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

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| **C.T., Appellant** | ) | |
| **and** | ) | **Docket No. 09-1340** |
| | ) | **Issued: July 1, 2010** |
| **DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT AGENCY, Washington, DC, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On April 28, 2009 appellant filed a timely appeal from schedule award decisions of the Office of Workers' Compensation Programs dated September 25 and December 1, 2008 and April 7, 2009. He also appealed an April 13, 2009 decision that denied modification of a November 8, 1999 loss of wage-earning capacity decision.[1] 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 is entitled to a schedule award for the left upper extremity greater than the 30 percent awarded; and (2) whether the Office properly denied modification of the November 8, 1999 wage-earning capacity decision.

[1] Appellant also appealed a March 10, 2009 Office decision that found that appellant did not establish clear evidence of error with regard to the November 8, 1999 wage-earning capacity decision. The Office's April 13, 2009 decision on the merits regarding the November 8, 1999 decision renders the March 10, 2009 decision moot.

## *FACTUAL HISTORY*

This is appellant's ninth appeal before the Board and the third appeal regarding the Office's November 8, 1999 wage-earning capacity decision.[2] Initially, by order dated January 20, 1983, the Board remanded the case to the Office for consideration of new evidence and a *de novo* decision on the issue of appellant's loss of wage-earning capacity.[3] By decision dated October 24, 1983, the Board affirmed an Office decision finalized on May 24, 1983. By that decision, the Office determined that the constructed position of personnel worker fairly and reasonably represented appellant's wage-earning capacity and reduced his compensation.[4] In a June 7, 1984 decision, the Board found him at fault in the creation of an overpayment in compensation in the amount of $322.97.[5] By decision dated November 30, 1984, the Board affirmed an August 2, 1984 decision of the Office denying appellant's reconsideration request of the wage-earning capacity determination.[6]

The record reflects that by decision dated January 30, 1973 appellant was granted a schedule award for a 10 percent loss of use of the left arm. On July 1, 1974 he received an additional award of 5 percent, for a total 15 percent permanent impairment of the left upper extremity. In an August 11, 1997 decision, the Office denied modification of the May 24, 1983 wage-earning capacity decision. On September 23, 1997 appellant underwent transposition of the left ulnar nerve and was returned to total disability compensation. He filed an appeal with the Board of the August 23, 1997 decision denying modification of the October 24, 1983 wage-earning capacity determination.

By decision dated August 5, 1998, the Office granted appellant a schedule award for an additional 15 percent permanent impairment of the left upper extremity for a total 30 percent impairment. In a November 8, 1999 decision, it issued a new wage-earning capacity determination, again finding that the constructed position of personnel clerk fairly and reasonably represented appellant's wage-earning capacity determination and reduced his compensation. By decision dated January 3, 2000, the Board affirmed the August 11, 1997 Office wage-earning capacity decision.[7] On January 5, 2000 the Board issued an order, remanding appellant's schedule award claim to the Office because the record before the Board

[2] On August 16, 1971 appellant, then a 27-year-old special agent trainee, injured his left elbow in a fall during training. He underwent surgery to the left elbow on June 16, 1972 and the Office accepted the claim for left elbow arthrotomy with excision of the joint. In decisions dated January 12, 1981 and January 13, 1982, the Office found that the position of superintendent of plant protection fairly and reasonably represented appellant's wage-earning capacity. By decision dated January 30, 1982, an Office hearing representative affirmed the decisions.

[3] Docket No. 83-312 (issued January 20, 1983).

[4] Docket No. 83-1384 (issued October 24, 1983).

[5] Docket No. 84-699 (issued June 7, 1984).

[6] Docket No. 84-2066 (issued November 30, 1984).

[7] Docket No. 97-2683 (issued January 3, 2000).

was incomplete. On remand, the Office was to reassemble the case record and issue a *de novo* decision.[8]

On February 9, 2000 the Office issued a schedule award, finding that appellant had a 30 percent impairment of the left upper extremity and noted that he had been fully paid in this regard. By decision dated July 26, 2000, an Office hearing representative affirmed the November 8, 1999 wage-earning capacity decision. Appellant filed appeals with the Board of both the February 9, 2000 schedule award decision and the July 26, 2000 hearing representative decision on the issue of his wage-earning capacity. In a decision dated November 26, 2001, the Board found that he had not established that the wage-earning capacity determination was in error and affirmed the July 26, 2000 Office decision. The Board, however, remanded the case to the Office for resolution of the issue of appellant's entitlement to an increased schedule award.[9] In an August 7, 2002 Office decision, the Office denied modification of the November 8, 1999 loss of wage-earning capacity determination. By decision dated February 25, 2003, the Board affirmed the August 7, 2002 decision.[10] The law and facts as set forth in the previous decisions and orders are incorporated herein by reference.[11]

On December 16, 2003 appellant requested reconsideration and submitted evidence previously of record. In a nonmerit decision dated February 2, 2004, the Office denied his reconsideration request.[12] In a January 3, 2006 report, Dr. Walter J. Hales, Board-certified in orthopedic and hand surgery, noted the history of injury and that appellant had ulnar nerve transposition surgery in the left upper extremity in 1998. He advised that maximum medical improvement had been reached approximately two years after the surgery and provided physical findings and an impairment analysis in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).[13] Dr. Hales concluded that appellant had a total 16 percent impairment of his left upper extremity secondary to a slight sensory deficit, loss of motion and traumatic arthritis. By report dated January 19, 2006, he noted appellant's complaints of painful left elbow and thumb, provided physical findings and prescribed medication and provided a resistance strap.

In a January 25, 2006 report, Dr. Wing C. Chau, a Board-certified physiatrist, noted the history of injury and appellant's complaints of persistent numbness.[14] He provided physical examination findings, diagnosed status post left ulnar transposition, left cubital tunnel syndrome

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[8] Docket No. 99-1274 (issued January 5, 2000).

[9] Docket No. 00-2551 (issued November 26, 2001). In an order dated April 24, 2002, the Board denied appellant's petition for reconsideration.

[10] Docket No. 03-126 (issued February 25, 2003).

[11] On December 15, 1972 the Office accepted that appellant sustained employment-related joint mice of the left elbow and left elbow arthrotomy was later accepted. .

[12] On December 28, 2003 appellant elected Federal Employees' Compensation Act (FECA) benefits and on August 25, 2005 was married.

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

[14] The physician also noted an industrial injury to appellant's right knee that occurred in private employment.

and left fourth and fifth digit numbness and concluded that, following his review of Dr. Hales' records, he concurred with his impairment analysis. By report dated February 1, 2006, Dr. Thomas Tan, Board-certified in internal medicine and pulmonary disease, noted the history of injury and provided physical examination findings. He diagnosed chronic obstructive pulmonary disease with moderate airway obstruction; hypertension, presently well controlled; chest pain syndrome, rule-out pulmonary hypertension, rule-out coronary artery disease, rule-out secondary to gastroesophageal reflux disease; traumatic arthritis over the left elbow, status post left ulnar transplant; history of right knee surgery and right big toe surgery times three with screw placement in 1999; and benign prostatic hypertrophy with erectile dysfunction. He recommended electromyography (EMG) and nerve conduction testing (NCS). A February 2, 2006 EMG demonstrated an entrapment of the left median nerve at the wrist consistent with moderate left carpal tunnel syndrome, a moderate to severe ulnar neuropathy at the left elbow and a demyelinating sensory peripheral neuropathy of unclear clinical significance with no evidence of a left cervical radiculopathy.

In a report dated July 18, 2008, Dr. Chester S. McLaughlin, Board-certified in orthopedic surgery, noted the history of injury, appellant's past medical history and his complaints of numbness, aching and stabbing pains about the left elbow with stiffness and weakness of the left upper extremity, extending into the ulnar surface of the left hand involving the left and little ring fingers. He reported his review of medical records and correspondence provided by appellant and described physical examination findings, noting that appellant was right-hand dominant. Regarding diagnoses, Dr. McLaughlin stated that appellant sustained a contusion and sprain of the left elbow resulting in traumatic arthritis and spur formation with tardy ulnar nerve palsy, resulting in surgery. He provided an impairment analysis in accordance with the fifth edition of the A.M.A., *Guides*, concluding that appellant had a 25 percent permanent impairment of the left upper extremity.

On September 22, 2008 an Office medical adviser reviewed the medical record and noted that appellant had a number of impairment ratings over the years. He advised that he agreed with Dr. McLaughlin's impairment rating with regard to loss of motion but disagreed with his rating for arthritis, stating that Table 17-2 of the fifth edition of the A.M.A., *Guides* precluded a rating for motion loss and a diagnosis-based rating. The Office medical adviser concluded that the correct rating was 12 percent for loss of motion, combined with a 5 percent rating for ulnar nerve irritation, for a total left upper extremity impairment of 16 percent, with maximum medical improvement reached on July 18, 2008.

By decision dated September 25, 2008, the Office found that appellant was not entitled to an increased schedule award. It noted that he had previously received schedule awards totaling a 30 percent loss of use of the left upper extremity and that, although the opinions of Dr. McLaughlin and the Office medical adviser were in conflict regarding the degree of impairment, he was not entitled to an increased schedule award because neither physician advised that he was entitled to an impairment rating greater than the 30 percent previously awarded. On December 1, 2008 the Office reissued the September 25, 2008 decision because appeal rights were not included with the latter decision.

On December 13, 2008 appellant requested an "appeal" with the Branch of Hearings and Review and on January 8, 2009 asked that his wage-earning capacity determination be modified.

In letters dated January 9 and 13, 2009, the Office advised him of the criteria needed to modify a formal loss of wage-earning capacity determination and forwarded a copy of the Board's February 25, 2003 decision. Appellant thereafter submitted correspondence disagreeing with the wage-earning capacity and schedule award determinations.[15] He also submitted correspondence dated March 29, 1972, February 4 and March 29, 1985 and November 23, 1999 previously of record. In a December 10, 2008 report, Dr. Rick George advised appellant that he would have to take and pass a physical agility test in order to work as a security guard at an Army installation.[16] An exercise treadmill test on January 27, 2009 demonstrated poor exercise tolerance. By letter dated February 11, 2009, appellant was informed that, as he did not pass the treadmill test, he was not fit to participate in a physical agility test.

By decision dated March 10, 2009, the Office denied appellant's reconsideration request of the Board's February 25, 2003 decision on the grounds that he failed to establish clear evidence of error. In an April 7, 2009 decision, based on a review of the written record, an Office hearing representative affirmed the December 1, 2008 schedule award decision on the grounds that there was no medical evidence of record that established that appellant had a left upper extremity impairment greater than that previously awarded. By decision dated April 13, 2009, the Office denied modification of the November 8, 1999 wage-earning capacity determination, finding that appellant did not demonstrate that the original rating was in error, that the newly submitted evidence failed to establish a material worsening of his injury-related condition and he did not submit evidence that he had been vocationally rehabilitated.[17]

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

Under section 8107 of the Act[18] and section 10.404 of the implementing federal regulations,[19] 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

[15] On February 24, 2009 appellant indicated that he would like a review of the written record on the schedule award decision. On February 26, 2009 he informed the employing establishment that he would like to request Equal Employment Opportunity Commission counseling on the matter of alleged discrimination regarding his FECA benefits. Email correspondence dated March 9, 2009, indicated that hearings and review would only address the schedule award and not the wage-earning capacity determination.

[16] Dr. George's credentials are not known.

[17] The record contains an order dismissing appeal dated June 19, 2009, noting that appellant filed an appeal with the Board of the March 10, 2009 decision, docketed as 09-1226. The order noted that he was pursuing a hearing before the Branch of Hearings and Review. Appellant's appeal in the present case, on the same issue, was filed on April 28, 2009. By decision dated July 2, 2009, the Office denied his hearing request. The decision is void, however, as the Office 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 a case on appeal until after the Board relinquishes its jurisdiction. Any decision 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).

[18] 5 U.S.C. § 8107.

[19] 20 C.F.R. § 10.404.

tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides*[20] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[21]

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.[22] A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment at a later date causally related to an employment injury. Office procedures state that claims for increased schedule awards may be based on an incorrect calculation of the original award or new exposure. To the extent that a claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this would be a request for reconsideration. A claim for an increased schedule award may be based on new exposure or on medical evidence indicating the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater impairment than previously calculated.[23] Before the A.M.A., *Guides*, can be utilized, a description of impairment must be obtained from the claimant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[24] Office procedures 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.[25]

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

The Board finds that appellant did not establish that he is entitled to a schedule award for his left upper extremity greater than the 30 percent previously awarded. Dr. Hales, an attending orthopedist, provided an impairment evaluation dated January 3, 2006 in accordance with the A.M.A., *Guides* and advised that appellant had a 16 percent left upper extremity impairment secondary to a slight sensory deficit, loss of motion and traumatic arthritis. Dr. Chau, after reviewing the record and providing a physical examination, concurred with Dr. Hales finding of 16 percent left upper extremity impairment. Dr. McLaughlin, also an attending orthopedist, submitted an impairment evaluation dated July 18, 2008, stating that it was in accordance with

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[20] *Supra* note 13.

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

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

[23] *Rose V. Ford*, 55 ECAB 449 (2004).

[24] *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

[25] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002); *see J.P.*, 60 ECAB ___ (Docket No. 08-832, issued November 13, 2008).

the A.M.A., *Guides*. He concluded that appellant had a 25 percent permanent impairment of the left upper extremity, finding 10 percent due to traumatic arthritis of the left elbow, 12 percent due to decreased range of motion and a 5 percent impairment for the ulnar nerve transposition. While the Office medical adviser properly determined that Table 17-2 of the A.M.A., *Guides* precluded a rating for motion loss and a diagnosis-based rating and concluded that appellant was entitled to a 16 percent impairment of the left upper extremity, in assessing the evidence in a light most favorable to appellant, the medical evidence as found in Dr. McLaughlin's report, only establishes a 25 percent impairment, less than the 30 percent previously awarded. Dr. Tan did not provide a schedule award rating assessment.

The evidence did not establish greater than the 30 percent impairment of his left upper extremity previously awarded.

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

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[26] The Office's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."[27] Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[28] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[29]

In addition, Chapter 2.814.11 of the procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.[30]

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[26] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[27] Federal (FECA) Procedure Manual, *supra* note 25 at Chapter 2.814.9(a) (December 1995).

[28] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[29] *Id.*

[30] *See* Federal (FECA) Procedure Manual, *supra* note 25 at Chapter 2.814.11 (June 1996).

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

The Board finds that, by its April 13, 2009 decision, the Office properly denied modification of the November 8, 1999 decision finding that the constructed position of personnel worker fairly and reasonable represented appellant's wage-earning capacity. Applicable case law and Office procedures require that once a formal wage-earning capacity decision is in place, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[31] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[32]

With his request for reconsideration, appellant submitted reports from Dr. Hales, Dr. Chau, Dr. Tan and Dr. McLaughlin, and an EMG study. Although each of these reports provide diagnosis and examination findings, none provided an opinion regarding appellant's disability status or ability to perform the duties of the constructed position of personnel worker due to the accepted left upper extremity conditions. Without that medical evidence, appellant cannot establish that his injury-related condition had materially changed and he submitted no evidence to establish that he had been retrained or otherwise was vocationally rehabilitated. Further appellant offered no new evidence to establish the November 8, 1999 wage-earning capacity decision was erroneous.[33] Appellant therefore did not establish that the November 8, 1999 wage-earning capacity decision should be modified.

## ***CONCLUSION***

The Board finds that appellant has not met his burden of proof to establish that he is entitled to a schedule award for his left upper extremity greater than the 30 percent awarded. The Board further finds that the Office properly denied modification of the November 8, 1999 wage-earning capacity determination.

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[31] *Stanley B. Plotkin, supra* note 28.

[32] *Id.*

[33] The Board finds that the issue of whether the original decision was erroneous is not subject to further consideration by the Board. A decision of the Board is final upon the expiration of 30 days following the date of its order and, in the absence of new review by the Director, the subject matter is *res judicata* and not subject to further consideration by the Board.[33] *Clinton E. Anthony, Jr.,* 49 ECAB 476, 479 (1998). *See* 20 C.F.R. § 501.6(d). By its November 26, 2001 decision, Docket No. 00-2251, the Board affirmed the Office determination that the constructed position of personnel worker fairly and reasonably represented appellant's wage-earning capacity. *Supra* note 9.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated April 13 and 7, 2009 and December 1, 2008 be affirmed.

Issued: July 1, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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