



## **FACTUAL HISTORY**

On October 25, 2002 appellant, then a 53-year-old processing clerk, filed an occupational disease claim for degenerative joint disease of his right shoulder.<sup>1</sup> The Office accepted that he sustained employment-related chronic right shoulder tendinitis. Appellant filed claims for compensation for intermittent periods of disability beginning in 1990. He retired on disability on November 10, 2003.

Appellant filed claims for a schedule award.<sup>2</sup> In a February 6, 2006 report, Dr. William M. Craven, an attending Board-certified orthopedic surgeon, advised that he had a 9 percent whole body impairment or a 15 percent impairment of his right upper extremity. On February 17, 2006 appellant requested that any schedule award be paid in a lump sum. In a March 9, 2006 report, Dr. Craven advised that maximum medical improvement had been reached on February 6, 2006. In accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>3</sup> appellant had diminished right shoulder range of motion. Dr. Craven advised that under Figure 16-43 he had a 4 percent impairment for abduction of 100 degrees and a 1 percent impairment for adduction of 20 degrees, under Figure 16-40, appellant had a 3 percent impairment for forward flexion of 140 degrees and a 2 percent impairment for 20 degrees of flexion and, under Figure 16-46 he had a 3 percent impairment for internal rotation of 40 degrees and a 2 percent impairment for external rotation of 10 degrees or a total right shoulder impairment of 15 percent. On March 9, 2006 an Office medical adviser reviewed Dr. Craven's report and agreed that maximum medical improvement was reached on February 6, 2006 and that appellant had a 15 percent impairment of the right upper extremity.

In a letter dated March 27, 2006, the Office described the consequences of a lump-sum schedule award and attached an agreement which advised appellant that a sum of \$38,790.32 would be in payment of compensation for the commuted value of further installments of compensation for the remainder of a schedule award payable from February 6 to

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<sup>1</sup> Appellant has had previous claims before the Board. By decision dated June 18, 1993, Docket No. 92-1799, the Board remanded the case to the Office for a decision on the merits of his claim that he sustained a right shoulder condition causally related to factors of his employment on or after November 14, 1989. On September 28, 1995 Docket No. 94-970, the Board affirmed an Office decision dated July 23, 1993, finding that appellant did not establish that he sustained an employment-related right shoulder condition. The aforementioned shoulder claim was adjudicated by the Office under file number 060480309. In a January 1, 1998 decision, Docket No. 96-328, Office file number 060396372, the Board adopted a September 27, 1995 decision in which an Office hearing representative denied that appellant sustained a recurrence of disability of an employment-related lumbar strain. By decision dated August 11, 2005, Docket No. 05-923, Office file number 062098951, the Board found that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty. Appellant had alleged that his treatment by the employing establishment and the Office in adjudicating the instant claim, file number 062073973, caused stress. In a May 18, 2006 decision, Docket No. 06-627, the Board found that, pursuant to 5 U.S.C. § 8128(a), the Office properly refused to reopen appellant's emotional condition claim for further consideration of the merits. The law and the facts of the previous Board decisions are incorporated herein by reference.

<sup>2</sup> Appellant also submitted a schedule award for a right knee condition. A right knee condition, however, has not been accepted by the Office as employment related and schedule awards are only payable for employment-related impairments. See generally *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>3</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

December 30, 2006. The lump-sum payment represented full and final settlement of the schedule award in connection with appellant's shoulder injury. He signed the agreement that day.

By decision dated March 30, 2006, appellant was granted a schedule award for a 15 percent impairment of the right upper extremity, for a total of 327.6 days, to run from February 6 to December 30, 2006.

On October 15, 2006 he requested reconsideration, stating that his civil rights were violated by the Office because he was not informed of the consequences of a lump-sum payment.

By decision dated October 30, 2006, the Office denied appellant's reconsideration request. It noted that medical evidence submitted subsequent to the March 30, 2006 schedule award was not relevant as it did not address his right shoulder impairment.<sup>4</sup> It further found that he did not provide any legal contention that his schedule award was processed incorrectly.

Appellant again requested reconsideration on November 17, 2006. He contended that his shoulder injury caused bilateral knee and foot injuries, a lower back condition and stress and again argued that the Office did not properly inform him regarding the lump-sum settlement. Appellant attached medical evidence, including reports from Dr. Earl H. Thurmond, a Board-certified internist, who provided restrictions to appellant's physical activity on August 22, 2005. On February 16, 2006 Dr. Thurmond diagnosed chronic hepatitis, hypertension, kidney stone and tendinitis of the shoulder. In an attending physician's report dated September 9, 2006, he diagnosed degenerative disc disease of the lumbar spine and advised that the back condition was caused by lifting at work. In reports dated October 11, 2005 and March 3, 2006, Dr. S. Christopher Cable, Board-certified in anesthesiology, noted giving appellant epidural injections for lumbosacral radiculitis. Reports from the Atlanta Veterans Administration Medical Center dating from February 7 to July 26, 2006 included laboratory test results and diagnoses of chronic knee pain and hypertension. Knee x-rays demonstrated right knee degenerative disease.

By decision dated December 13, 2006, the Office denied appellant's reconsideration request.

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

Under section 8107 of the Federal Employees' Compensation Act<sup>5</sup> and section 10.404 of the implementing federal regulations,<sup>6</sup> schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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

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<sup>4</sup> The medical evidence submitted after the March 30, 2006 schedule award consisted of a referral to physical therapy by Dr. Craven dated June 15, 2005 and physical therapy notes from June, August and September 2005.

<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

A.M.A., *Guides* has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.<sup>7</sup> Chapter 16 provides the framework for assessing upper extremity impairments.<sup>8</sup>

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*. However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant does not have more than 15 percent right upper extremity impairment. In reports dated February 6 and March 6, 2006, Dr. Craven, appellant's attending orthopedist, provided range of motion measurements for his right shoulder and concluded that appellant had a 15 percent impairment of his right shoulder. His finding of 100 degrees of abduction and 20 degrees of adduction under Figure 16-43 equals four percent and one percent impairments respectively.<sup>10</sup> Under Figure 16-40, forward flexion of 140 degrees and 20 degrees of extension yields impairments of three and two percent respectively<sup>11</sup> and under Figure 16-46 internal rotation of 40 degrees and external rotation of 10 degrees yields impairments of three and two percent respectively.<sup>12</sup> Dr. Craven properly added the loss of shoulder motion deficits to total a 15 percent right upper extremity impairment.<sup>13</sup> In a March 9, 2006 report, an Office medical adviser reviewed Dr. Craven's report and agreed with his conclusion that appellant had a 15 percent impairment of the right upper extremity. There is no other medical evidence in the record that provides a greater rating for appellant's right shoulder impairment. Appellant did not establish that he is entitled to a schedule award greater than the 15 percent awarded on March 30, 2006.

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

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on

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<sup>7</sup> See *Joseph Lawrence, Jr.*, *supra* note 4; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

<sup>8</sup> A.M.A., *Guides*, *supra* note 4 at 433-521.

<sup>9</sup> *Robert V. Disalvatore*, 54 ECAB 351 (2003).

<sup>10</sup> A.M.A., *Guides*, *supra* note 4 at 477.

<sup>11</sup> *Id.* at 476.

<sup>12</sup> *Id.* at 479.

<sup>13</sup> *Id.*, at 474, section 16.4i.

application by a claimant.<sup>14</sup> Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.<sup>15</sup> Section 10.608(b) provides that when an application for reconsideration 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.<sup>16</sup> Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>17</sup> Likewise, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>18</sup>

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

In his request for reconsideration, appellant stated that the Office violated his civil rights because it did not fully inform him of the consequences of having his schedule award paid in a lump sum.<sup>19</sup> Office procedures provide that lump-sum payments can be made under section 8107 of the Act.<sup>20</sup> The record supports that the lump sum was granted at appellant's request. The lump-sum settlement agreement signed by him on March 27, 2006 provided that he agreed to accept a sum of \$38,790.32 for the commuted value of further installments of compensation pursuant to his schedule award.<sup>21</sup> Appellant's argument therefore does not support that the Office erroneously applied or interpreted a specific point of law and does not advance a relevant

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<sup>14</sup> 5 U.S.C. § 8128(a).

<sup>15</sup> 20 C.F.R. § 10.606(b)(2).

<sup>16</sup> *Id.* at § 10.608(b).

<sup>17</sup> *Helen E. Paglinawan*, 51 ECAB 591 (2000).

<sup>18</sup> *Kevin M. Fatzner*, 51 ECAB 407 (2000).

<sup>19</sup> Appellant contended that he was not aware that his Social Security benefits would be decreased upon receipt of a schedule award. Office regulations at section 10.422(b), provide that the Office, in its exercise of discretion afforded under section 8135(a) of the Act, may make a lump-sum payment to an employee entitled to a schedule award under section 8107 when such a payment is in the employee's best interest. 20 C.F.R. § 10.422(b). Section 8116(a) of the Act provides that, while an employee is receiving compensation or if she has been paid a lump sum in commutation of installment payments, until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified circumstances. An individual receiving benefits for disability or death under this subchapter who is also receiving benefits under Subchapter III of Chapter 84 or benefits under Title II of the Social Security Act shall be entitled to all such benefits, except that -- in the case of benefits received on account of age or death under Title II of the Social Security Act, compensation payable under the Act based on the federal service of an employee shall be reduced by the amount of any such social security benefits payable that are attributable to federal service of that employee covered by Chapter 84. 5 U.S.C. § 8116(a); *Wayne B. Kovacs (Cynthia A. Kovacs)*, 55 ECAB 133 (2003).

<sup>20</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Lump Sum Payments*, Chapter 2.133.2 (July 2003).

<sup>21</sup> *See Dale Mackelprang*, 55 ECAB 174 (2003).

legal argument not previously considered by the Office.<sup>22</sup> He also argued that knee, hip, lower back and kidney conditions were secondary injuries.<sup>23</sup> This too does not show that the Office erroneously applied or interpreted a specific point of law and do not address the underlying issue in this case, *i.e.*, whether appellant established that he had greater than a 15 percent impairment of his right upper extremity. Consequently, he was 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).<sup>24</sup>

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted no additional medical evidence that contained any discussion of a right upper extremity impairment. He therefore did not submit relevant and pertinent new evidence not previously considered by the Office and the Office properly denied appellant's reconsideration requests by its October 30 and December 13, 2006 decisions.

### **CONCLUSION**

The Board finds that appellant failed to establish that he is entitled to a schedule award greater than the 15 percent right upper extremity impairment previously awarded. It further finds that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>22</sup> 20 C.F.R. § 10.606(b)(2).

<sup>23</sup> The Board notes that the Office has not issued a final decision as to whether these conditions were caused or aggravated by appellant's federal employment. Its jurisdiction is limited to reviewing final decisions of the Office. *Karen L. Yaeger*, 54 ECAB 323 (2003).

<sup>24</sup> 20 C.F.R. § 10.606(b)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated December 13, October 30 and March 30, 2006 be affirmed.

Issued: February 1, 2008  
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