

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

R.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
North Topeka, KS, Employer**

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**Docket No. 09-1231
Issued: July 27, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 9, 2009 appellant filed a timely appeal from an August 25, 2008 merit decision of the Office of Workers' Compensation Programs denying his claim for a schedule award and an October 20, 2008 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained any permanent impairment to his right arm causally related to his accepted injury; and (2) whether the Office properly denied his request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board. In a March 19, 2007 decision, the Board affirmed the Office's denial of appellant's claim for a recurrence of disability commencing

June 22, 2004.¹ The facts of the case as set forth in the Board's prior decision are hereby incorporated by reference. On April 26, 2007 appellant filed a claim for a schedule award.

In a May 31, 2007 report, Dr. Glenn M. Amundson, an attending Board-certified orthopedic surgeon, advised that appellant had 19 percent impairment to the whole body as a result of the August 1, 2001 injury. He noted that the rating was pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (4th ed. 1993) and based on injury to appellant's spine.

In a July 27, 2007 decision, the Office denied appellant's claim for a schedule award. It found that the medical evidence did not support impairment to a member or function of the body covered under the schedule at section 8107 of the Federal Employees' Compensation Act or the implementing federal regulations.

On September 13, 2007 appellant requested reconsideration and submitted additional medical evidence. In an August 5, 2007 report, Dr. Amundson stated that appellant sustained a permanent aggravation to his low back, neck and right upper extremity as a result of the August 1, 2001 motor vehicle accident. On December 13, 2005 appellant underwent surgery at the C5-6 and C6-7 levels for an anterior cervical discectomy and fusion. With regard to permanent impairment, Dr. Amundson advised that appellant had a Grade 2 sensory deficit of 80 percent to C7 sensory function.² He multiplied this sensory deficit by the five percent maximum impairment allowed for sensory deficit or pain involving the C7 nerve root.³ This totaled four percent impairment to the right arm for pain. In rating loss of strength, Dr. Amundson advised that an electromyogram supported fatigability of appellant's right triceps (C7 innervated muscle) for which he assigned a Grade 4 strength deficit of 15 percent.⁴ He noted that the maximum impairment allowed for loss of strength involving the C7 nerve root was 35 percent for motor deficit. This totaled five percent impairment of the right arm for motor loss. Dr. Amundson combined the four percent sensory loss with the five percent strength loss to total nine percent impairment to appellant's right arm due to the C6-7 disc herniation. He based his opinion on a "reasonable degree of medical certainty." Dr. Amundson pointed out that appellant had no preexisting injury or deficit.

On October 19, 2007 the Office referred the medical record to an Office medical adviser for review. On November 26, 2007 the Office medical adviser stated that Dr. Amundson's report did not conform to the A.M.A., *Guides* because he based his findings on electromyogram and nerve conduction studies that had been performed on March 31, 2006. The Office medical adviser stated that Dr. Amundson did not perform an adequate physical examination to support the impairment that he rated.

¹ Docket No. 06-987 (issued March 19, 2007), *petition for recon. denied* December 20, 2007. The Office accepted appellant's claim for a cervical strain, displacement of a cervical intervertebral disc without myelopathy, degeneration of a cervical disc, right shoulder strain and temporary aggravation of degenerative disc disease at L4-5.

² A.M.A., *Guides* 482, Table 16-10.

³ *Id.* at 489, Table 16-13.

⁴ *Id.* at 484, Table 16-11.

In a December 11, 2007 decision, the Office denied modification of the July 27, 2007 decision. It found the weight of medical opinion was represented by the Office medical adviser.

On July 21, 2008 appellant requested reconsideration. In an April 2, 2008 report, Dr. Amundson noted that appellant continued to have C7 nerve root deficit and complaint of reduced range of motion in the cervical spine. He listed findings with regard to appellant's reflexes, strength and range of motion. Dr. Amundson did not further address appellant's impairment under the A.M.A., *Guides*.

On August 9, 2008 the Office medical adviser found that Dr. Amundson's April 2, 2008 report provided incomplete information on which to consider an impairment rating.

In an August 25, 2008 decision, the Office denied modification of its prior decisions denying appellant's schedule award claim.

On September 29, 2008 appellant requested reconsideration. He submitted an April 10, 2008 report from Dr. Amundson who rated impairment of the right upper extremity at 12 percent.

In an October 20, 2008 decision, the Office denied appellant's request for reconsideration. It found that he did not raise a substantive legal question or include new and relevant medical evidence.

LEGAL PRECEDENT

Section 8107, the schedule award provision of the Act,⁵ and its implementing federal regulations,⁶ set forth the maximum number of weeks of compensation payable to employees who sustain permanent impairment from loss or loss of use of listed members or functions of the body.⁷ 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, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to rate impairment.⁸

A schedule award is not payable for loss, or loss of use, of a part of the body that is not specifically enumerated in the schedule.⁹ Section 8107 and its implementing regulations do not provide for schedule awards for impairment to the back, spine or the body as a whole. The back is specifically excluded from the definition of organ.¹⁰ To the extent that the schedule award

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ Less than total impairment is compensated at a proportionate rate. See *Paul I. Anderson*, 31 ECAB 1845 (1980).

⁸ 20 C.F.R. § 10.404(a).

⁹ See *James W. Ray*, 33 ECAB 1470 (1982).

¹⁰ *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990); 5 U.S.C. § 8101(19).

provisions include the extremities, an employee may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine.¹¹

ANALYSIS

The Office accepted appellant's claim for cervical strain and disc conditions, right shoulder strain and temporary aggravation of degenerative disc disease at L4-5. Appellant filed a claim for a schedule award which was denied by the Office based on the finding by an Office medical adviser that appellant's attending physician, Dr. Amundson, did not provide adequate information on which to rate permanent impairment. The Board finds that the medical evidence of record is sufficient to establish that appellant sustained nine percent impairment to his right arm due to his accepted injury.

On August 5, 2007 Dr. Amundson provided findings on examination of appellant, noting that residuals of the accepted conditions impaired the right upper extremity resulting from the August 1, 2001 employment injury. His opinion of causal relationship was based on a reasonable degree of medical certainty," pointing out there was no preexisting injury. Dr. Amundson identified the C7 nerve root as causing both sensory and motor deficit to the right arm based on radiculopathy into the upper extremity. He noted that appellant underwent cervical discectomy and fusion on December 5, 2005 and addressed his postoperative course of treatment. Despite surgery, appellant still has C7 radiculopathy with his complaints largely unchanged. As to sensory deficit, Dr. Amundson noted that Table 16-13, page 498, provided a maximum impairment of five percent for sensory loss involving the C7 spinal nerve. He classified appellant's symptoms under Table 16-10, page 482, as Grade 2 for decreased superficial cutaneous pain and tactile sensibility for which he allowed 80 percent. Multiplying the maximum impairment value of 5 percent by the 80 percent deficit, equals 4 percent sensory loss to the right arm. For loss of motor strength, Dr. Amundson noted that Table 16-13 provided a maximum impairment of 35 percent for the C7 nerve. He classified appellant's motor deficit under Table 16-11, page 484, as Grade 4 for which he allowed 15 percent. Dr. Amundson multiplied the 35 percent maximum value by the 15 percent deficit to find 5 percent motor loss to the right arm. He combined the motor and sensory losses to total nine percent impairment to appellant's right arm based on residuals of C7 radiculopathy.¹² The Board finds that Dr. Amundson provided an impairment rating based on C7 radiculopathy causing motor and sensory impairment to appellant's right arm. His rating is based on a proper application of the A.M.A., *Guides* and constitutes the weight of medical opinion. As an attending physician, Dr. Amundson examined appellant, provided an accurate history of medical treatment and surgery and supplied a thorough description of the residuals affecting the arm. He stated the reasons for selecting the deficit grades under Table 16-10 and 16-11.

Although the Office medical adviser found that Dr. Amundson's rating was not sufficient to support a schedule award, the Board does not share in this conclusion.

¹¹ *George E. Williams*, 44 ECAB 530, 533 (1993).

¹² *See Combined Values Chart*, page 604.

The Board will set aside the August 25, 2008 Office decision. The case is remanded to the Office to issue a schedule award conforming to this decision.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.¹⁵

ANALYSIS -- ISSUE 2

On reconsideration, appellant submitted an April 10, 2008 report from Dr. Amundson that was not previously considered by the Office. Dr. Amundson further discussed the issue of appellant's impairment with regard to the A.M.A., *Guides*. This evidence is new to the record and relevant to the issue of the extent of permanent impairment caused by appellant's accepted injury. It is sufficient to require further review of the merits of appellant's claim. The case will be remanded for the Office to review this evidence. After such further development of the claim as it deems necessary, it shall issue an appropriate schedule award decision on the extent of impairment to appellant's right arm.¹⁶

CONCLUSION

The Board finds that appellant has nine percent impairment to his right arm. The Board further finds that the Office abused its discretion in denying his request for reconsideration.

¹³ 20 C.F.R. § 10.606(b)(2).

¹⁴ *Id.* at § 10.607(a).

¹⁵ *Id.* at § 10.608(b).

¹⁶ The record on appeal includes evidence received after the Office's October 20, 2008 decision. The Board may not consider evidence for the first time on appeal. 20 C.F.R. § 501.2(c). Following appellant's April 9, 2009 appeal to the Board, the Office issued an April 29, 2009 schedule award. As this decision was issued after the Board took jurisdiction of the case, it is null and void. The Board and the Office may not have simultaneous jurisdiction over the same issue. *See Douglas E. Billings*, 41 ECAB 880 (1990).

ORDER

IT IS HEREBY ORDERED THAT the October 20 and August 25, 2008 decisions of the Office of Workers' Compensation Programs be set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: July 27, 2010
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