

FACTUAL HISTORY

On March 28, 2005 appellant, then a 54-year-old maintenance mechanic, filed a traumatic injury claim alleging that on March 18, 2005 he injured his upper arm while going to move a tool box. The Office accepted the claim for right bicipital tenosynovitis.

In a report dated September 28, 2005, Dr. Judson C. McGowan, a treating Board-certified orthopedic surgeon, diagnosed right biceps muscle rupture. He reported that appellant had approximately 15 to 20 percent residual loss of right elbow flexion strength and loss of supination strength.

On October 21, 2005 appellant filed a claim for a schedule award.

On January 31, 2006 the Office medical adviser determined that appellant had a two percent permanent impairment of the right upper extremity based upon Table 16-35 at 510.

On March 3, 2006 the Office granted appellant a schedule award for a two percent permanent impairment of the right arm.

On May 1, 2006 appellant requested reconsideration and submitted an April 17, 2006 report by Dr. McGowan. Using Table 16-35, Dr. McGowan determined that appellant had five percent impairment due to flexion weakness and a four percent impairment due to pronation weakness, resulting in a total impairment of nine percent for the right upper extremity. Range of motion was 5/5 for appellant's inability "to perform full active range of motion against gravity with full resistance" and 4/5 for his ability "to perform full active range of motion against gravity with some resistance."

On July 10, 2006 the Office medical adviser reviewed Dr. McGowan's report and concluded that appellant had a five percent impairment of the right upper extremity based upon elbow flexion weakness. The Office medical adviser noted that residual weakness is to be expected in flexion and supination but not pronation. With respect to Dr. McGowan's finding of a ruptured biceps muscle based on an obvious "popeye" deformity the Office medical adviser opined that "this is not the typical bicipital tendinitis."

By decision dated August 6, 2006, the Office found that appellant had a five percent permanent impairment of his right upper extremity. The Office noted that, while Dr. McGowan found a four percent impairment due to weakness in pronation, he provided no explanation or cited to the section of the A.M.A., *Guides* he used in making this rating. The Office found the Office medical adviser's opinion was entitled to greater probative weight as he supported his opinion with rationale.

By decision dated August 7, 2006, the Office granted appellant an award for a five percent permanent impairment of the right arm.

On November 6, 2006 appellant requested reconsideration.

On November 16, 2006 the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing federal regulation,² 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 for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) as the uniform standard applicable to all claimants.³ Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁴

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for right bicipital tenosynovitis. On October 7, 2005 appellant filed a claim for a schedule award. By decision dated March 3, 2006, the Office granted appellant a schedule award for a two percent permanent impairment to his right arm. Appellant requested reconsideration, which was granted. On August 2, 2006 the Office vacated the March 3, 2006 decision and found that appellant had a five percent permanent impairment for his right arm. On appeal, appellant contends that he has greater than a five percent impairment of his right upper extremity.

The Office medical adviser and Dr. McGowan agreed with respect to appellant's impairment due to elbow flexion weakness (five percent). However, they disagreed on whether appellant was entitled to an impairment rating for elbow pronation weakness. Dr. McGowan concluded that appellant had a four percent impairment for elbow pronation weakness. The Office medical adviser disagreed with including an impairment rating for pronation weakness. He stated that "residual weakness is to be expected in flexion and supination but not pronation." Dr. McGowan provided no rationale explaining why he included an impairment determination for appellant's elbow pronation weakness.

The Office medical adviser properly applied the A.M.A., *Guides* and provided rationale for rating a five percent impairment of the right upper extremity. The Board finds that the opinion of the Office medical adviser represents the weight of the medical evidence of record and establishes that appellant has no more than five percent impairment of the right upper extremity.

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

³ 20 C.F.R. § 10.404(a).

⁴ 20 C.F.R. § 10.404(a); see *Thomas P. Lavin*, 57 ECAB ____ (Docket No. 05-1229, issued February 3, 2006); *Jesse Mendoza*, 54 ECAB 802 (2003).

LEGAL PRECEDENT -- ISSUE 2

The Act⁵ provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.⁶ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.⁷

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and 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.⁸

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁹ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁰

ANALYSIS -- ISSUE 2

Appellant disagreed with the August 7, 2006 decision awarding him a schedule award for a five percent permanent impairment of the right arm. However, he made no argument in support of his request for reconsideration. Appellant also did not submit any relevant and pertinent new evidence in support of his request. His reconsideration request failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office.

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 November 6, 2006 request for reconsideration.

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB ____ (Docket No. 06-121, issued June 6, 2006).

⁷ 20 C.F.R. § 10.605.

⁸ 20 C.F.R. § 10.606. *See Susan A. Filkins*, 57 ECAB ____ (Docket No. 06-868, issued June 16, 2006).

⁹ 20 C.F.R. § 10.607(a). *See Joseph R. Santos*, 57 ECAB ____ (Docket No. 06-452, issued May 3, 2006).

¹⁰ 20 C.F.R. § 10.608(b). *See Candace A. Karkoff*, 56 ECAB ____ (Docket No. 05-677, issued July 13, 2005).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 16 and August 7, 2006 are affirmed.

Issued: July 11, 2007
Washington, DC

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

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

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