United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 10-1017**
	)	**Issued: January 12, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Decatur, GA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 1, 2010 appellant filed a timely appeal from an October 26, 2009 schedule award decision of the Office of Workers' Compensation Programs and a February 17, 2010 denial of his request for reconsideration. 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 more than 10 percent impairment of the right upper extremity for which he received a schedule award; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal appellant asserts that the Office medical adviser did not review his physician's September 23, 2009 report.

FACTUAL HISTORY

On December 13, 1995 appellant, then a 45-year-old letter carrier filed an occupational disease claim alleging that his federal employment duties caused sharp right shoulder and arm pain. On June 13, 1996 the Office accepted tendinitis of the right shoulder as employment related and that he sustained recurrences of disability on December 31, 1998 and February 13, 2008. Appellant was placed on the periodic compensation rolls. Left shoulder surgery was performed on June 18, 2008.[1]

On October 14, 2008 Dr. Peter J. Symbas, a Board-certified orthopedic surgeon, performed right shoulder arthroscopic repair of a massive rotator cuff tear with subacromial decompression and excision of clavicle. Appellant filed a schedule award claim for the right shoulder on December 7, 2008. On December 10, 2008 and January 12, 2009 the Office informed him that he was not entitled to a schedule award while receiving wage-loss compensation payments. Appellant could elect Office of Personnel Management (OPM) retirement or forego periodic payments to collect a schedule award. A functional capacity evaluation on March 19, 2009 indicated that he was able to perform work duties at the medium physical demand level.

By reports dated April 22, 2009, Dr. Symbas noted findings of an intact neurovascular examination with no swelling, tenderness or warmth and appropriate range of motion. He diagnosed rotator cuff syndrome of the shoulder and advised that appellant could return to modified duties as outlined in the functional capacity evaluation. Dr. Symbas stated that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[2] appellant had 18 percent right upper extremity impairment, secondary to loss of range of motion and strength and distal clavicle excision. In an April 29, 2009 report, Dr. Joseph C. Tatum, Board-certified in orthopedic surgery and an Office referral physician, advised that appellant had residuals of his work injury and could not elevate his arms above horizontal with any weight but could return to modified duties. On June 12, 2009 appellant elected OPM retirement, effective August 2, 2009.[3]

In an August 17, 2009 report, Dr. Howard P. Hogshead, a Board-certified orthopedic surgeon and Office medical adviser, advised that maximum medical improvement was reached on April 30, 2009. He reviewed the medical record, noting that the attending physician provided an impairment rating under the fifth edition of the A.M.A., *Guides*; but the sixth edition of the A.M.A., *Guides* was the appropriate edition to be used.[4] Dr. Hogshead noted that Dr. Tatum

[1] Appellant's claim for a left shoulder condition was adjudicated separately by the Office. In a September 22, 2008 report, Dr. Harold H. Alexander, a Board-certified orthopedic surgeon who provided a second opinion evaluation for the Office, advised that the right shoulder tendinitis had not resolved and that he could return to modified duties.

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

[3] The employing establishment's Office of Inspector General conducted an investigation of appellant's activities, observing him from February 11 to June 3, 2009 performing activities outside his physical restrictions, including playing nine holes of golf. Appellant filed another schedule award claim on August 11, 2009.

[4] A.M.A., *Guides* (6th ed. 2008).

stated only that range of motion was 10 degrees above horizontal and did not comment on impairment. The March 19, 2009 functional capacity evaluation did not provide range of motion for the right shoulder. Dr. Hogshead stated that, under these circumstances, an assessment for range of motion was not available, and the diagnosis-based impairment (DBI) method should be followed. He advised that, under Table 15-5 of the sixth edition of the A.M.A., *Guides*, appellant's principal impairment of the right upper extremity was a distal clavicle excision, which he graded as Class 1 with a default Grade C for one percent impairment. Dr. Hogshead also rated the impairment class for the diagnosed condition (CDX), the grade modifier for functional history (GMFH), and the grade modifier for physical examination (GMPE) at one each and followed the formula for calculating impairment. He concluded that appellant had a net adjustment of zero, or 10 percent right upper extremity impairment.

By letter dated September 23, 2009, the Office asked Dr. Symbas to provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*. In an October 6, 2009 treatment note, Dr. Symbas stated that appellant was seen for follow-up to rotator cuff syndrome of shoulder and allied disorders. He provided findings on physical examination identical to those in his April 22, 2009 report. Under the sixth edition of the A.M.A., *Guides*, appellant had 18 percent right upper extremity impairment secondary to loss of range of motion and strength and distal clavicle excision. In an October 21, 2009 report, Dr. Hogshead reviewed the October 6, 2009 report and advised that Dr. Symbas merely restated his opinion regarding appellant's impairment. The Office medical adviser referred to Table 15-5 of the sixth edition and reiterated that appellant had 10 percent right upper extremity impairment.

By decision dated October 26, 2009, appellant was granted a schedule award for 10 percent permanent impairment of the right arm, for 31.2 weeks, to run from August 2, 2009 to March 8, 2010. The Office found that the weight of the medical evidence rested with the opinion of the Office medical adviser as he correctly applied the A.M.A., *Guides*.

On February 2, 2010 appellant requested reconsideration, asserting that the rating be adjusted to 13 percent. In an October 29, 2009 report, Dr. Symbas advised that appellant had been discharged and the date of maximum medical improvement was April 22, 2009. He stated that appellant had permanent restrictions and that, based on Table 15-5, he had 13 percent right upper extremity impairment.

In a nonmerit February 17, 2010 decision, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act,[5] and its implementing federal regulations,[6] 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

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8] For decisions issued after May 1, 2009, the sixth edition will be used.[9]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[10] Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS).[11] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[12]

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 in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.[13]

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined on October 26, 2009 that appellant was entitled to a schedule award for 10 percent impairment of the right upper extremity. It is well established that, when the examining physician does not provide an estimate of impairment conforming to the proper edition of the A.M.A., *Guides*, the Office may rely on the impairment rating provided by a medical adviser.[14] In this case, Dr. Symbas, an attending orthopedic surgeon, first advised in an April 22, 2009 report, that in accordance with the fifth edition of the A.M.A., *Guides*, appellant had 18 percent impairment of the right upper extremity secondary to loss of range of motion and strength and distal clavicle resection. This report was submitted to the Office on May 1, 2009 and after that date the sixth edition of the A.M.A., *Guides* was to be used in calculating impairment.[15] Thus, Dr. Symbas' April 22, 2009 report was not in

[7] *Id.* at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[9] FECA Bulletin No. 09-03 (issued March 15, 2009).

[10] A.M.A., *Guides*, *supra* note 4 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[11] *Id*. at 385-419.

[12] *Id*. at 411.

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[14] *See J.Q.*, 59 ECAB 366 (2008).

[15] *Supra* note 9.

accordance with the appropriate edition of the A.M.A., *Guides* and is of decreased probative medical evidence.[16]

On September 23, 2009 the Office asked Dr. Symbas to provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides* and provided an impairment worksheet. Dr. Symbas, however, did not return the worksheet and merely advised in an October 6, 2009 report that, under the sixth edition, appellant had 18 percent right upper extremity impairment secondary to loss of range of motion and strength and distal clavicle excision. He did not identify the impairment class for the diagnosed condition or provide analysis of the grade modifiers based on functional history, physical examination and did not use the net adjustment formula as described in section 15.3 of the sixth edition.[17] The Office therefore properly referred the medical record to Dr. Hogshead, an Office medical adviser, for review.

The only medical reports of record that properly referenced the applicable tables and grids of the sixth edition and provided a sufficient explanation are those of the Office medical adviser, Dr. Hogshead, dated August 17 and October 21, 2009.[18] The sixth edition of the A.M.A., *Guides* provides that upper extremity impairments be classified by diagnosis which is then adjusted by grade modifiers according to the formula described above.[19] Appellant's accepted diagnosed condition is tendinitis of the right shoulder. Regarding the right shoulder injury, Table 15-5 of the sixth edition of the A.M.A., *Guides*, "Shoulder Regional Grid," provides that a rotator cuff injury with partial-thickness tear can be classified from Class 0 to Class 4, with Class 1 defined as having a history of painful injury and residual symptoms without consistent objective findings. A finding under Class 1 yields impairments ranging from 1 to 13 percent.[20]

By extrapolating the physical findings reported by Dr. Symbas, Dr. Hogshead advised that, as an assessment for range of motion was not available, the DBI method should be followed. He provided an impairment rating in accordance with Table 15-5 of the sixth edition with analysis provided in Tables 15-7 through 15-9, and the net adjustment formula, finding that appellant's principal right upper extremity impairment was a distal clavicle excision, which he graded as Class 1 with a default grade C for one percent impairment. Dr. Hogshead also rated the impairment class for CDX, GMFH AND GMPE at one each and, following the appropriate formula, concluded that appellant had a net adjustment of zero, for 10 percent right upper extremity impairment.

It is well established that, when, as here, the examining physician does not provide an estimate of impairment conforming to the A.M.A., *Guides*, the Office may relay on the

[16] *See A.A.*, 59 ECAB 726 (2008).

[17] A.M.A., *Guides*, *supra* note 4 at 405-09.

[18] *P.B.*, 61 ECAB ___ (Docket No. 10-103, issued June 23, 2010).

[19] A.M.A., *Guides*, *supra* note 4 at 403.

[20] *Id*. at 401. The operative report does not indicate that appellant had a full thickness tear.

impairment rating provided by an Office medical adviser.[21] Dr. Hogshead's reports provide the competent medical evidence of record and establish that on October 26, 2009 appellant was entitled to a schedule award for a 10 percent right upper extremity impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[22] Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[23] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (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.[24] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[25]

Office procedures provide that claims for increased schedule awards may be based on incorrect calculation of the original award or new exposure.[26] To the extent that a claimant is asserting that the original award was erroneous based on his 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, resulting in a greater permanent impairment than previously calculated.[27]

ANALYSIS -- ISSUE 2

On February 2, 2010 appellant requested reconsideration, stating that he requested that the schedule award be adjusted to 13 percent right upper extremity impairment. He therefore did not show that the Office erroneously applied or interpreted a specific point of law, and argument, such as this, that repeats or duplicates evidence previously of record has no evidentiary value and

[21] *J.Q.*, 59 ECAB 366 (2008).

[22] 5 U.S.C. § 8128(a).

[23] 20 C.F.R. § 10.608(a).

[24] *Id.* at § 10.608(b)(1) and (2).

[25] *Id.* at § 10.608(b).

[26] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.7(b) (March 1995).

[27] *A.A.*, *supra* note 16.

does not constitute a basis for reopening a case.[28] Consequently, appellant was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[29]

With respect to the third above-noted requirement under section 10.6069b)(2), Dr. Symbas' April 22, 2009 report was previously of record, and evidence that repeats or duplicates evidence of record has no evidentiary value and does not constitute a basis for reopening a case.[30] While a claim for an increased schedule award may be based on the progression of an employment-related condition, without new exposure to employment factors, resulting in a greater permanent impairment than previously calculated,[31] the claim must be supported by relevant and pertinent new evidence to warrant merit review of the claim. Appellant did not supply sufficient evidence in this case as in the October 29, 2009 report, Dr. Symbas advised that maximum medical improvement was reached on April 22, 2009, prior to the October 26, 2009 schedule award, and, again, the physician did not provide any explanation or analysis in support of his impairment rating of 13 percent, merely stating that based on his injury, appellant was entitled to 13 percent right upper extremity impairment under Table 15.5.

As appellant did not show that the Office erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by the Office, the Office properly denied his reconsideration request.[32]

CONCLUSION

The Board finds that appellant did not establish that he has greater than 10 percent impairment of the right upper extremity, and that the Office properly refused to reopen his case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[28] *M.E.*, 58 ECAB 694 (2007).

[29] 20 C.F.R. § 10.606(b)(2).

[30] *Freddie Mosley*, 54 ECAB 255 (2002).

[31] *A.A.*, *supra* note 16.

[32] He retains the right to file a claim for an increased schedule award that is based on new exposure or on medical evidence indicating the progression of an employment-related condition, without new exposure to employment factors, resulting in a greater permanent impairment than previously calculated. *Supra* note 27.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 17, 2010 and October 26, 2009 be affirmed.

Issued: January 12, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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