United States Department of Labor
Employees' Compensation Appeals Board

T.Y., Appellant	)	
and	)	**Docket No. 10-1857**
	)	**Issued: October 15, 2010**
DEPARTMENT OF THE NAVY, NAVAL SUPPORT ACTIVITY, Norfolk, VA, Employer	)	

Appearances:
Orville Theel, for the appellant
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 July 7, 2010 appellant timely appealed the February 4, 2010 merit decision of the Office of Workers' Compensation Programs, which granted a schedule award. He also timely appealed the June 23, 2010 nonmerit decision, which denied reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award claim.[1]

ISSUES

The issues are: (1) whether appellant has greater than 12 percent impairment of the right upper extremity; and (2) whether the Office properly denied his April 1, 2010 request for reconsideration under 5 U.S.C. § 8128(a).

[1] Appellant initially requested oral argument before the Board. However, in subsequent correspondence he indicated that, while he was willing to attend oral argument, he thought it was "unnecessary" because he had already submitted all the supporting medical documents to the Office. As discussed *infra*, rather than conduct oral argument, the Board believes that appellant's interest would be better served by remanding the case to the Office for issuance of a proper decision based upon a thorough review of all relevant evidence of record. Accordingly, the Board acting within its discretion denies appellant's request for oral argument pursuant to 20 C.F.R. § 501.5 (2009).

FACTUAL HISTORY

Appellant, a 61-year-old air conditioning equipment mechanic, has an accepted claim for right shoulder sprain and right rotator cuff tear, which occurred on January 29, 2008.[2] On February 4, 2010 the Office granted a schedule award for 12 percent impairment of the right upper extremity. The award covered a period of 37.44 weeks from February 2 through October 22, 2009. The Office based the schedule award on the August 12, 2009 report of its district medical adviser (DMA), who in turn relied upon the February 2, 2009 report of Dr. Wayne T. Johnson, a Board-certified orthopedic surgeon.[3]

On April 1, 2010 appellant requested reconsideration.[4] The request was accompanied by Dr. Johnson's February 15, 2010 office notes. He indicated that it had been a year since he last examined appellant. Dr. Johnson provided physical examination findings, shoulder range of motion measurements. He noted that overall there were some minor changes both for improvement and deterioration, but he did not see any change in appellant's disability rating, which Dr. Johnson previously found to be 18 percent of the right upper extremity.

By decision dated June 23, 2010, the Office denied appellant's request for reconsideration noting, *inter alia*, that the request did not include "new and relevant evidence."

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[5] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A.,

[2] Appellant's torn rotator cuff was surgically repaired on February 25, 2008.

[3] Dr. Johnson, who previously operated on appellant's right shoulder, found 18 percent impairment of the right upper extremity. While he stated that his rating was based on the 5th edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001), Dr. Johnson did not identify the particular table(s) he relied upon in calculating appellant's impairment. The DMA reviewed Dr. Johnson's February 2, 2009 examination findings under both the 5th and 6th editions of the A.M.A., *Guides*, and in both instances found no more than 12 percent right upper extremity impairment due to loss of motion in the shoulder.

[4] Appellant submitted a similar request on February 19, 2010. After acknowledging the initial reconsideration request on February 24, 2010, the Office sought clarification as to whether appellant was requesting review of the February 4, 2010 schedule award or requesting an additional schedule award. He filed the April 1, 2010 request for reconsideration in response to the Office's March 29, 2010 correspondence. Appellant clarified that he was in fact challenging the February 4, 2010 schedule award based on what he perceived to be an unresolved conflict in medical opinion between the DMA and Dr. Johnson.

[5] For total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) (2006).

Guides as the appropriate standard for evaluating schedule losses.[6] Effective May 1, 2009, schedule awards are determined in accordance with the 6th edition A.M.A., *Guides* (2008).[7]

ANALYSIS -- ISSUE 1

Although the diagnosis-based approach is the preferred method of evaluating permanent impairment under the 6th edition of the A.M.A., *Guides*, the shoulder regional grid, Table 15-5, A.M.A., *Guides* 401-05, provides that, if loss of motion is present, the impairment may alternatively be assessed using section 15-7, range of motion (ROM) impairment.[8] A range of motion impairment stands alone and is not combined with a diagnosis-based impairment.[9] In his August 12, 2009 report, the DMA explained that the alternative diagnosis-based impairment rating would not be as great as the ROM rating, and therefore, the ROM assessment was the better impairment model.

The Office properly determined that appellant had 12 percent impairment of the right upper extremity due to loss of motion in the shoulder. While appellant's surgeon did not rate his impairment under the 6th edition of the A.M.A., *Guides*, the DMA was able to apply Dr. Johnson's February 2, 2009 examinations findings to the latest edition of the A.M.A., *Guides*. According to Table 15-34, A.M.A., *Guides* 475, flexion of 140 degrees represents three percent impairment of the upper extremity. Abduction of 120 degrees also represents three percent upper extremity impairment under Table 15-34, and 40 degrees of internal rotation represents four percent upper extremity impairment. Lastly, 10 degrees of external rotation represents two percent impairment under Table 15-34. Adding the above-noted shoulder ROM impairments results in 12 percent impairment of the right upper extremity as correctly noted by the DMA in his August 12, 2009 report. Accordingly, when the Office issued its February 4, 2010 schedule award the medical evidence of record did not demonstrate a greater impairment than the 12 percent awarded.

LEGAL PRECEDENT -- ISSUE 2

The Office has the discretion to reopen a case for review on the merits.[10] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[11]

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[6] 20 C.F.R. § 10.404.

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Example 1 (January 2010).

[8] *See* section 15-7, A.M.A., *Guides* 459, 461.

[9] *Id.* at 461.

[10] 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606(b)(2).

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 without reopening the case for a review on the merits.[12]

ANALYSIS -- ISSUE 2

In his April 1, 2010 request for reconsideration appellant specifically noted that he enclosed a recent report from his doctor dated February 15, 2010. The Office's June 23, 2010 decision makes no mention of Dr. Johnson's February 15, 2010 report. It only acknowledged receipt of appellant's "letter" requesting reconsideration. Furthermore, the Office found that appellant's request did not include "new and relevant evidence." Most likely, it simply overlooked Dr. Johnson's February 15, 2010 report, which did include new examination findings. This evidence is both new and relevant, and the Office should have referred the doctor's latest report to its DMA as it had similarly done with Dr. Johnson's February 2, 2009 report. Further merit review is appropriate where appellant submits relevant and pertinent new evidence not previously considered by the Office.[13] The Board finds that appellant submitted relevant and pertinent new evidence with his April 1, 2010 request for reconsideration, thereby satisfying the third requirement under 20 C.F.R. § 10.606(b)(2).[14] Consequently, appellant is entitled to a review of the merits of his schedule award claim.[15] The case shall be remanded to the Office for merit review followed by the issuance of an appropriate *de novo* decision.

CONCLUSION

Appellant failed to establish that he has greater than 12 percent impairment of the right upper extremity. The Board further finds that the Office improperly denied his April 1, 2010 request for reconsideration.

[12] *Id*. at § 10.608(b).

[13] *Id*. at § 10.606(b)(2)(iii).

[14] *Id.*

[15] *Id*. at § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2010 decision of the Office of Workers' Compensation Programs is affirmed. However, the Office's June 23, 2010 decision is set aside and the case remanded for further action consistent with this decision.

Issued: October 15, 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