United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 10-1134**
	)	**Issued: March 24, 2011**
DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND, Cherry Point, NC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 18, 2010 appellant filed a timely appeal from a December 10, 2009 schedule award decision of the Office of Workers' Compensation Programs and a January 19, 2010 Office decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether appellant has established that he is entitled to a greater than one percent permanent impairment of the right upper extremity, for which he received a schedule award; and (2) whether the Office properly determined that appellant's request for reconsideration was insufficient to warrant further merit review of the claim.

FACTUAL HISTORY

On September 10, 2008 appellant, then a 39-year-old machinist, filed a traumatic injury claim alleging that on September 4, 2008 he injured his right shoulder while picking up a rotor

hub out of a box. The Office accepted the claim for right shoulder impingement and authorized right shoulder surgery, which was performed on January 6, 2009.

In a June 10, 2009 report, Dr. Robert E. Coles, a treating Board-certified orthopedic surgeon, diagnosed impingement syndrome. He also reported that appellant returned to work with no restrictions. Dr. Coles related that appellant had occasional mild and minimal residual symptoms. He concluded that appellant had a five percent permanent impairment of the right upper extremity based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Coles stated that appellant reached maximum medical improvement on May 7, 2009 in a July 23, 2009 note.

On June 17, 2009 appellant filed a claim for a schedule award.

The record contains an undated permanent impairment worksheet form report for the upper extremity from Dr. Cole, who made a diagnosis-based impairment (DBI) rating of one percent pursuant to the sixth edition of the A.M.A., *Guides*. Referring to Table 15-5 he determined that appellant had a Class 1 impairment of his right upper extremity based on a diagnosis of impingement syndrome and he identified Grade C as the appropriate grade for a final impairment of five percent.

The evidence was referred to an Office medical adviser for review. On August 26, 2009 Dr. Howard P. Hogshead, an Office medical adviser and Board-certified orthopedic surgeon, referenced Dr. Cole's report and the reference to right shoulder arthroplasty surgery which occurred on January 6, 2009. Using Table 15-5, page 401 he concluded that one percent impairment for the right upper extremity was appropriate and July 29, 2009 as the date of maximum medical improvement.

On November 2, 2009 the Office referred appellant to Dr. Donald D. Getz, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Cole and Hogshead on appellant's right upper extremity impairment determination. In a December 2, 2009 report, Dr. Getz reviewed the statement of accepted facts and medical records and diagnosed status postoperative right shoulder impingement syndrome. A physical examination revealed mild pain at extremes of right shoulder motion, particularly above the shoulder, no evidence of mass or atrophy, no evidence of instability and mild tenderness to deep palpation under the lateral posterior acromion. Range of motion for the right shoulder included 170 degrees flexion, 45 degrees extension, 40 degrees abduction and 90 degrees internal and external rotation. Dr. Getz determined that appellant had a one percent right upper extremity permanent impairment. He stated that he used the DBI instead of the range of motion method. The rationale given for this choice was that he "considered the measured ranges of motion invalid due to the prior rotator cuff surgery and the likelihood of some residual motion loss at the end ranges due to this prior unrelated procedure." Dr. Getz used Chapter 15 of the sixth edition of the A.M.A., *Guides* and identified a Class 1 impairment with a default Grade C, for the class of diagnosis (CDX) was one percent impairment of the upper extremity. He advised that had represented a Grade Modifier 1 (Grade Modifier for Functional History -- GMFH). Dr. Getz found a Grade Modifier 2 based on appellant's physical examination findings (GMPE) and a Grade Modifier 0 based on clinical studies (GMCS). He noted that, in order to determine the final impairment under the sixth edition, he applied the Net Adjustment Formula (NAF): GMFH

(1) minus CDX (1) plus GMPE (2) minus CDX (1). Based on the formula, the net adjustment modifier was zero Dr. Getz further explained that the result was a Class 1 with an adjustment of zero which equaled a Class 1 default Grade C or a one percent right upper extremity impairment. On December 8, 2009 another Office medical adviser agreed with the one percent right upper extremity impairment rating.

By decision dated December 10, 2009, the Office issued a schedule award for a one percent right upper extremity impairment. The award was for 3.12 weeks and the period of the award was June 10 to July 1, 2009.

On December 19, 2009 appellant requested reconsideration and resubmitted medical evidence considered by the Office, an April 20, 2009 pain disability index, an April 20, 2009 functional capacity evaluation and his statement.

By decision dated January 19, 2010, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulations[2] 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.[3] Effective May 1, 2009, the Office adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[4]

Section 8123(a) of the Act[5] provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[6] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404.

[3] *Id.*

[4] Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

[5] 5 U.S.C. §§ 8101-8193

[6] *Id*. at § 8123(a); *Geraldine Foster*, 54 ECAB 435 (2003); *see J.J.*, Docket No. 09-27 (issued February 10, 2009).

specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[7]

ANALYSIS -- ISSUE 1

The Office accepted the claim for right shoulder impingement and authorized right shoulder surgery. On June 17, 2009 appellant filed a claim for a schedule award. Dr. Coles, a treating Board-certified orthopedic surgeon, addressed the extent of appellant's permanent impairment and using Table 15-5, page 401 of the A.M.A., *Guides* sixth edition found a five percent right upper extremity impairment. Dr. Hogshead, an Office medical adviser and Board-certified orthopedic surgeon, reviewed this report and noted no impairment rating on page 401, Table 15-5 that correlated to five percent but found that appellant had one percent impairment of the right upper extremity using Table 15-5, page 401 of the A.M.A., *Guides* sixth edition. In fact Dr. Cole used Table 15-5, page 403. Due to the difference of opinion regarding extent of appellant's permanent impairment between Dr. Coles and Dr. Hogshead, the Office medical adviser, the Office determined there was a conflict in medical opinion evidence and referred appellant to Dr. Getz, a Board-certified orthopedic surgeon, selected as the impartial medical examiner to determine the extent of appellant's right upper extremity impairment.

Under the sixth edition of the A.M.A., *Guides*, impairments of the upper extremities are covered by Chapter 15. Section 15.2, entitled DBI, indicates that DBI is the primary method of evaluation of the upper limb.[8] The initial step in the evaluation process is to identify the impairment class by using the corresponding diagnosis-based regional grid. Dr. Getz noted he utilized Chapter 15 with the relevant section of the Shoulder Regional Grid, Table 15-5, A.M.A., *Guides* 402. He identified a Class 1 impairment based on shoulder impingement syndrome and pain on terminal motions of the shoulder. Once the impairment class was determined based on the diagnosis, the grade was initially assigned the default value, C. Under Table 15-5, the default Grade, C, for a Class 1 impingement syndrome represents one percent upper extremity impairment.[9]

After determining the impairment class and default grade, Dr. Getz determined whether there were any applicable grade adjustments for so-called nonkey factors or modifiers. These include adjustments for functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS). The grade modifiers are used in the NAF to calculate a net adjustment.[10] The final impairment grade is determined by adjusting the grade up or down from the default value C by the calculated net adjustment. Dr. Getz then found, a Grade Modifier 1 for functional history (GMFH), a Grade Modifier 1 for class of diagnosis-regional grid and a Grade Modifier 2 for

[7] *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002); *B.P.*, Docket No. 08-1457 (issued February 2, 2009).

[8] Section 15.2, A.M.A., *Guides* 387.

[9] The Grades range from A to E, with A representing zero (0) percent upper extremity impairment, B and C representing one (1) percent and D and E representing two (2) percent upper extremity impairment. Table 15-5, A.M.A., *Guides* 402.

[10] Net Adjustment = (GMFH - CDX) + (GMPE - CDX) + (GMCS CDX). Section 15.3d, A.M.A., *Guides* 411.

physical examination (GMPE). As there were no relevant clinical studies (GMCS), the NAF for this case is (GMFH - CDX or 1 -1 = 0) + (GMPE - CDX or 2 -1 = 1) + (GMCS - CDX or 0 -1 = -1) which resulted in a zero net adjustment (0 + 1 + -1 = 0). On December 8, 2009 an Office medical adviser reviewed Dr. Getz' report and concurred with his use of the A.M.A., *Guides* and the impairment rating.

The Board finds that Dr. Getz' opinion is entitled to special weight as his report is sufficiently well rationalized and based upon a proper factual background. The Office properly relied upon his report in finding that appellant was entitled to an impairment of one percent to the right upper extremity. Dr. Getz examined appellant, reviewed his medical records and reported accurate medical and employment histories. He found no basis on which to attribute any greater impairment. There is no probative medical evidence of record establishing that appellant has more than one percent impairment of the right upper extremity.

The Board finds that the medical evidence does not establish that appellant was entitled to more than a one percent impairment of the right upper extremity for which he has received a schedule award.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[11] the Office's regulations provide that 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) submit relevant and pertinent new evidence not previously considered by the Office.[12] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[13] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[14]

ANALYSIS -- ISSUE 2

In his December 19, 2009 application for reconsideration appellant did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. As to new evidence, he submitted pain disability index and functional capacity evaluation dated April 20, 2009 and his statement. None

[11] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

[12] 20 C.F.R. § 10.606(b)(2). *Susan A. Filkins*, 57 ECAB 630 (2006); *B.P.*, Docket No. 08-1457 (issued February 2, 2009).

[13] 20 C.F.R. § 10.607(a). *Robert G. Burns*, 57 ECAB 657 (2006); *see S.J.*, Docket No. 08-2048 (issued July 9, 2009).

[14] 20 C.F.R. § 10.608(b). *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006); *see Y.S.*, Docket No. 08-440 (issued March 16, 2009).

of the evidence submitted by appellant addressed the issue of a permanent impairment determination for his right upper extremity. As the evidence did not address the issue in question, *i.e.*, the degree of his right upper extremity impairment, the evidence is not relevant or pertinent. The Board finds that appellant did not submit relevant and pertinent new evidence not previously considered by the Office.

The Board also notes that appellant resubmitted reports from Drs. Coles and Getz, which were previously of record and considered in the adjudication of his schedule award. 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.[15] Appellant did not provide any relevant and pertinent new evidence to the issue of whether he was entitled to an increased schedule award.

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 did not establish that he sustained more than one percent right upper extremity impairment. The Board further finds that he did not meet the requirements of 20 C.F.R. § 10.606(b)(2) and the Office properly refused to reopen the case for merit review.

[15] *M.E.*, 58 ECAB 694 (2007); *D'Wayne Avila*, 57 ECAB 642 (2006); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 19, 2010 and December 10, 2009 are affirmed.

Issued: March 24, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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