

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

K.B., Appellant)
)
)
and) **Docket No. 09-1672**
) **Issued: March 17, 2010**
)
U.S. POSTAL SERVICE, SEATTLE BULK)
MAIL CENTER, Federal Way, WA, Employer)
_____)

Appearances:
Rainer Brown, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 22, 2009 appellant filed a timely appeal of an April 6, 2009 decision of the Office of Workers' Compensation Program denying his schedule award claim and a June 11, 2009 decision denying his request for reconsideration without a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he sustained permanent impairment due to his accepted employment injury; and (2) whether the Office properly denied appellant's request for reconsideration without a merit review.

FACTUAL HISTORY

On July 5, 2007 appellant, then a 47-year-old mail handler, sustained injury when he tore his left bicep muscle while removing a placard off of a mail pallet. He stopped work on July 9, 2007 and returned to light duty on August 4, 2007. The Office accepted appellant's claim for left bicep tendon tear.

In a July 5, 2007 magnetic resonance imaging (MRI) scan report, Dr. Kerry Schumacher, a Board-certified diagnostic radiologist, found that appellant's left elbow had complete disruption of the distal biceps tendon with six millimeters of medial retraction and a considerable amount of surrounding hemorrhage. He also found moderate common extensor tendinopathy without tear or longitudinal split.

In a July 6, 2007 report, Dr. J. Chriss Cancro, a Board-certified orthopedic surgeon, found acute complete avulsion of the left distal biceps tendon of the left elbow, the nondominant extremity. He performed surgery on July 9, 2007. Between July 30, 2007 and August 11, 2008, Dr. Cancro treated appellant for postoperative left distal biceps tendon repair. On August 11, 2008 he found full elbow motion and normal biceps contour. Dr. Cancro noted no evidence of infections. He also noted occasional paresthesias when appellant performed repetitive work activities with his left hand. Dr. Cancro indicated that sensory examination was normal and that there was no thenar muscle atrophy.

On November 13, 2008 appellant filed a schedule award claim. In a November 10, 2008 report, Dr. Cancro diagnosed postoperative left distal biceps tendon repair and residual biceps muscle atrophy and weakness. His examination revealed full left elbow motion and improved strength with some residual weakness of supination and elbow flexion. Dr. Cancro also found full forearm rotation and no distal muscle atrophy. He opined that appellant had reached "medical stability" for the left distal biceps tendon avulsion injury with repair. Dr. Cancro noted less left biceps muscle tone and indicated that the left biceps muscle measure 31 centimeters while the right measured 34. He found seven percent permanent impairment of the left upper extremity based on residual weakness with biceps muscle atrophy.

On November 25, 2008 the Office requested an impairment rating from Dr. Cancro based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

On January 23, 2009 the Office referred appellant with a statement of accepted facts to Dr. Steven Nadler, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a February 11, 2009 report, Dr. Nadler provided a detailed summary of appellant's injury and treatment. He also reviewed the statement of accepted facts and medical evidence. Dr. Nadler advised that appellant reported that "sometimes" his left arm was not as strong as before his injury. Upon examination, he found well-healed scars from surgery on the anterior and posterior aspect of the elbow. Dr. Nadler also found no signs of infection, inflammation or drainage. He noted excellent range of motion, with no limitations of extension or flexion and supination and pronation within normal limits. Dr. Nadler found that appellant's biceps tendon was palpable and clinically intact. He also found some mild weakness in the elbow with extension and flexion. Dr. Nadler noted no neurologic or vascular abnormalities, no forearm atrophy and no sensory or motor deficit. He diagnosed repaired biceps tendon rupture of the elbow.¹ Based on Dr. Nadler's examination findings and the A.M.A., *Guides*, appellant had no left upper extremity impairment from the July 5, 2007 injury.

¹ While this portion of the report lists right elbow it appears to be a typographical error as Dr. Nadler's report as a whole is consistent with an assessment of the left upper extremity.

In a March 5, 2009 report, an Office medical adviser summarized the findings of Drs. Cancro and Nadler. He agreed with Dr. Nadler's impairment rating and found zero percent left upper extremity impairment with complete recovery. The medical adviser indicated that appellant reached maximum medical improvement on February 11, 2009. He noted that the findings of Drs. Cancro and Nadler were consistent with each other.

In an April 6, 2009 decision, the Office denied appellant's schedule award claim finding the evidence insufficient to establish that he sustained permanent impairment due to his accepted injury.

Appellant requested reconsideration on May 3, 2009 and disagreed with Dr. Nadler's findings. He asserted that the physician conducted a five-minute examination whereas Dr. Cancro performed appellant's surgery and provided monthly follow-up care through November 2008.

In a June 11, 2009 decision, the Office denied appellant's reconsideration request without a merit review finding that he did not submit any new and relevant evidence or raise substantive legal questions.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulations 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. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. A.M.A., *Guides* has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.³

Not all medical conditions accepted by the Office result in permanent impairment to a schedule member.⁴ 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.⁵ Office procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail to include, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity,

² 5 U.S.C. §§ 8101-8193. See 5 U.S.C. § 8107.

³ See 20 C.F.R. § 10.404; *R.D.*, 59 ECAB ____ (Docket No. 07-379, issued October 2, 2007).

⁴ *Thomas P. Lavin*, 57 ECAB 353 (2006).

⁵ *Tammy L. Meehan*, 53 ECAB 229 (2001).

decreases in strength or disturbance of sensation or other pertinent description of the impairment and the percentage of impairment should be computed in accordance with the A.M.A., *Guides*.⁶

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained left bicep tendon tear and authorized surgical repair. Appellant subsequently claimed a schedule award due to this accepted injury. However, the medical evidence is insufficient to establish that his accepted left bicep condition caused any permanent impairment to a schedule member of the body pursuant to the A.M.A., *Guides*.

In support of his schedule award claim, appellant submitted Dr. Cancro's November 10, 2008 report, which found seven percent impairment of the left arm. However, this report provides insufficient support for appellant's claim as it determined that he had seven percent left upper extremity impairment based on a general finding of residual weakness and biceps muscle atrophy. Dr. Cancro did not address whether he applied the A.M.A., *Guides*⁷ and if so, how he derived the values under the A.M.A., *Guides* to calculate seven percent impairment. Moreover, he did not cite to any tables or figures he used to rate appellant's impairment.⁸ On November 25, 2008 the Office requested that Dr. Cancro submit a report rating impairment pursuant to the A.M.A., *Guides*. However, Dr. Cancro did not submit a responsive report.

The Office subsequently referred appellant to Dr. Nadler for a second opinion examination regarding permanent impairment due to the July 5, 2007 work injury. In a February 11, 2009 report, Dr. Nadler properly determined that appellant had no ratable impairment under the A.M.A., *Guides* as he found full range of motion without limitations of extension, flexion, supination and pronation. He also determined that appellant had no atrophy and no sensory or motor deficit. Therefore, Dr. Nadler's opinion does not support that the accepted left bicep injury resulted in permanent impairment to a schedule member of the body pursuant to the A.M.A., *Guides*.

An Office medical adviser, on March 5, 2009 reviewed the medical record and concurred with Dr. Nadler's opinion that there was no ratable impairment. He also indicated that Drs. Cancro and Nadler both reported similar findings.

There is no other medical evidence of record discussing any impairment of a schedule body member, attributable to appellant's accepted left bicep injury, pursuant to the A.M.A., *Guides*. For these reasons, the medical evidence does not establish that appellant's accepted left bicep condition caused any permanent impairment entitling him to a schedule award.

⁶ *J.P.*, 60 ECAB ___ (Docket No. 08-832, issued November 13, 2008); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

⁷ See *I.H.*, 60 ECAB __ (Docket No. 08-1352, issued December 24, 2008) (the Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*).

⁸ See *Tommy R. Martin*, 56 ECAB 273 (2005) (where the Board found that a physician's impairment calculation not sufficiently supported by the A.M.A., *Guides* is of diminished probative value).

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a), 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.⁹ Section 10.608(b) of Office regulations provide that 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.¹⁰

ANALYSIS -- ISSUE 2

In support of his request for reconsideration, appellant disagreed with Dr. Nadler's findings contending that the physician only conducted a five-minute examination whereas Dr. Cancro performed appellant's surgery and provided monthly follow-up care. However, appellant's statement did not show that the Office erroneously applied or interpreted a point of law nor did it advance a relevant legal argument.

Moreover, appellant did not submit any additional medical evidence regarding left arm impairment. This is particularly important as the underlying issue is medical in nature regarding whether he has submitted sufficient medical evidence establishing that his employment injury caused permanent impairment of a schedule member of the body. Therefore, appellant's statement is not relevant to the underlying medical issue and does not constitute relevant or pertinent new evidence not previously considered by the Office. Consequently, the Office properly denied his request for reconsideration without a merit review.

On appeal, appellant asserts that his impairment rating was best determined by Dr. Cancro as he had performed surgery and provided follow-up care. As noted, the Office evaluates impairment ratings based on the standards set forth in the A.M.A., *Guides*. As Dr. Cancro did not indicate whether he utilized the A.M.A., *Guides* or cite to relevant tables and figures of the A.M.A., *Guides* that he used to calculate impairment, his opinion is of diminished little probative value. Appellant also asserts that he should be referred for another evaluation. However, further evaluation is not warranted as Dr. Nadler and the Office medical adviser agreed that appellant did not have ratable impairment under the A.M.A., *Guides*.

CONCLUSION

The Board finds that appellant has not established that he is entitled to a schedule award due to an accepted employment injury. The Board also finds that the Office properly denied appellant's request for reconsideration without a merit review.

⁹ 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

¹⁰ *Id.* at § 10.608(b); *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated June 11 and April 6, 2009 are affirmed.

Issued: March 17, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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