



the right rotator cuff. It authorized arthroscopic surgery which was performed on July 31, 2006. Appellant stopped work on April 6, 2008.

Appellant came under the treatment of Dr. Richard Curnow, a Board-certified orthopedic surgeon, who noted treating appellant from June 16 to July 3, 2006 for injuries to his right elbow and shoulder sustained in a fall at work. Dr. Curnow diagnosed full thickness tear of the right rotator cuff and performed acromioplasty with exploration and debridement of old mass irreparable rotator cuff tear. In reports dated August 30, 2006 to January 22, 2007, he noted that appellant was progressing well postoperatively with full range of motion and some weakness. On January 22, 2007 Dr. Curnow advised that appellant reached maximum medical improvement and estimated appellant's impairment of the right shoulder at 30 percent. On May 7, 2007 appellant filed a claim for a schedule award.

On June 11, 2007 the Office referred appellant for a second opinion to Dr. George Varghese, a Board-certified physiatrist, for an impairment rating in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>1</sup> In a July 16, 2007 report, Dr. Varghese reviewed the medical records and noted the history of a full thickness rotator cuff tear, for which appellant underwent acromioplasty and debridement of the rotator cuff. He found that right shoulder abduction was 130 degrees for two percent impairment,<sup>2</sup> adduction was 50 degrees for zero percent impairment,<sup>3</sup> internal rotation was 70 degrees for one percent impairment,<sup>4</sup> external rotation was 50 degrees for one percent impairment,<sup>5</sup> flexion was 130 degrees for three percent impairment<sup>6</sup> and extension was 50 degrees for zero percent impairment.<sup>7</sup> In rating strength, Dr. Varghese referred to Table 16-35, rating strength deficit for abduction at four, external rotation at three and internal rotation at two or total muscle weakness of nine percent.<sup>8</sup> He found that appellant had 15 percent impairment to the right upper extremity under the A.M.A., *Guides* Combined Values Chart. Dr. Varghese noted that appellant reached maximum medical improvement.

In a report dated July 16, 2007, an Office's medical adviser concurred with Dr. Varghese that appellant had 15 percent impairment of the right upper extremity due to loss range of motion and strength deficits. The Office medical adviser noted that Dr. Varghese discussed range of motion, chronic pain, sensory change and chronic weakness and properly cited to the appropriate tables and figures in the A.M.A., *Guides* in support of his impairment rating.

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<sup>1</sup> A.M.A., *Guides*, (5<sup>th</sup> ed. 2001).

<sup>2</sup> *Id.* at 477, Figure 16-43.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 479, Figure 16-46.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 476, Figure 16-40.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 510, 16-35.

In a decision dated August 30, 2007, the Office granted appellant a schedule award for 15 percent permanent impairment of the right upper extremity. The period of the award was from July 16, 2007 to June 7, 2008 or 46.8 weeks.

In a letter dated June 3, 2008, appellant requested reconsideration of the August 30, 2007 schedule award. He asserted that his surgeon told him that his impairment was at least 30 percent. Appellant contended that he could not lift anything with his right arm and had not been able to secure a job since being released on September 1, 2007 by the employing establishment.

In a decision dated June 17, 2008, the Office denied appellant's reconsideration request on the grounds that his letter did not raise substantive legal questions or include new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

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

The schedule award provision of the Federal Employees' Compensation Act<sup>9</sup> and its implementing regulations<sup>10</sup> 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.

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

The Office accepted appellant's claim for sprain of the right shoulder/upper arm, contusion of the right shoulder and full thickness tear of the right rotator cuff. It authorized arthroscopic surgery, which was performed on July 31, 2006. In a January 22, 2007 report, Dr. Curnow advised that appellant had reached maximum medical improvement and that he had permanent impairment of 30 percent due to his right shoulder injury. However, he did not explain how he calculated this impairment rating pursuant to the A.M.A., *Guides*.<sup>11</sup> It is well established that an impairment estimate not based on the standards adopted by the Office is of diminished probative value.<sup>12</sup>

On July 16, 2007 Dr. Varghese noted findings upon physical examination of the right shoulder: for abduction was 130 degrees for two percent impairment,<sup>13</sup> adduction was

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<sup>9</sup> 5 U.S.C. § 8107.

<sup>10</sup> 20 C.F.R. § 10.404.

<sup>11</sup> *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).

<sup>12</sup> *See Carl J. Cleary*, 57 ECAB 563 (2006).

<sup>13</sup> *See A.M.A., Guides* 477, Figure 16-43.

50 degrees for zero percent impairment,<sup>14</sup> internal rotation was 70 degrees for one percent impairment,<sup>15</sup> external rotation was 50 degrees for one percent impairment,<sup>16</sup> flexion was 130 degrees for three percent impairment<sup>17</sup> and extension was 50 degrees for zero percent impairment.<sup>18</sup> He found a total of percent impairment for loss range of motion. The Board notes that these values for range of motion deficit conform to the A.M.A., *Guides*.

With regard to impairment for strength deficit, Dr. Varghese used Table 16-35. He advised that right shoulder abduction was valued at four percent, external rotation was valued at three percent and internal rotation was valued at two percent or total muscle weakness of nine percent.<sup>19</sup> The Office medical adviser also concurred in this finding. However, the Board notes that pursuant to the A.M.A., *Guides* decreased strength cannot be rated in the presence of decreased motion or painful conditions. The A.M.A., *Guides* provide that only in rare cases, if the examiner believed that the individual's loss of strength represents an impairment factor that has not been considered adequately by other methods in the A.M.A., *Guides*, then the loss of strength can be rated separately.<sup>20</sup> In this instance, Dr. Varghese did not fully explain why strength impairment was calculated in addition to the range of motion impairment. He did not address whether the tall thickness tear of the rotator cuff warranted a separate loss of strength rating. The Board notes that the medical evidence in this case does not show a ratable impairment greater than seven percent permanent impairment of the right upper extremity.

Appellant did not submit any medical evidence supporting greater impairment than that which he was granted by the Office.

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

Under section 8128(a) of the Act,<sup>21</sup> 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 in section 10.606(b)(2) of the implementing federal regulations,<sup>22</sup> which provide that a claimant

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 479, Figure 16-46.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 476, Figure 16-40.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 510, 16-35.

<sup>20</sup> *Id.* at 508, 16.8a, Principles.

<sup>21</sup> 5 U.S.C. § 8128(a).

<sup>22</sup> 20 C.F.R. § 10.606(b).

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:

“(1) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(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.]”

Section 10.608(b) provide 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.<sup>23</sup>

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

Appellant’s June 3, 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 did not submit any additional medical evidence with his reconsideration request, only a narrative statement which noted that Dr. Curnow had rated impairment as 30 percent. He indicated that he could lift anything with his right arm and has not been able to find work since his agency released him on September 1, 2007. However, this is insufficient to show that the Office erroneously applied or interpreted a specific point of law nor does it advance a relevant legal argument not previously considered. Therefore, the Office properly determined that this did not constitute a basis for reopening the case for a merit review. Consequently, appellant is not entitled to a review of the merits of his claim under section 10.606(b)(2).

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 June 3, 2008 request for reconsideration.

### **CONCLUSION**

The Board finds that appellant has no more than 15 percent right upper extremity impairment. The Board further finds that the Office properly denied appellant’s request for reconsideration of his case on its merits.

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<sup>23</sup> *Id.* at § 10.608(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 17, 2008 and August 30, 2007 decisions of the Office of Workers' Compensation Programs are affirmed, as modified.

Issued: May 13, 2009  
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