



October 25, 2002. The Office accepted the claim for advanced malignancy of the tongue base with neck metastasis and authorized panendoscopic surgery with biopsies of the right original cervical metastatic disease that were performed on March 8 and June 10, 2002 and August 8 and September 16, 2005. Appellant stopped work on March 20, 2002, returned on August 12, 2002 and retired in May 2003.

Appellant submitted an impairment rating from Dr. T. Flint Gray, III, a Board-certified internist, dated March 31, 2003, who noted in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>1</sup> (A.M.A., *Guides*) that appellant sustained a loss of tongue and pharyngeal function for a 40 to 60 percent impairment.<sup>2</sup> Additionally, Dr. Gray noted that appellant had loss of function of the right shoulder and impaired dexterity of the right hand. He noted findings upon physical examination of the shoulder of flexion of 135 degrees for a three percent impairment,<sup>3</sup> extension of 25 degrees for a two percent impairment,<sup>4</sup> abduction of 90 degrees for a four percent impairment,<sup>5</sup> internal rotation of 60 degrees for a two percent impairment,<sup>6</sup> and external rotation of 100 degrees for a 0 percent impairment.<sup>7</sup> Dr. Gray opined that in accordance with the A.M.A., *Guides* appellant sustained a 11.5 percent impairment for loss of function for the right shoulder.

On July 1, 2003 appellant filed a claim for a schedule award. He submitted a report from Dr. Kimmel dated March 17, 2003, who noted that appellant was diagnosed with pharyngeal malignancy requiring surgery, radiation and chemotherapy. Appellant indicated that the treatment made nutrition problematic, speaking difficult, dry mouth, loss of full function of the tongue associated with the disfigurement of his neck and face, salt wasting nephropathy, orthostatic hypotension, peripheral neuropathy, loss of function of the right shoulder and impaired dexterity of the right hand.

The Office referred Dr. Gray's report of March 31, 2003 and the case record to the Office's medical adviser who, in a report dated July 10, 2003, in accordance with the A.M.A., *Guides*, advised that appellant sustained a 17 percent permanent impairment of the right arm. The Office medical adviser noted that appellant's right shoulder impairment as it related to the radical neck dissection caused adhesive capsulitis disturbance to the shoulder girdle. He calculated that flexion was 135 degrees for three percent impairment,<sup>8</sup> extension was 25 degrees

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

<sup>2</sup> *See id.* at 262.

<sup>3</sup> *Id.* at 476, Figure 16-40.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 477, Figure 16-43.

<sup>6</sup> *Id.* at 479, Figure 16-46.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 476, Figure 16-40.

for two percent impairment,<sup>9</sup> abduction was 90 degrees for four percent impairment,<sup>10</sup> internal rotation was 60 degrees for two percent impairment,<sup>11</sup> and external rotation was 100 degrees for zero percent impairment.<sup>12</sup> The medical adviser further noted that in accordance with Table 16-35, page 510 of the A.M.A., *Guides* that appellant sustained six percent impairment for weakness. He opined that appellant sustained a 17 percent permanent impairment of the right arm.

In a report dated July 14, 2003, another medical adviser noted that appellant's claim was accepted for malignancy of the tongue base with neck metastases and that he was granted 60 percent impairment of the tongue. He concurred with the previous medical adviser, as set forth in the July 10, 2003 report, with regard to appellant's loss of function of the right shoulder.

Appellant submitted a report from Dr. Gray dated August 26, 2003, who noted that appellant had xerostomia as a result of radiation therapy which caused disability in speech, voice and swallowing. In addition, Dr. Gray noted that appellant's cancer treatment caused peripheral neuropathy, autonomic neuropathy and orthostatic hypotension.

On August 27, 2003 appellant requested an oral hearing. In a decision dated December 6, 2004, the Office denied appellant's request for an oral hearing as untimely.

In a decision dated February 17, 2005, the Office granted appellant a schedule award for 17 percent permanent impairment of the right arm. The period of the schedule award was from January 31, 2005 to February 6, 2006.

On March 8, 2005 appellant requested an oral hearing. He submitted reports from Dr. Mark C. Weissler, a Board-certified internist, dated June 21, 2004 to December 22, 2005, who noted that there was no evidence of recurrent tongue base cancer.

In a decision dated March 2, 2006, the hearing representative set aside the February 17, 2005 decision. The hearing representative noted that further medical development was required to determine the extent of impairment of the right arm including the right shoulder and digits of the right hand.

On March 13, 2006 the Office referred appellant for a second opinion to Dr. David M. Seales, a Board-certified neurologist. In an April 11, 2006 report, Dr. Seales indicated that he reviewed the records provided to him and examined appellant. He noted findings of the right shoulder of full range of motion and full strength of 5/5. Dr. Seales noted that appellant experienced numbness for light touch at the tips of the thumb and index finger of the right hand and numbness along the soles of both feet. He noted a marked problem with xerostomia related to aspects of the cancer and its treatment. Dr. Seales noted that appellant did have relative

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 477, Figure 16-43.

<sup>11</sup> *Id.* at 479, Figure 16-46.

<sup>12</sup> *Id.*

decrease in the appreciation of light touch at the tips of the thumb and index fingers which was present as early as 1987 and related to the cervical spine condition which preceded the detection and treatment of the tongue cancer. He noted reduced range of motion at the neck resulting from the surgery and radiation. Dr. Seales noted spasticity in the left limbs which was a remnant from his prior neck condition and preceded his cancer detection and treatment.

The Office referred Dr. Seales' report and the case record to an Office medical adviser who, in an April 27, 2006 report, advised that appellant did not have an additional impairment of the right arm pursuant to the A.M.A., *Guides*. The medical adviser noted that Dr. Seales' findings indicated that appellant had full range of motion and strength of the right shoulder. He noted that appellant had relative decrease in appreciation of light touch at the tips of his thumb and index fingers on the right; however, this finding was noted as early as 1987 as part of a preexisting problem with the cervical spine and cervical fusion in 1987. The medical adviser determined that appellant was not entitled to an additional schedule award.

In a decision dated May 2, 2006, the Office denied appellant's claim for an additional schedule award on the basis that the medical evidence did not support an increase in impairment over that which was already granted.

In letters dated June 23 and September 22, 2006, appellant indicated that he requested an oral hearing in 2003 and was never notified of the status of this request. He indicated that he had other unresolved medical issues related to his tongue cancer including chronic salt wasting nephropathy, peripheral neuropathy, stricture of the esophagus, radiation induced necrosis of the mandible, vestibular instability and brain stem injury. In a letter dated September 22, 2006, appellant requested a response to his letter dated June 23, 2006 and requested reconsideration of the May 2, 2006 decision.

By decision dated October 20, 2006, the Office denied appellant's reconsideration request on the grounds that his letter neither raised substantive legal questions nor included new and relevant evidence and was insufficient to warrant review of the prior decision.

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

The schedule award provision of the Federal Employees' Compensation Act<sup>13</sup> and its implementing regulation<sup>14</sup> set 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.<sup>15</sup>

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<sup>13</sup> 5 U.S.C. § 8107.

<sup>14</sup> 20 C.F.R. § 10.404 (1999).

<sup>15</sup> *Linda R. Sherman*, 56 ECAB \_\_\_\_ (Docket No. 04-1510, issued October 14, 2004);

## **ANALYSIS -- ISSUE 1**

The Office awarded appellant a 17 percent permanent impairment of the right arm on February 17, 2005 based on the report of the medical adviser dated July 10, 2003. Appellant requested an oral hearing and in a decision dated March 2, 2006, the hearing representative remanded the case and noted that it was not clear how the medical adviser calculated the impairment rating of 17 percent for the right arm and requested further medical development.<sup>16</sup>

On March 13, 2006 the Office referred appellant for a second opinion evaluation to Dr. Seales. In his April 11, 2006 report, Dr. Seales noted that appellant's physical examination of the right shoulder revealed full range of motion and full strength. He noted that appellant experienced numbness for light touch at the tips of the thumb and index finger of the right hand and numbness along the soles of both feet. Dr. Seales noted that appellant's problems with weakness and restricted range of motion of the shoulder had resolved. He stated that the relative decrease in the appreciation of light touch at the tips of the thumb and index fingers and spasticity in the left limbs was present as early as 1987 and was related to the cervical spine condition which preceded the detection and treatment of the tongue cancer. Dr. Seales did not attribute any permanent impairment of the right arm to the accepted conditions.

The Office medical adviser applied the A.M.A., *Guides* to the information provided in Dr. Seales April 11, 2006 report and correctly calculated that, based on the fifth edition of the A.M.A., *Guides*, appellant had no additional impairment over which was previously granted. He noted that Dr. Seales' findings indicated that appellant had full range of motion of the right shoulder and full strength of the right shoulder. The medical adviser noted that appellant had relative decrease in appreciation of light touch at the tips of his thumb and index fingers on the right; however, this finding was noted as early as 1987 as part of a preexisting problem with the cervical spine and cervical fusion in 1987. He determined that appellant was not entitled to an additional schedule award for the right upper extremity.

The Board finds that, under the circumstances of this case, the weight of the medical evidence establishes that appellant has no more than a 17 percent permanent impairment of the right upper extremity for which he was previously granted.

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

Under section 8128(a) of the Act,<sup>17</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 regulations,<sup>18</sup> which provides that a

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<sup>16</sup> The medical adviser calculated 11 percent impairment for range of motion deficits of the right shoulder and cited to appropriate tables and charts in the A.M.A., *Guides* in support of this calculation. He further noted six percent impairment for a total right upper extremity for weakness and cited to Table 16-35, page 510 of the A.M.A., *Guides*. However, the medical adviser did not explain why he used Table 16-35 or how he calculated the additional six percent impairment of the arm under that table.

<sup>17</sup> 5 U.S.C. § 8128(a).

<sup>18</sup> 20 C.F.R. § 10.606(b).

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 [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>19</sup>

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

Appellant’s September 22, 2006 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Appellant did not submit any additional evidence with his reconsideration request only narrative statements dated June 23 and September 22, 2006, which indicated that he had other unresolved health issues which he claimed impairment.<sup>20</sup> However, this is insufficient to show that the Office erroneously applied or interpreted a specific point of law nor does it advance a relevant legal argument not previously considered.<sup>21</sup>

Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. 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 did not submit any new evidence with his reconsideration request. The Office’s May 2, 2006 merit decision denied the claim for an additional schedule award because there was no medical evidence supporting that appellant was entitled to a schedule award for more than a 17 percent permanent impairment of the right upper

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<sup>19</sup> 20 C.F.R. § 10.608(b).

<sup>20</sup> The Board notes that appellant claimed impairment from several alleged consequential conditions of his treatment for the accepted condition; however, it appears from the record that the Office has not issued a final decision on such matters. Therefore, the Board does not have jurisdiction over the matter. *See* 20 C.F.R. § 501.2(c).

<sup>21</sup> Additionally, appellant indicated that he requested an oral hearing in 2003 and was not informed of the status of the hearing. The record reflects that the Office issued a decision on December 6, 2004 which denied appellant’s August 27, 2003 request for an oral hearing and this decision was mailed to appellant’s address of record on December 6, 2004.

extremity for which he was previously granted. Thus, the underlying issue is medical in nature. But, as noted above, appellant did not submit any new and relevant medical evidence with his reconsideration request.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his September 22, 2006 request for reconsideration.

### **CONCLUSION**

The Board finds that appellant, is therefore not entitled to an additional schedule award for the right upper extremity. The Board further finds that the Office properly denied appellant's request for reconsideration.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 20 and May 2, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 6, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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