narrowing and spur formation in the MCP joint of the left thumb. In a February 10, 2005 chart note, Dr. Clark opined that the December 21, 2004 incident aggravated the accepted ulnar collateral ligament injury. On May 12, 2005 Dr. Clark opined that, due to the "recent injury," "eight percent should be added" to his prior impairment rating of appellant's left thumb.

On June 1, 2005 appellant claimed an additional schedule award.

In a June 14, 2005 letter, the Office requested that Dr. Clark submit a report supporting his May 12, 2005 opinion that appellant had sustained an additional eight percent impairment to the left thumb. In noted the 37 percent impairment previously awarded. The Office enclosed a rating form utilizing the fifth edition of the A.M.A., *Guides*.

Dr. Clark completed the rating form on July 26, 2005. He found that appellant had reached maximum medical improvement as of that day. Dr. Clark observed that, in the left thumb, the IP joint had retained active flexion to 40 degrees and the MCP joint had retained

[1] The Board notes that the medical adviser did not refer to a specific portion of the second edition of the A.M.A., *Guides* (1984 ed.) regarding why he multiplied the 38 percent impairment by 5 percent. Also, the Board notes that 38 multiplied by 5 percent is 1.9, not 37. However, as the Office medical adviser did not refer to specific portions of the A.M.A., *Guides* in determining the percentages of impairment due to range of motion or the "nonpreferred upper extremity" calculation, the Board cannot ascertain if the 37 percent awarded was, in fact, incorrect. As the schedule award must now be recalculated under the fifth edition of the A.M.A., *Guides*, the Office medical adviser's application of the criteria under the second edition in 1988 is of very little relevance to the case on appeal.

[2] In a May 26, 2005 file memorandum, the Office explained that it would not create a new file for the December 21, 2004 injury to avoid an overpayment and as the accepted claim remained open for medical treatment.

active flexion to 5 degrees. According to Figure 16-16, page 458[3] of the fifth edition of the A.M.A., *Guides*, appellant had 55 degrees of thumb radial abduction. According to Figure 16-17, page 458[4] and Figure 16-18, page 459[5] of the A.M.A., *Guides*, appellant had 4.1 centimeters (cm) of thumb adduction. Appellant had no Ankylosis as described by Table 16-8b, page 459[6] of the A.M.A., *Guides*. Dr. Clark opined that there was no additional impairment due to sensory deficit according to Table 16-6, page 448[7] of the A.M.A., *Guides*. Dr. Clark opined that the loss of adduction equaled a 4 percent impairment and that abduction limited to 55 degrees[8] equaled a 9 percent impairment, for a total 13 percent impairment of the left thumb.

In a September 27, 2005 chart note, Dr. Clark noted work restrictions against repetitive use of the left thumb for longer than one hour at a time, with 30-minute rest breaks in between.

In an October 20, 2005 report, an Office medical adviser reviewed Dr. Clark's reports. He opined that IP joint flexion in the left thumb limited to 40 degrees equaled a 3 percent impairment of the left thumb according to Figure 16-12, page 456[9] of the fifth edition of the A.M.A., *Guides*. The Office medical adviser found that MCP joint flexion limited to five degrees equaled a five percent impairment of the left thumb according to Figure 16-15, page 457[10] of the fifth edition of the A.M.A., *Guides*. He noted that thumb adduction limited to 4 cm equaled a 20 percent motion unit impairment and a 4 percent impairment of the left thumb, combining Figure 16-18 with Table 16-18b. The Office medical adviser found that radial abduction of the left thumb limited to 55 degrees equaled a 0 percent impairment. He then

[3] Figure 16-16, page 458 of the fifth edition of the A.M.A., *Guides* is entitled "Thumb Radial Abduction Measures in Degrees the Angle of Separation Formed Between the First and Second Metacarpal in the Coronal Plane."

[4] Figure 16-17, page 458 of the fifth edition of the A.M.A., *Guides* is entitled "Adduction of Thumb, Measured in Centimeters From the Flexion Crease of the Thumb IP Joint to the Distal Palmar Crease Over the Level of the M[C]P Joint of the Little Finger."

[5] Figure 16-18, page 459 of the fifth edition of the A.M.A., *Guides* is entitled "Linear Measurements of Thumb Adduction in Centimeters at Various Positions and Motion Unit Impairment Curve for Lack of Adduction."

[6] Table 16-8b, page 459 of the fifth edition of the A.M.A., *Guides* is entitled "Thumb Impairment Values Due to Lack of Radial Abduction and to Ankylosis."

[7] Table 16-6, page 448 of the fifth edition of the A.M.A., *Guides* is entitled "Digit Impairment for Transverse and Longitudinal Sensory Losses in *Thumb* and *Little Finger* Based on the Percentage of Digit Length Involved."

[8] Dr. Clark described this limitation as ankylosis.

[9] Figure 16-12, page 456 of the fifth edition of the A.M.A., *Guides* is entitled "Pie Chart of Thumb Impairments Due to Abnormal Motion at the IP] Joint."

[10] Figure 16-15, page 457 of the fifth edition of the A.M.A., *Guides* is entitled "Pie Chart of Thumb Impairments Due to Abnormal Motion at the M[C]P Joint."

totaled the 5, 4, 3 and 0 percent impairments to equal a 12 percent impairment of the left thumb. He noted that a 12 percent impairment of the thumb was equal to a 5 percent impairment of the left hand according to Table 16-1, page 438.[11]

By decision dated October 25, 2005, the Office denied appellant's claim for an additional schedule award as the medical evidence did not establish greater impairment than the 37 percent previously awarded. The Office found that Dr. Clark's July 26, 2005 finding of a 13 percent impairment of the left thumb and the Office medical adviser's calculation of a 12 percent impairment of the left thumb were greater than the 37 percent previously awarded.

In a November 20, 2005 letter, appellant requested reconsideration and submitted additional medical evidence. In a November 17, 2005 letter, Dr. Clark stated that, in 1987, he opined that appellant had an eight percent impairment of the left thumb. Dr. Clark noted that, after the December 2004 reinjury, appellant's impairment rating was 13 percent "whereas the prior one had been listed at [five] percent." He stated that, according to the fifth edition of the A.M.A., *Guides*, "the rating with the loss of function was at 13 percent." Dr. Clark amended his July 26, 2005 form report on November 23, 2005 to indicate an additional but unspecified impairment of the left thumb due to sensory deficit.

By decision dated February 2, 2006, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review of the claim. The Office found that Dr. Clark's additional reports were irrelevant as they failed to substantiate impairment greater than the 37 percent previously awarded.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of the Federal Employees' Compensation Act[12] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a mater which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[13] As of February 1, 2001, schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*, published in 2000.[14]

[11] Table 16-1, page 438 of the fifth edition of the A.M.A., *Guides* is entitled "Conversion of Impairment of the Digits to Impairment of the Hand."

[12] 5 U.S.C. §§ 8101-8193.

[13] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[14] *See* FECA Bulletin 01-05 (issued January 29, 2001) (schedule awards calculated as of February 21, 2001 should be evaluated according to the fifth edition of the A.M.A., *Guides*. Any recalculations of previous awards which result from hearings, reconsideration or appeals should, however, be based on the fifth edition of the A.M.A., *Guides* effective February 1, 2001).

The standards for evaluation the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.[15] Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedure for determining impairments of the upper extremities due to pain, discomfort, loss of sensation or loss of strength.[16]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a torn ulnar collateral ligament of the MCP joint of the left thumb with consequential degenerative arthritis. On September 23, 1988 the Office awarded appellant a schedule award for a 37 percent permanent impairment of the left thumb.

Appellant claimed an additional schedule award on June 1, 2005. In an October 20, 2005 report, an Office medical adviser reviewed Dr. Clark's July 26, 2005 impairment rating. Regarding the left thumb, the Office medical adviser opined that 40 degrees retained active flexion of the IP joint equaled a 3 percent impairment, 5 degrees retained active flexion of the MCP joint equaled a 5 percent impairment, adduction limited to 4 cm equaled a 4 percent impairment of the left thumb and radial abduction limited to 55 degrees equaled a 0 percent impairment. He based these percentages of impairment on the ranges of thumb motion illustrated in Figures 16-16, 16-17 and 16-18 of the fifth edition of the A.M.A., *Guides*. The Office medical adviser then totaled the 3, 4 and 5 percent impairments to equal a 12 percent impairment of the left thumb. The Board finds that the Office medical adviser utilized the appropriate tables and grading schemes of the A.M.A., *Guides* in assessing the percentage of impairment and performed a correct mathematical calculation in arriving at a 12 percent impairment.

The Board notes that, in the July 26, 2005 report, Dr. Clark observed diminished ranges of motion in the left thumb when compared to his September 7, 1988 calculation. In his September 7, 1988 report, Dr. Clark found 60 degrees retained active flexion of the IP joint, decreased to 40 degrees by July 26, 2005. Active flexion of the MCP joint decreased from 43 degrees to 5 degrees. The findings of the attending physician do not support greater impairment than the 37 percent previously found. The Board finds that appellant has not established that he sustained greater than a 37 percent permanent impairment of the left thumb. He submitted insufficient medical evidence to establish an increased percentage of permanent impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office

[15] *See Paul A. Toms*, 28 ECAB 403 (1987).

[16] A.M.A. *Guides*, Chapter 16, "The Upper Extremities," page 433-521 (5th ed. 2001).

erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[17] Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[18]

In support of his request for reconsideration, a claimant an appellant is not required to submit all evidence which may be necessary to discharge his burden of proof.[19] The appellant need only submit relevant and pertinent evidence not previously considered by the Office.[20] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[21]

ANALYSIS -- ISSUE 2

The Office denied appellant's claim for an augmented schedule award by October 25, 2005 decision, finding that Dr. Clark's assessment of a 13 percent impairment of the left thumb did not establish an increased impairment above the 37 percent previously awarded. Appellant requested reconsideration in a November 20, 2005 letter. He submitted a November 17, 2005 letter and November 23, 2005 form report from Dr. Clark. Both reports opine that appellant had a 13 percent impairment of the left thumb according to the fifth edition of the A.M.A., *Guides*. These opinions, however, are cumulative in nature. Dr. Clark expressed a similar opinion in his July 26, 2005 schedule award calculation, already of record and properly considered by the Office prior to its October 25, 2005 decision. Thus, under the circumstances of this case, Dr. Clark's additional reports are insufficient to warrant reopening appellant's case for a review of the merits.[22]

As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument or submit relevant and pertinent new evidence not previously considered by the Office, he is not entitled to a review of the merits of his claim. Therefore, the Office's February 2, 2006 decision denying appellant's request for reconsideration is proper under the law and facts of this case.

[17] 20 C.F.R. § 10.606(b)(2).

[18] 20 C.F.R. § 10.608(b).

[19] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[20] *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

[21] *Annette Louise*, 54 ECAB 783 (2003).

[22] *Patricia G. Aiken*, 57 ECAB ___ (Docket No. 06-75, issued February 17, 2006).

CONCLUSION

The Board finds that appellant has not established that he sustained greater than a 37 percent impairment of the left thumb. The Board further finds that the Office properly denied appellant's November 20, 2005 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 2, 2006 and October 25, 2005 are affirmed.

Issued: November 3, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board