

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

_____)	
J.B., Appellant)	
)	
and)	Docket No. 09-1595
)	Issued: June 11, 2010
U.S. POSTAL SERVICE, POST OFFICE,)	
Dayton, OH, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 8, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated May 13, 2009, which denied further merit review and a September 9, 2008 schedule award decision. 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 has more than a 33 percent permanent impairment of his right upper extremity and a 43 percent permanent impairment of his left lower extremity; and (2) whether the Office properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 24, 2003 appellant, then a 59-year-old letter carrier, injured his left knee, low back and right hand when he jumped from his work vehicle after a wasp entered it. The Office accepted a lumbosacral sprain, trigger finger of the right third digit and aggravation of

preexisting left knee osteoarthritis.¹ The claim was also accepted for temporary aggravation of a right shoulder rotator cuff tear.² Appellant stopped work due to right trigger finger surgery. He returned to work on September 8, 2003 and retired on September 27, 2003. Appellant underwent a left knee arthroscopy and partial medial and lateral meniscectomy on October 28, 2003.³

In a decision dated June 21, 2005, the Office granted appellant schedule awards for 35 percent impairment of the left leg and 21 percent impairment of the right arm. The awards covered the period October 11, 2004 to December 19, 2007.

On July 25, 2007 appellant claimed an additional schedule award. In an October 23, 2007 report, Dr. Martin Fritzhand, a Board-certified urologist, noted appellant's history and provided findings on examination. Dr. Fritzhand referred to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (hereinafter A.M.A., *Guides*) (5th ed. 2001) to find that appellant had 33 percent impairment of the right arm and 43 percent impairment to the left leg. For the right arm, he referred to Figure 16-40 and found that shoulder flexion of 70 degrees resulted in seven percent impairment while extension of 15 degrees yielded two percent impairment.⁴ For shoulder abduction and adduction under Figure 16-43, Dr. Fritzhand noted that 50 degrees of abduction equaled six percent impairment and 10 degrees of adduction equaled one percent impairment.⁵ For shoulder rotation, he referred to Figure 16-46 and noted that 10 degrees of internal rotation equaled two percent impairment and 10 degrees of external rotation equaled five percent impairment.⁶ Dr. Fritzhand noted that appellant's injury was to the radial nerve and, for sensory impairment, Table 16-15 provided that the maximum impairment for radial nerve sensory deficit or pain was five percent.⁷ The impairment was then rated for severity under Table 16-10.⁸ Dr. Fritzhand found a Grade 3 or 50 percent sensory deficit and multiplied this by the 5 percent maximum value for sensory deficit or pain to the radial nerve, (50 percent times 5 percent) which resulted in 2.5 percent sensory impairment for the radial nerve. He advised that Table 16-15 provided for a maximum 42 percent impairment for motor

¹ Appellant has preexisting conditions which include an irregular heart rhythm, stress, headaches and surgical history of left knee surgery.

² Appellant has several prior claims. On July 15, 1992 he had a right index finger bee sting claim File No. xxxxxx908. The Office accepted that on March 27, 1995 appellant sustained a left shoulder strain with no time lost from work in claim File No. xxxxxx378. It also accepted that on February 16, 1999 he had a left knee strain and right shoulder strain under claim File No. xxxxxx488. The Office accepted that on March 4, 2002 appellant sustained a lumbosacral strain claim File No. xxxxxx989. It also accepted a September 8, 2003 right shoulder, elbow and left knee contusion and lumbosacral strain claim File No. xxxxxx829. The Office combined File Nos. xxxxxx309, xxxxxx929 and xxxxxx908 under master File No. xxxxxx488.

³ In a June 15, 2005 decision, the Office denied appellant's claim for a right rotator cuff tear, as the evidence did not show that this was causally related to either the June 24 or September 8, 2003 work injuries.

⁴ A.M.A., *Guides* 476.

⁵ *Id.* at 477.

⁶ *Id.* at 479.

⁷ *Id.* at 492.

⁸ *Id.* at 483.

deficit of the radial nerve.⁹ The impairment was rated for severity under Table 16-11.¹⁰ Dr. Fritzhand found a Grade 4 or 25 percent motor deficit and multiplied this by the 42 percent maximum value for motor deficit of the radial nerve (25 percent times 42 percent) and determined that appellant had 10.5 percent impairment for motor deficit of the radial nerve. He used the Combined Values Chart and determined that appellant had an impairment of 33 percent to the right upper extremity.

For the left leg, appellant had 90 degrees of knee flexion and 10 degrees of extension. Dr. Fritzhand referred to Table 17-10 and found that the measurements yielded 10 percent and 20 percent impairment.¹¹ He referred to Table 17-7 and advised that appellant had a motor impairment "4/5."¹² Dr. Fritzhand determined that Table 17-8 supported impairment to the left leg of 12 percent.¹³ He also advised that he utilized the guidelines for estimating impairment of pain to the left lower extremity which resulted in eight percent impairment. Dr. Fritzhand referred to the Combined Values Chart and determined that appellant had impairment to the left leg of 43 percent.¹⁴

In an August 1, 2008 report, an Office medical adviser concurred with Dr. Fritzhand that appellant had 33 percent impairment for the right arm and 43 percent for the left leg. He advised that maximum medical improvement was the date of the examination by Dr. Fritzhand on October 23, 2007.

By decision dated September 5, 2008, the Office granted appellant additional schedule awards for 8 percent impairment of the left leg and a 12 percent impairment of the right arm or a total impairment of 43 percent to the left lower extremity and 33 percent to the right upper extremity. The awards covered 60.48 weeks from December 20, 2007 through February 15, 2009.

On March 18, 2009 appellant requested reconsideration. He noted having severe back problems and two rotator cuff tears which required surgery. Appellant contended that, despite being taken off work by his physician, the employing establishment ordered him back to work and he was forced to retire. The Office received physical therapy notes. An October 10, 2005 emergency room report indicated that appellant was treated for sciatica and lumbago.

In a September 19, 2005 report of a lumbar magnetic resonance imaging (MRI) scan, Dr. J. Keith Bidwell, a Board-certified diagnostic radiologist, noted multilevel degenerative disc and facet disease and a small abdominal aortic aneurysm. In a May 9, 2007 lumbar MRI scan, Dr. Bidwell noted multilevel degenerative disc and facet disease more prominent toward the right resulting in increased right perolateral recess encroachment and SI root compression. In an

⁹ *Id.* at 492.

¹⁰ *Id.* at 484.

¹¹ *Id.* at 537.

¹² *Id.* at 531.

¹³ *Id.* at 532.

¹⁴ *Id.* at 604.

October 11, 2004 report, Dr. Kevin J. Paley, a Board-certified orthopedic surgeon, provided an impairment rating for appellant.¹⁵ A May 30, 2007 treatment note from Dr. Harvey S. Hahn, a Board-certified internist, indicated that appellant was a candidate for back surgery.

By decision dated May 13, 2009, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that his request failed to provide new and relevant evidence and was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act¹⁶ and its implementing regulations¹⁷ 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.¹⁸

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.¹⁹ However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.²⁰

ANALYSIS -- ISSUE 1

The Office medical adviser agreed that, Dr. Fritzhand had properly rated the extent of appellant's impairment.

For the right arm, Dr. Fritzhand rated shoulder range of motion impairment in conformance with the A.M.A., *Guides*. Figure 16-40,²¹ provides seven percent for 70 degrees of

¹⁵ The record reflects that Dr. Paley was part of an earlier medical conflict, prior to receipt of appellant's first schedule award in 2005.

¹⁶ 5 U.S.C. § 8107.

¹⁷ 20 C.F.R. § 10.404.

¹⁸ A.M.A., *Guides* (5th ed. 2001).

¹⁹ See *William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

²⁰ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000); see also *Paul A. Toms*, 28 ECAB 403 (1987).

²¹ A.M.A., *Guides*, 476.

forward flexion and two percent for 15 degrees of extension. Under Figure 16-43²² appellant had impairment of one percent for 10 degrees adduction and six percent for 50 degrees of abduction. For rotation, under Figure 16-46²³ 10 degrees of internal rotation is two percent impairment while 10 degrees of external rotation is five percent impairment. The values for loss of extension, abduction, adduction and rotation were added to find a total 23 percent right shoulder impairment.

For sensory and motor impairment, Dr. Fritzhand identified involvement of the radial nerve. Under Table 16-15 the maximum impairment for sensory deficit of the radial nerve is five percent.²⁴ The deficit was then rated for severity under Table 16-10.²⁵ Dr. Fritzhand rated a Grade 3 impairment for distorted superficial tactile sensibility (diminished light touch and two-point discrimination), with some abnormal sensations or slight pain, that interferes with some activities. The range of sensory deficit is 26 to 60 percent of the maximum. Dr. Fritzhand provided a 50 percent grade. He multiplied the 5 percent maximum for sensory deficit of the radial nerve by the 50 percent deficit grade, to yield 2.5 percent sensory impairment.

Dr. Fritzhand determined that under Table 16-15 the maximum impairment for radial nerve motor loss was 42 percent.²⁶ The impairment was rated for severity under Table 16-11.²⁷ Dr. Fritzhand rated a Grade 4 deficit for complete active range of motion against gravity with some resistance. The range of impairment for this grade is from 1 to 25. Dr. Fritzhand allowed 25 percent and multiplied this by the 42 percent maximum value for motor loss to find 10.5 percent impairment of the radial nerve. He referred to the Combined Values Chart to combine the sensory and motor loss with the range of motion loss to total 33 percent impairment to the right arm.

For the left leg, Dr. Fritzhand referred to Table 17-10 to find 10 percent impairment for knee flexion of 90 degrees and 20 percent for extension of 10 degrees or a 30 percent total for loss of range of motion.²⁸ Under Table 17-7, appellant had a motor impairment 4/5 or Grade 4.²⁹ Grade 4 impairment for the knee under Table 17-8 represents lower extremity impairment of 12 percent.³⁰ The Board notes that the 30 percent for range of motion and the 12 percent for the motor deficit when combined is 38 percent impairment of the left lower extremity.³¹

²² *Id.* at 477.

²³ *Id.* at 479.

²⁴ *Id.* at 492.

²⁵ *Id.* at 483.

²⁶ *Id.* at 492.

²⁷ *Id.* at 484.

²⁸ *Id.* at 537.

²⁹ *Id.* at 531.

³⁰ *Id.* at 532.

³¹ *Id.* at 604.

Dr. Fritzhand found that appellant had pain to the left lower extremity, which was eight percent impairment; however, he did not refer to a specific table or the A.M.A., *Guides*. The Board finds that this is an improper application of the A.M.A., *Guides*. The Board has held that physicians should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.³² Dr. Fritzhand did not explain how this rating was made under Chapter 17 of the A.M.A., *Guides*. The Office medical adviser did not explain how this rating conformed to the A.M.A., *Guides*. Consequently, the Office improperly allowed eight percent leg impairment for pain as this rating is not sufficiently explained.

The Board finds that the medical evidence supports 33 percent impairment of the right upper extremity and 38 percent of the left lower extremity. Appellant has not submitted any other medical evidence conforming with the A.M.A., *Guides* establishing a greater impairment.

On appeal, appellant argued as to the amount or insufficiency of his award, his last accident, retirement and the extent of his injuries. As noted, the issue on appeal concerns the impairment rating of his right arm and left leg. Factors such as employability or limitations on daily activities have no bearing on the calculation of a schedule award.³³

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,³⁴ the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains 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 [the Office].”³⁵

³² See *Linda Beale*, 57 ECAB 429 (2006); *Frantz Ghassan*, 57 ECAB 349 (2006). See A.M.A., *Guides* 571. See also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 4 (November 2002). See *A.G.*, 58 ECAB 582 (2007).

³³ *J.H.*, 60 ECAB ___ (Docket No. 08-2432, issued June 15, 2009).

³⁴ 5 U.S.C. § 8128(a).

³⁵ 20 C.F.R. § 10.606(b).

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.³⁶

ANALYSIS -- ISSUE 2

Appellant disagreed with the amount of his schedule award and requested reconsideration. The underlying issue on reconsideration was whether he has greater impairment than the 33 percent for the right arm or 43 percent for the left leg for which he has received schedule awards. This is a medical determination; however, appellant did not submit any relevant or pertinent new evidence.

Appellant's arguments on reconsideration included that he had severe back problems and underwent two rotator cuff surgeries that were not approved by the Office. As noted, the issue is the extent of permanent impairment. Appellant's arguments regarding surgery are not relevant to the issue of his request for an increased award.³⁷ He also disagreed with the schedule awards received, contending that the surgery to his back was not successful. However, appellant did not submit any medical evidence from a physician. His arguments regarding the employing establishment, retirement or dissatisfaction with his prior representative are not relevant to the issue on appeal. Appellant's assertions do not establish that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office.

Appellant also submitted physical therapy records; however, they are not relevant or pertinent to the issue on appeal. The various diagnostic studies and treatment note of Dr. Hahn, do not address the issue of permanent impairment. This evidence does not constitute a basis for reopening the case for further merit review.³⁸

The Board also notes that appellant resubmitted an October 11, 2004 report from Dr. Paley previously of record and considered in the adjudication of appellant's first schedule award. It is not relevant to his claim for an increased award filed in 2007. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.³⁹ Appellant did not provide any relevant and pertinent new evidence to the issue of whether he was entitled to an increased schedule award.

³⁶ *Id.* at § 10.608(b).

³⁷ The Board notes that if appellant were to undergo authorized surgery, he may seek an increased schedule award if the evidence establishes that progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *See Linda T. Brown*, 51 ECAB 115 (1999).

³⁸ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).

³⁹ *Khambandith Vorapanya*, 50 ECAB 490 (1999); *John Polito*, 50 ECAB 347 (1999); *David J. McDonald*, 50 ECAB 185 (1998).

Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review. Furthermore, appellant also has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant new argument not previously submitted. Therefore, the Office properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he has greater than the 33 percent impairment of the right upper extremity and 43 percent impairment of the left lower extremity, for which he received a schedule award. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 13, 2009 is affirmed. The September 9, 2008 schedule award decision is affirmed as modified.

Issued: June 11, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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