United States Department of Labor
Employees' Compensation Appeals Board

T.W., Appellant	)	
and	)	**Docket No. 09-812**
	)	**Issued: December 2, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Independence, MO, Employer	)	

Appearances:
Kevin A. Graham, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 4, 2009 appellant filed a timely appeal from a schedule award decision of the Office of Workers' Compensation Programs dated May 27, 2008 and a November 10, 2008 decision that denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a 22 percent impairment of the left upper extremity for which he received schedule awards; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a). On appeal appellant, through his attorney, argues that the Office improperly denied merit review by its November 10, 2008 decision because he had submitted new and relevant evidence that established entitlement to a left upper extremity schedule award greater than that awarded.

FACTUAL HISTORY

On October 21, 1996 appellant, then a 43-year-old mail handler, filed a Form CA-2, occupational disease claim, alleging that heavy lifting and throwing mailbags caused a right shoulder injury. He did not stop work. On March 10, 1997 the Office accepted right shoulder impingement syndrome as employment related and corrective surgery was performed on April 2, 1997. On December 24, 1997 appellant filed a second occupational disease claim, alleging that moving heavy equipment caused left shoulder tendinitis. On January 29, 1998 the Office accepted this claim for aggravation of acromioclavicular arthritis, left and impingement syndrome of the left shoulder. Appellant underwent left diagnostic arthroscopy acromioplasty on March 11, 1998. On August 3, 1998 he was granted a schedule award for 11 percent impairment of the right shoulder and on June 25, 1999 a schedule award for a 16 percent impairment of the left upper extremity. Appellant had additional left shoulder procedures on December 6, 2000 and June 17, 2002. By decision dated September 30, 2003, the Office determined that his actual wages as a modified mail handler fairly and reasonably represented his wage-earning capacity, finding that he had zero percent loss. On March 17, 2004 he had a fourth left upper extremity surgical procedure.[1]

In September 2006, the Office determined that, a conflict in medical evidence was created between the opinions of appellant's attending Board-certified orthopedist, Dr. Steven Joyce, and Dr. Kathryn Hedges, a Board-certified neurologist who provided a second opinion evaluation for the Office regarding whether appellant had reflex sympathetic dystrophy or a chronic regional pain syndrome.[2] Appellant retired on disability effective October 12, 2006. In April 2007, the Office referred him to Dr. Donohoe, Board-certified in neurology, for an impartial evaluation. In a May 3, 2007 report, Dr. Donohoe provided examination findings and advised that appellant had a complex regional pain syndrome directly related to the surgeries described in the statement of accepted facts, particular the surgery for thoracic outlet syndrome. He stated, "in my opinion the basic requirements according to the 5th edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) are met."

On May 21, 2007 appellant filed a schedule award claim. By letter dated June 4, 2007, the Office informed him of the type of evidence needed to support the claim and on June 28, 2007 accepted the condition of complex regional pain syndrome, reflex sympathetic dystrophy (RSD) of the left upper limb. In an August 8, 2007 report, Stanley Butts, Ph.D., a licensed psychologist, diagnosed pain disorder with both psychological factors and a general medical condition, generalized anxiety disorder and complex regional pain syndrome and advised that appellant was unable to work. By reports dated September 13 and October 25, 2007, Dr. Joyce

[1] After each procedure appellant returned to modified duty.

[2] Dr. Joyce had been appellant's attending physician for many years, performing the 1997, 1998, 2000 and 2002 surgical procedures. Dr. Hedges examined appellant on June 28, 2006. The Office initially referred him to Dr. Michael E. Ryan, a Board-certified neurologist, who provided reports dated October 17, 2006 and January 5 and February 9, 2007. Dr. Ryan advised that appellant had a 20 percent left upper extremity impairment. Finding his reports not well reasoned, the Office referred appellant to Dr. Charles D. Donohoe, also Board-certified in neurology.

advised that on February 26, 2004 he increased appellant's permanent impairment of the left upper extremity to 20 percent due to significant loss of motion and decreased strength and that, based on the continuation of symptoms of RSD, he would add 5 percent for a regional pain syndrome, for a total left upper extremity impairment of 25 percent.

On January 18, 2008 the Office referred appellant to Dr. George Varghese, a Board-certified physiatrist, for an impairment evaluation. In a February 13, 2008 report, Dr. Varghese noted that he examined appellant on February 11, 2008 and reported his past medical history including multiple surgical procedures and electromyographic findings of mild carpal tunnel syndrome. He advised that the only finding suggestive of reflex sympathetic dystrophy on examination of the left shoulder was hyperesthesia in the C5 dermatome and possibly in the C8, T1 dermatome and noted some disuse atrophy of the serratus anterior and shoulder girdle muscles. Range of motion findings of the left shoulder were 125 degrees of forward flexion, 50 degrees of extension, 130 degrees of abduction, 50 degrees of adduction and 60 degrees of internal and external rotation, with mild weakness of the serratus anterior and external and internal rotation and shoulder abduction. Dr. Varghese provided analysis in accordance with the A.M.A., *Guides*,[3] finding an eight percent impairment due to loss of shoulder motion, a seven percent impairment due to loss of strength and a nine percent impairment for pain and sensory deficit. He combined the ratings to find a 22 percent impairment of the left upper extremity.

By letter dated February 22, 2008, an Office medical adviser noted that he agreed with Dr. Varghese's range of motion and strength impairment ratings, but asked that the physician provide additional explanation regarding his pain and sensory determination, in accordance with the A.M.A., *Guides*.[4]

In an April 8, 2008 report, Dr. Varghese advised that his examination did not show evidence of reflex sympathetic dystrophy and therefore he had not utilized section 16-2.5e of the A.M.A., *Guides* regarding complex regional pain syndrome. He stated that appellant's pain and hypesthesia of the C-5, C-8 and T-1 dermatomes should be taken as a residual nerve injury, secondary to previous surgery. By report dated April 11, 2008, an Office medical adviser advised that maximum medical improvement was reached on February 11, 2008. He stated that, with the additional rationale provided by Dr. Varghese in his April 8, 2008 report, appellant was entitled to a 22 percent permanent impairment of the left upper extremity. By report dated May 12, 2008, the Office medical adviser noted that appellant had previously received a schedule award for a 16 percent impairment of the left upper extremity and was therefore entitled to an additional award of 6 percent. On May 27, 2008 appellant was granted a schedule award for an additional six percent impairment of the left upper extremity, for a total of 18.72 weeks, to run from February 11 to June 21, 2008.

[3] A.M.A., *Guides* (5th ed. 2001).

[4] On February 14, 2008 the Office referred appellant to Dr. James Gregory Hunter, a Board-certified psychiatrist, for a psychiatric second opinion evaluation. In a report dated March 10, 2008, Dr. Hunter diagnosed dysthymia, generalized anxiety disorder, pain disorder due to a general medical condition, complex regional pain syndrome, severe chronic pain and inability to work. He advised that appellant's depressive disorder and anxiety disorder were secondary to the development of chronic pain and recommended consultation with a psychiatrist to assist in medication management for optimal pain relief and for his depression and anxiety disorders. On March 28, 2008 the Office accepted the conditions of dysthymic disorder and generalized anxiety disorder.

On October 6, 2008 appellant requested reconsideration, contending that the schedule award was in error because it did not take into account the accepted conditions of dysthymic disorder or generalized anxiety disorder. He submitted a copy of Dr. Hunter's March 10, 2008 report and a June 23, 2008 report in which Dr. Donohoe reiterated his prior findings and conclusions. Appellant noted that on examination that day he was in obvious pain and had weakness of abduction of the left shoulder graded at 4.5/5. He concluded:

> "In summary, I would concur with prior observations regarding the level of impairment with respect to his left shoulder. In that regard, I would use a figure of 25 percent. My major difference with prior observation centers about the pain syndrome related to his reflex sympathetic dystrophy (complex regional pain syndrome). It is my feeling that the pain has a much more global effect on his quality of life. In that regard, I would rate his permanent partial disability with respect to the body as a whole at 30 percent."

Appellant also submitted a September 25, 2008 report in which Dr. Joyce provided examination findings.

By decision dated November 10, 2008, the Office denied appellant's reconsideration request, finding the evidence submitted repetitious and insufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of the Federal Employees' Compensation Act[5] and section 10.404 of the implementing federal regulations,[6] 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 A.M.A., *Guides*[7] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[8]

It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.[9] Office procedures provide that to support a schedule award, the file must contain competent medical evidence, which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred ("date of maximum medical improvement"), describes the impairment in sufficient detail to include, where applicable, the loss in degrees of active and passive motion of the

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] A.M.A., *Guides*, *supra* note 3.

[8] *See Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[9] *Tammy L. Meehan*, 53 ECAB 229 (2001).

affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment and the percentage of impairment should be computed in accordance with the fifth edition of the A.M.A., *Guides*.

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 figures and tables found 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.[10] Chapter 16 of the fifth edition of the A.M.A., *Guides* provides the framework for assessing upper extremity impairments.[11] Office procedures further provide that after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment and the Office medical adviser should provide rationale for the percentage of impairment specified.[12]

ANALYSIS -- ISSUE 1

The Board finds that, at the time the Office issued the May 27, 2008 schedule award, appellant had not met his burden of proof to establish that he was entitled to an impairment rating for the left upper extremity greater than the 22 percent awarded. The accepted conditions regarding the left upper extremity are: aggravation of acromioclavicular arthritis; impingement syndrome; reflex sympathetic dystrophy; and complex regional pain syndrome. Further accepted conditions are: right shoulder impingement syndrome; dysthymic disorder; and generalized anxiety disorder. On August 3, 1998 appellant had already been granted a schedule award for 11 percent impairment of the right shoulder and on June 25, 1999, a schedule award for a 16 percent impairment of the left upper extremity.

Regarding appellant's general argument on appeal that his accepted conditions of dysthymic disorder and generalized anxiety disorder should be considered in his impairment rating, section 8107 of the Act identifies specific members of the body such as the arm, leg, hand, foot, thumb and finger; functions such as loss of hearing and loss of vision; and organs to include the eye.[13] Section 8107(c)(22) provides for the payment of compensation for permanent loss of any other important external or internal organ of the body as determined by the Secretary of Labor who has made such a determination and pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, tongue, ovary, uterus/cervix and vulva/vagina to the schedule.[14] Disorders of the nervous system are not included as covered

[10] *Robert V. Disalvatore*, 54 ECAB 351 (2003).

[11] A.M.A., *Guides*, *supra* note 3 at 433-521.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(b-d) (August 2002).

[13] 5 U.S.C. § 8107(c).

[14] 5 U.S.C. § 8107(c)(22); 20 C.F.R. § 10.404(a); *see D.J.*, 59 ECAB ___ (Docket No. 08-725, issued July 9, 2008).

members for purposes of a schedule award under the Act.[15] Appellant would therefore not be entitled to an increased schedule award for his accepted psychological conditions.

The medical evidence relevant to a left upper extremity impairment includes an October 17, 2006 report, in which Dr. Ryan advised that appellant had a 20 percent left upper extremity impairment, less than that awarded. In a May 3, 2007 report, Dr. Donohoe merely stated that the requirements for a diagnosis of complex regional pain syndrome had been met in accordance with the A.M.A., *Guides*. He provided no impairment analysis in which he referenced specific sections, figures or tables of the A.M.A., *Guides* nor did he provide the degree of permanent impairment. On October 25, 2007 Dr. Joyce advised that appellant had a 20 percent left upper extremity impairment due to significant loss of motion and decreased strength and an additional 5 percent for complex regional pain syndrome, to total a 25 percent left upper extremity impairment. However, he did not reference specific sections, figures or tables of the A.M.A., *Guides.*

An opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment.[16] Schedule awards are to be based on the A.M.A., *Guides* and an estimate of permanent impairment is irrelevant and of diminished probative value where it is not based on the A.M.A., *Guides*.[17] The reports of Drs. Ryan, Donohoe and Joyce are therefore insufficient to establish that appellant was entitled to a schedule award greater than the 22 percent awarded.

In reports dated February 13 and April 8, 2008, Dr. Varghese noted his review in accordance with the fifth edition of the A.M.A., *Guides* and advised that, under Figures 16-40, 125 degrees of forward flexion yielded a four percent impairment and 50 degrees of extension yielded zero percent impairment;[18] that under Figure 16-43, 130 degrees of abduction yielded a two percent impairment and 50 degrees of adduction yielded zero percent impairment;[19] and that under Figure 16-46, 60 degrees of internal rotation yielded a two percent impairment.[20] He then properly added these values to find an eight percent impairment for loss of left shoulder range of motion. Dr. Varghese also properly utilized Tables 16-11 and 16-35 to find a three percent impairment due to weakness of the serratus anterior muscle, a two percent impairment due to abduction weakness and one percent impairments for internal and external rotation, to yield a strength deficit of seven percent.[21] He then rated appellant's pain and sensory deficits under Table 16-13, finding a four percent impairment at C5, a three percent impairment at C8 and a

[15] *F.M.*, 58 ECAB ____ (Docket No. 06-632, issued: May 3, 2007).

[16] *Carl J. Cleary*, 57 ECAB 563 (2006).

[17] *James R. Hill*, 57 ECAB 583 (2006).

[18] A.M.A., *Guides supra* note 3 at 476.

[19] *Id* at 477.

[20] *Id* at 479.

[21] *Id*. at 484, 510.

two percent impairment at T1, for a nine percent impairment for pain and sensory deficit.[22] Dr. Varghese then properly utilized the Combined Values Chart,[23] to conclude that appellant had a 22 percent permanent impairment of the left upper extremity. In reports dated April 11 and May 12, 2008, an Office medical adviser agreed with Dr. Varghese's impairment findings. The Office medical adviser noted that, as appellant had previously received a schedule award for a 16 percent permanent impairment of the left upper extremity, he was entitled to an additional schedule award for a 6 percent impairment, which the Office granted on May 27, 2008.

As the reports of Dr. Varghese and the Office medical adviser provided the only evaluations that, conformed with the A.M.A., *Guides*, they constitute the weight of the medical evidence. Appellant therefore did not meet his burden of proof to establish that he is entitled to a schedule award greater than those awarded.

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 application by a claimant.[24] Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[25] This section provides that the application for reconsideration must be submitted in writing and 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.[26] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[27]

ANALYSIS -- ISSUE 2

The merit issue in this case is whether appellant met his burden of proof to establish that he has more than a 22 percent impairment of the left upper extremity, for which he received schedule awards. With his October 6, 2008 reconsideration request, appellant contended that the schedule award was in error because it did not take into account the accepted conditions of dysthymic disorder or generalized anxiety disorder. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required

[22] *Id*. at 489.

[23] *Id*. at 604-06.

[24] 5 U.S.C. § 8128(a).

[25] 20 C.F.R. § 10.608(a).

[26] *Id*. at § 10.608(b)(1) and (2).

[27] *Id*. at § 10.608(b).

where the legal contention, as in this case, does not have a reasonable color of validity.[28] As stated above, disorders of the nervous system are not covered members for purposes of a schedule award under the Act.[29] Consequently, appellant 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).[30]

With respect to the third above-noted requirement under section 10.6069b)(2), Dr. Hunter's March 10, 2008 report was previously of record. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[31] Appellant also submitted a September 25, 2008 report in which Dr. Joyce provided examination findings. Dr. Joyce, however, provided no impairment analysis. The Board has held that the submission of evidence which does not address the particular issue involved in a case does not constitute a basis for reopening the claim.[32] Appellant, however, also submitted a June 23, 2008 report in which Dr. Donohoe advised that he felt that pain has a much more global effect on quality of life and would rate appellant's permanent partial disability with respect to the body as a whole at 30 percent.

In order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[33] As the June 23, 2008 report from Dr. Donohoe constituted new and relevant medical evidence, the Board finds that the Office improperly denied appellant's request for review of the merits of his claim and the case will be remanded to the Office to conduct an appropriate merit review. Following this and such other development as deemed necessary, the Office shall issue a merit decision on the schedule award claim.[34]

CONCLUSION

The Board finds that appellant did not establish that he was entitled to a schedule award for his left upper extremity greater than the 22 percent awarded and that the Office improperly

[28] *M.E.*, 58 ECAB ____ (Docket No. 07-1189, issued September 20, 2007).

[29] *F.M.*, *supra* note 15.

[30] 20 C.F.R. § 10.606(b)(2).

[31] *D'Wayne Avila*, 57 ECAB 642 (2006).

[32] *Id*.

[33] *Billy B. Scoles*, 57 ECAB 258 (2005).

[34] On December 1, 2008 appellant requested reconsideration with the Office and on February 4, 2009 filed an appeal with the Board of the May 27, 2008 Office decision. By decision dated February 27, 2009, the Office denied modification of the May 27, 2008 decision. It and the Board may not have simultaneous jurisdiction over the same issue in the same case. Following the docketing of an appeal with the Board, the Office does not retain jurisdiction to render a further decision regarding the same issue on appeal until after the Board relinquishes its jurisdiction. Any decision, such as that issued on February 27, 2009, rendered by the Office on the same issues for which an appeal is filed is null and void. *Jacqueline S. Harris*, 54 ECAB 139 (2002).

refused to reopen his schedule award claim for further review of the merits pursuant to section 8128(a) of the Act.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 27, 2008 be affirmed. The decision dated November 10, 2008 is vacated and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: December 2, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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