

**United States Department of Labor
Employees' Compensation Appeals Board**

S.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
New Orleans, LA, Employer)

**Docket No. 08-2448
Issued: June 11, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 9, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 11, 2007, which denied modification of an August 4, 2006 decision denying his claim for a schedule award. He also appealed decisions dated February 25, July 21 and September 4, 2008, which denied appellant's requests for reconsideration without a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant sustained any permanent impairment based on his accepted injury; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

This matter has previously been before the Board. In an August 12, 1997 decision, the Board set aside Office decisions terminating appellant's compensation and remanded the case for

further medical development.¹ The Board instructed the Office to develop whether his cervical condition after September 17, 1991 was caused or aggravated by the August 31, 1988 employment injury.² In a decision dated July 3, 2000, the Board affirmed a December 23, 1997 Office decision terminating appellant's wage-loss compensation effective September 17, 1991; however, it reversed the termination of his medical benefits.³ The facts and circumstances of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

On June 28, 2001 appellant filed a schedule award claim. In a May 31, 2001 report, Dr. Mark J. Hontas, a Board-certified orthopedist, found that he had a 10 percent permanent impairment as a result of his work injury. In letters dated May 31 and July 17, 2001, the Office requested that Dr. Hontas submit a detailed report providing an impairment rating pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ On March 4, 2002 Dr. Hontas advised that appellant had residuals from his 1998 work injury with weakness, pain and loss of range of motion in his neck representing a 10 percent impairment based on the A.M.A., *Guides*. In a May 2, 2002 report, an Office medical adviser opined that the report of Dr. Hontas was insufficient to determine maximum medical improvement or permanent impairment as he did not provide objective findings or reference the pertinent tables in the A.M.A., *Guides*. The medical adviser recommended a second opinion referral.⁵

On May 1, 2006 the Office referred appellant for a second opinion to Dr. Christopher Ecenac, a Board-certified orthopedic surgeon. In a June 19, 2006 report, Dr. Ecenac reviewed the records provided to him and examined appellant. He noted the history of appellant's work-related neck injury. On examination Dr. Ecenac found symmetrized grip strength, normal reflexes in the upper and lower extremities, full and unrestricted range of motion in the neck and back and sensory deficits in the median distribution were noted to pin prick and light touch in the left hand but no deficits were noted in the hands or feet. He related that Tinel's sign was negative bilaterally, no muscle spasm in the spine, straight leg raises were normal and no atrophy was noted in the arms, hands, legs or feet. Examination of the right arm revealed a healed lateral

¹ The Office accepted that on August 31, 1988 appellant sustained contusions of the head, right shoulder, right elbow and neck while in the performance of duty. He received continuation of pay and compensation and returned to work on July 5, 1990 for four hours per day on limited duty.

² Docket No. 95-1104 (issued August 12, 1997).

³ Docket No. 98-870 (issued July 3, 2000). Subsequent to the Board's July 3, 2000 decision, the Board disposed of three other appeals on procedural grounds. In a December 18, 2001 decision, the Board dismissed appellant's appeal for lack of jurisdiction. Docket No. 01-2150 (issued December 18, 2001). In an October 29, 2003 decision, the Board remanded the case to the Office for reconstruction of the case record. Docket No. 03-35 (issued October 29, 2003). In a May 2, 2005 decision, the Board dismissed appellant's appeal for lack of jurisdiction and also dismissed his petition for reconsideration in 03-35. Docket No. 03-0035 and 04-1180 (issued May 2, 2005).

⁴ A.M.A., *Guides* (5th ed. 2001).

⁵ On May 9 and June 25, 2002 the Office referred appellant to a second opinion physician regarding permanent impairment and whether he had residuals of his work injury. Appellant did not attend the second opinion appointments. On July 29, 2002 the Office denied appellant's schedule award claim. In a September 8, 2005 decision, a hearing representative set aside the July 29, 2002 decision finding that the Office failed to make a finding with regard to appellant's reasons for failing to appear for the directed medical examination.

incision on the lateral epicondyle, full supination, pronation, flexion and extension of the wrist, full motion of the elbow and right shoulder, no crepitation of the wrist or elbow or shoulder and normal shoulder strength with no atrophy. Dr. Ecenac recommended an updated evaluation with imaging studies and an electromyogram (EMG) prior to an impairment evaluation.

Appellant was referred for a magnetic resonance imaging (MRI) scan of the cervical spine on June 27, 2006, which revealed cervical spondylosis at C3-4 and C4-5 and C5-6 with neural foraminal narrowing bilaterally at C5-6. An EMG and nerve conduction studies (NCS) dated July 3, 2006 revealed no abnormalities. In a supplemental report dated July 5, 2006, Dr. Ecenac found no evidence to base an impairment rating. He noted normal findings for the EMG and NCS testing, the MRI scan of the lumbar spine revealed no evidence of cord compression or nerve root impingement causing any proximal nerve root pathology diagnostically and there were normal physical findings in the extremities. Dr. Ecenac opined that appellant had no impairment or residual causally related to his accepted conditions in accordance with the A.M.A., *Guides*.

In a July 24, 2006 report, an Office medical adviser reviewed Dr. Ecenac's opinion and diagnostic studies and concurred in his findings that there was no evidence to support any impairment of the upper extremities due to the accepted injuries. The medical adviser further noted that the spine was not a scheduled member therefore it was not a basis for impairment. While impairment of an upper extremity due to radiculopathy could be rated under the A.M.A., *Guides*, Dr. Ecenac found no radiculopathy or neuropathy secondary to appellant's cervical spine condition. The medical adviser opined that, under the A.M.A., *Guides*, there was no basis for rating an impairment based on the accepted conditions.

In a decision dated August 4, 2006, the Office denied appellant's claim for a schedule award.

On July 31, 2007 appellant requested reconsideration. In a report dated November 20, 2006, Dr. Hontas noted that appellant's symptoms were unchanged with pain in the neck radiating down the left arm. He advised that appellant had 10 percent impairment.

In a decision dated September 11, 2007, the Office denied modification of the August 4, 2006 decision.

On November 7, 2007 appellant requested reconsideration. He submitted reports from Dr. Hontas dated September 20 and October 29, 2007, who noted that appellant's symptoms were unchanged with pain in the neck radiating down the left arm and recommended conservative treatment. Dr. Hontas noted that an MRI scan showed C5-6 left paracentral building of the disc material and osteophytic formation producing stenosis and flattening of the cervical cord, which he opined caused the neck pain and radiculopathy.

In a February 25, 2008 decision, the Office denied appellant's reconsideration request finding that it was insufficient to warrant further review of the prior decision.

On June 24, 2008 appellant requested reconsideration and submitted a June 19, 2008 MRI scan of the cervical spine, which revealed a herniated disc and arthritis of the small facet joints on the left side of his neck that was pinching nerves causing left hand weakness.

In a decision dated July 21, 2008, the Office denied appellant's reconsideration request finding that it was insufficient to warrant review of the prior decision.

On July 31, 2008 appellant requested reconsideration and asserted that the Office improperly denied merit review as he submitted new evidence that should have been considered. He referenced the June 2008 MRI scan of the cervical spine. Appellant further indicated that his chronic pain should have been considered in his schedule award.

In a decision dated September 4, 2008, the Office denied appellant's reconsideration request finding that it was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁶ and its implementing regulations⁷ 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 regulations as the appropriate standard for evaluating schedule losses.⁸

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.⁹ As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.¹⁰ The Board notes that section 8101(19) specifically excludes the back from the definition of "organ."¹¹ However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.¹²

ANALYSIS -- ISSUE 1

On appeal, appellant contends that he is entitled to a schedule award for permanent partial impairment of the upper extremities and cervical spine. The Office accepted appellant's claim for contusions of the head, right shoulder, right elbow, neck and cervical herniated disc at C5-6. However, as noted, the Act does not allow for a schedule award based on impairment to

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁹ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁰ *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

¹¹ 5 U.S.C. § 8101(19).

¹² *Thomas J. Engelhart*, *supra* note 9.

the neck or spine. Appellant may only be awarded a schedule award for impairment to the upper extremities if such impairment is established as being due to his accepted cervical condition.

On March 4, 2002 Dr. Hontas opined that appellant had residuals from his 1998 work injury and noted weakness, pain and loss of range of motion in his neck for 10 percent impairment based on the A.M.A., *Guides*. On November 20, 2006 he reiterated that appellant sustained 10 percent impairment. However, these reports are insufficient to establish permanent impairment for schedule award purposes as Dr. Hontas did not explain how he made this rating pursuant to the A.M.A., *Guides*. He failed to reference any tables or charts in support of his determination.¹³ Although Dr. Hontas opined that appellant had 10 percent impairment, he failed to provide findings upon physical examination or other objective clinical evidence of neurological impairment. The report offered no basis on which to attribute impairment under the A.M.A., *Guides*.

The Office referred appellant to Dr. Ecenac, who on June 19, 2006, noted generally normal sensory and motor findings on examination with no atrophy found in the upper extremities. Dr. Ecenac requested diagnostic testing before making a final impairment determination. A June 27, 2006 MRI scan showed cervical spondylosis at C3-4 and C4-5 and C5-6 with neural foraminal narrowing bilaterally at C5-6. A July 3, 2006 EMG and NCS revealed no abnormalities. In a July 5, 2006 supplemental report, Dr. Ecenac noted that he found no evidence on which to base an impairment rating due to appellant's accepted cervical condition in accordance with the A.M.A., *Guides*. He based this finding on normal physical findings upon examination of the upper extremities, the normal EMG and NCS and the MRI scan showing no evidence of cord compression or nerve root impingement.

Dr. Ecenac's reports and the case record were referred to an Office medical adviser. On July 24, 2006 he concurred with Dr. Ecenac's determination that there was no evidence to support any impairment to the upper extremities due to the accepted injuries in accordance with the A.M.A., *Guides*. The Office medical adviser noted that Dr. Ecenac conducted a thorough evaluation of appellant's upper extremities and found no radiculopathy or neuropathy secondary to the abnormality of the cervical spine. Dr. Ecenac noted that the spine was not a scheduled member for purposes of a schedule award.

The Board finds that appellant has no permanent impairment to a scheduled member of the body pursuant to the A.M.A., *Guides*. There are no medical reports of record, in conformance with the A.M.A., *Guides*, which support that he sustained a ratable impairment to his upper extremities causally related to his accepted conditions.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,¹⁴ the Office has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth

¹³ *Richard A. Neidert*, 57 ECAB 474 (2006) (an attending physician's report is of little probative value where the A.M.A., *Guides* are not properly followed).

¹⁴ 5 U.S.C. § 8128(a).

in section 10.606(b)(2) of the implementing federal regulations,¹⁵ which provide that a 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;

“(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.¹⁶

ANALYSIS -- ISSUE 2

In his November 7, 2007 request for reconsideration, appellant 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. With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, Dr. Hontas' reports dated September 20 and November 29, 2007 are new. However, the reports are essentially duplicative of his reports dated November 21, 2005 and June 15, 2006, which were considered by the Office in its decision dated August 4, 2006. Evidence that repeats or duplicates that already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁷ Additionally, the reports failed to address the issue of whether appellant has work-related permanent impairment of a scheduled member of the body. Therefore, this evidence was insufficient to require the Office to reopen the claim for a merit review.

Appellant's June 24, 2008 request for reconsideration did not allege or demonstrate 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 submitted a June 19, 2008 MRI scan of the cervical spine. However, this report is not relevant as it does not address the issue of permanent impairment due to his accepted conditions. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

¹⁵ 20 C.F.R. § 10.606(b).

¹⁶ *Id.* at § 10.608(b).

¹⁷ 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; see *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

In a July 31, 2008 reconsideration request, appellant asserted that he had submitted new evidence, the June 19, 2008 MRI scan report. He further indicated that his chronic pain should have been considered in his schedule award. These assertions do not demonstrate that the Office erroneously applied or interpreted a specific point of law nor do they advance a relevant legal argument not previously considered by the Office. The underlying condition in this case is medical in nature. As such, it is appellant's obligation to submit medical evidence to support that the sustained permanent impairment is due to his accepted cervical condition. The Office had previously considered the June 19, 2008 MRI scan report. Appellant did not submit any new and relevant evidence with his reconsideration request. Therefore, the Office properly denied this 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 requests for reconsideration.

CONCLUSION

The Board finds that appellant did not establish that he sustained permanent impairment of his upper extremities due to his accepted cervical condition. The Board further finds that the Office properly denied his requests for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the September 4, July 21, February 25, 2008 and September 11, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 11, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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