

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

N.F., Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Southeastern, PA, Employer**

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**Docket No. 08-1847
Issued: March 19, 2009**

Appearances:
Thomas R. Uliase, 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 June 19, 2008 appellant timely appealed the March 5, April 2 and 21, 2008 decisions of the Office of Workers' Compensation Programs, which affirmed a schedule award and denied reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award.

ISSUES

The issues are: (1) whether appellant has greater than 13 percent impairment of the right upper extremity; and (2) whether the Office properly denied appellant's April 10, 2008 request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board. Appellant, a 57-year-old mail processor/flat sorter machine operator, has an accepted occupational disease claim for bilateral shoulder tendinitis, lumbosacral strain and right thumb strain.¹ On December 3, 2003 the Office

¹ Appellant's employment-related injuries occurred on or about October 14, 2001.

granted a schedule award for 30 percent impairment of the right thumb, which covered a period of 22.5 weeks. Appellant received an additional schedule award on February 7, 2006. At that time, the Office granted two percent impairment of the left upper extremity and an additional two percent impairment of the right upper extremity.² The February 7, 2006 award covered a period of 12.48 weeks. This decision was affirmed by the Branch of Hearings and Review on October 16, 2006.

When this case was previously on appeal, the Board found that the issue of appellant's entitlement to a schedule award was not in posture for decision.³ The Board noted that while Dr. Berman disagreed with certain aspects of Dr. Weiss' impairment rating, Dr. Berman failed to adequately explain the basis for his disagreement, particularly with respect to a 20 percent rating Dr. Weiss assigned for right pinch key strength deficit. Additionally, the Board noted that neither Dr. Berman nor Dr. Weiss explained why their respective pain-related impairments were appropriate under the circumstances. Lastly, the Board found that the Office miscalculated the amount of offset between the December 3, 2003 and February 7, 2006 awards. Accordingly, the Board set aside the October 16, 2006 decision and remanded the case for further medical development, followed by the issuance of a *de novo* decision regarding appellant's entitlement to a schedule award.⁴

In a supplemental report dated August 10, 2007, Dr. Berman explained that appellant had evidence of loss of range of motion, decreased strength and pain. However, decreased strength could not be rated in the presence of decreased motion or painful conditions. As such, Dr. Berman could not utilize Dr. Weiss' 20 percent impairment for weakness of pinch. With respect to the additional two percent rating for pain, Dr. Berman stated that in view of appellant's functional level and Dr. Weiss' failure to justify a three percent rating, he believed two percent was appropriate for appellant's pain.

By decision dated August 20, 2007, the Office found that appellant was not entitled to an additional schedule award. Appellant had not established a greater impairment than the 13 percent right upper extremity impairment previously awarded.⁵

In a decision dated March 5, 2008, the Branch of Hearings and Review agreed with the Office's finding with respect to appellant's entitlement to an additional schedule award. However, the hearing representative noted that the Office had not addressed the offset issue, which the Board previously found in error. Accordingly, the hearing representative remanded

² The award was based on the November 14, 2005 report of Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and district medical adviser (DMA). Dr. Berman reviewed an August 9, 2004 impairment rating from Dr. David Weiss, a Board-certified orthopedist, who found 23 percent impairment of the left upper extremity and 37 percent impairment of the right upper extremity. Dr. Berman largely disagreed with Dr. Weiss' impairment rating. However, he did find 13 percent impairment of the right upper extremity and 2 percent impairment of the left upper extremity. The Office purportedly offset Dr. Berman's 13 percent right upper extremity rating by the percentage impairment previously awarded for the right hand.

³ Docket No. 07-864 (issued July 13, 2007).

⁴ The Board's July 13, 2007 decision is incorporated herein by reference.

⁵ The Office also found that appellant had not established an additional impairment of the left upper extremity.

the case to the Office to clarify its finding regarding the appropriate offset between the two prior schedule awards.

By decision dated April 2, 2008, the Office awarded appellant an additional 11.82 weeks compensation for his overall 13 percent impairment of the right upper extremity.

Appellant's attorney requested reconsideration on April 10, 2008. The request was accompanied by a December 17, 2007 magnetic resonance imaging (MRI) scan of the right shoulder. The Office also received a March 11, 2008 prescription for physical therapy for appellant's right shoulder. It denied appellant's request for reconsideration by decision dated April 21, 2008.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁶ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.⁷ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁸

ANALYSIS -- ISSUE 1

Appellant's attorney argues that there is an unresolved conflict in medical opinion between Drs. Weiss and Berman regarding the extent of appellant's right upper extremity permanent impairment.⁹ Counsel noted that Dr. Weiss found an overall right upper extremity impairment of 37 percent, which included 3 percent impairment due to pain, 18 percent impairment for right thumb motor strength deficit (abduction) and 20 percent impairment for right pinch key strength deficit. In contrast, Dr. Berman, the district medical adviser, found 13 percent impairment of the right upper extremity. He essentially increased the December 2003 award, which represented 11 percent impairment of the right upper extremity, by 2 percent due to pain.

⁶ For a total, or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) (2006).

⁷ 20 C.F.R. § 10.404 (2008).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

⁹ Counsel has not challenged the Office's award of two percent impairment of the left upper extremity due to loss of motion in the shoulder. He noted that a separate claim had been filed and was currently under development with respect to injuries allegedly sustained to appellant's left wrist on or about May 5, 2004 (xxxxxx204).

Dr. Berman disagreed with Dr. Weiss' assignment of 18 percent impairment for right thumb motor strength deficit, explaining that there was no basis for an award for neurological deficit because there was no evidence of carpal tunnel syndrome or median nerve deficit.¹⁰ He also disagreed with Dr. Weiss' 20 percent impairment rating for pinch key strength deficit. In his August 10, 2007 supplemental report, Dr. Berman cited section 16.8a, A.M.A., *Guides* 508 and explained that decreased strength cannot be rated in the presence of "decreased motion or painful conditions." The A.M.A., *Guides* indicate that factors such as decreased motion and painful conditions may prevent effective application of maximal force in the region being evaluated.¹¹ Because of the reported pain and decreased motion in the right thumb region, the pinch strength measurements identified by Dr. Weiss may not accurately reflect the extent of appellant's right upper extremity impairment. For this reason, the district medical adviser properly excluded the additional 20 percent impairment for right pinch key strength deficit. The Board finds that Dr. Berman's August 10, 2007 explanation for excluding loss of pinch strength from appellant's overall impairment rating is consistent with the A.M.A., *Guides* (5th ed. 2001) and thus, represents the weight of the medical evidence.¹²

As to the additional impairment rating for pain, the Board finds that neither Dr. Berman nor Dr. Weiss provided adequate justification for their respective ratings. Both physicians cited Figure 18-1, A.M.A., *Guides* 574, as support for assigning additional impairment due to pain.¹³ Dr. Weiss found three percent impairment for pain, whereas Dr. Berman found two percent. In his supplemental report, Dr. Berman indicated that he reduced Dr. Weiss' three percent rating to two percent because of appellant's "functional level and the fact that [Dr. Weiss] had not justified the maximum [three] [percent] award." But in reducing the pain award to 2 percent, Dr. Berman himself failed to explain why the 11 percent impairment for loss of motion in the right thumb basilar joint was by itself insufficient. Although he believed an additional 2 percent for pain was "appropriate," Dr. Berman also indicated that the 11 percent award was "adequately rated on the basis of body part." Given that the "body part" award was deemed

¹⁰ Dr. Weiss diagnosed "[b]ilateral median nerve dysfunction by history." However, his August 9, 2004 report did not reference any prior history of median nerve dysfunction. Furthermore, Dr. Weiss' own physical and sensory examination findings did not reveal any signs of carpal tunnel syndrome or any neurological deficit involving the median nerve.

¹¹ A.M.A., *Guides* 508, section 16.8a.

¹² Appellant's counsel argues that a conflict in medical opinion exists between the district medical adviser and Dr. Weiss, requiring referral to an impartial medical examiner. For a conflict to arise, the opposing physicians' viewpoints must be of "virtually equal weight and rationale." *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006). Dr. Weiss' August 9, 2004 impairment rating is not on par with Dr. Berman's rating, and therefore, no conflict exists. Accordingly, the case need not be remanded for an impartial medical evaluation.

¹³ The A.M.A., *Guides* limit the circumstances under which a pain-related impairment may be assessed under Chapter 18. If an impairment can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*, such as Chapters 13, 16 and 17, then pain-related impairments should not be assessed using Chapter 18. See the A.M.A., *Guides* 571, section 18.3b. The A.M.A., *Guides* provide for an incremental adjustment of up to three percent for pain when the conventional rating system does not adequately encompass the burden of the individuals condition. Where the pain-related impairment appears to increase the burden of the individual's condition "slightly," the physician can increase the percentage found under the conventional rating system by up to three percent. See the A.M.A., *Guides* 573, section 18.3d; the A.M.A., *Guides* 574, Figure 18-1.

adequate and then an additional two percent award for pain was inappropriate under the circumstances. The Board finds that appellant has not demonstrated that he has a greater impairment of the right upper extremity than the combined 13 percent schedule awards he has already received. The Office has paid appellant a total of 40.56 weeks' compensation for the right upper extremity, which corresponds to 13 percent impairment.¹⁴

LEGAL PRECEDENT -- ISSUE 2

The Office has the discretion to reopen a case for review on the merits.¹⁵ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (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.¹⁶ 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.¹⁷

ANALYSIS -- ISSUE 2

Appellant's April 10, 2008 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. Therefore, 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).¹⁸ He also failed to satisfy the third requirement under section 10.606(b)(2). Appellant did not submit any relevant and pertinent new evidence with his April 10, 2008 request for reconsideration. Neither the December 17, 2007 right shoulder MRI scan nor the March 11, 2008 physical therapy prescription specifically identified additional impairment of the right upper extremity. As such, this evidence is not relevant to the issue on reconsideration.¹⁹ Consequently, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).²⁰

¹⁴ See 5 U.S.C. § 8107(c)(1) (13 percent multiplied by 312 weeks' compensation = 40.56).

¹⁵ 5 U.S.C. § 8128(a).

¹⁶ 20 C.F.R. § 10.606(b)(2).

¹⁷ 20 C.F.R. § 10.608(b).

¹⁸ 20 C.F.R. § 10.606(b)(2)(i) and (ii).

¹⁹ On appeal, appellant's attorney argued that he submitted a March 11, 2008 addendum report from Dr. David L. Rubenstein with the April 10, 2008 request for reconsideration. Counsel is mistaken. The report he references was submitted under cover letter dated April 25, 2008 and received by the Office on May 1, 2008. Because this evidence was received after the Office issued the April 21, 2008 decision denying reconsideration, the Board is precluded from reviewing it for the first time on appeal. 20 C.F.R. § 10.501.2(c).

²⁰ 20 C.F.R. § 10.606(b)(2)(iii).

CONCLUSION

Appellant is not entitled to an additional schedule award for permanent impairment of the right upper extremity. The Board further finds that the Office properly denied appellant's April 10, 2008 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the April 21, April 2 and March 5, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 19, 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