

FACTUAL HISTORY

On June 30, 2008 appellant, then a 63-year-old city carrier, fell and injured his right shoulder while delivering his route. OWCP accepted his claim for contusion of right shoulder and upper arm and right shoulder rotator cuff tear. Appellant underwent an authorized right arthroscopic surgery on April 1, 2009 which included debridement of rotator cuff tear, subacromial decompression and distal clavicle resection. OWCP paid medical and wage-loss benefits.

On September 1, 2009 appellant requested a schedule award. In an October 8, 2009 report, Dr. John L. Graves, a Board-certified orthopedic surgeon, stated that appellant was at maximum medical improvement and had 15 percent impairment to the right shoulder due to acromioplasty, distal clavicle resection and chronic rotator cuff problems. On November 10, 2009 an OWCP medical adviser reviewed the medical record and Dr. Graves' October 8, 2009 report and opined that appellant had 11 percent impairment of the right upper extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

By decision dated December 7, 2009, OWCP issued a schedule award for 11 percent permanent impairment of the right upper extremity. The award ran for a total of 34.32 weeks for the period October 8, 2009 through June 6, 2010.

On January 5, 2010 appellant requested a telephonic hearing. In a January 21, 2010 report, Dr. Graves submitted examination findings, including range of motion findings. He noted appropriate tables under the A.M.A., *Guides* and opined that appellant had 15 percent right arm impairment for full thickness tear of rotator cuff irreparable surgically and status post distal clavicle resection.

In a February 19, 2010 decision, an OWCP hearing representative set aside the December 7, 2009 decision and remanded it for a supplemental report from the medical adviser.

In a March 1, 2010 report, the medical adviser reviewed the medical record along with Dr. Graves' January 21, 2010 report. He noted that Dr. Graves assigned 5 percent impairment for rotator cuff tear and 10 percent for distal clavicle resections for arthritis, which an accepted condition. Therefore, the medical adviser opined that the 15 percent impairment rating to the right upper extremity in Dr. Graves' January 21, 2010 report was not valid. He stated that a significant portion of loss of range of motion of the right shoulder could be accepted as a stand-alone impairment under page 473 of the A.M.A., *Guides*, which he calculated as 11 percent right upper extremity impairment. Thus, the medical adviser opined that there was no additional impairment over the previously awarded 11 percent right upper extremity impairment.

By decision dated March 23, 2010, OWCP denied appellant's claim for a schedule award greater than the previously awarded 11 percent permanent impairment of the right upper extremity.

On April 7, 2010 appellant requested a telephone hearing which was held on August 3, 2010. His attorney argued that the acromioclavicular (AC) joint arthritis was aggravated by the work injury and should be included in the impairment rating.

In a July 16, 2010 report, Dr. Graves noted that there had been some concern as to whether the AC joint issue was related to appellant's work injury. He opined that, prior to the work-related injury, appellant had no pain in his shoulder. At that time, appellant was noted to have some AC joint tenderness and his x-rays showed AC joint spurring. He opined that the AC joint arthritis had been present prior to the injury, but was not symptomatic until his fall. Appellant's surgery involved a distal clavicle resection, which should be included in his compensation/rating postoperatively from the on-the-job injury.

By decision dated September 21, 2010, an OWCP hearing representative affirmed the March 23, 2010 schedule award decision. The hearing representative also found that the medical evidence of record relating to the additional condition of aggravation of AC joint arthritis was not causally related to the accepted work injury and thus could not be included in the schedule award.

On January 27 and June 25, 2011 appellant requested reconsideration. He stated that Dr. Graves has never backed away from his 15 percent impairment rating of the right upper extremity. Appellant additionally noted that OWCP used Dr. Graves for second opinion evaluations. Also provided was a November 2, 2010 report from Dr. Graves who opined that appellant's diagnoses related to his work injury should be right rotator cuff tear and AC joint arthritis, as his work-related injury exacerbated those conditions.

By decision dated July 15, 2011, OWCP denied appellant's reconsideration request on the grounds that his request was insufficient to warrant a review of its prior decision.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.³ Section 10.608(b) of OWCP's 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), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁴ The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.⁵

³ 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB 141 (2007).

⁴ *Id.* at § 10.608(b); *K.H.*, 59 ECAB 495 (2008).

⁵ *See Daniel Deparini*, 44 ECAB 657 (1993).

ANALYSIS

Appellant requested reconsideration of OWCP's September 21, 2010 decision which affirmed a schedule award determination of 11 percent permanent impairment of the right upper extremity and denied his claim of arthritis as work related. His request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Appellant did not advance a relevant legal argument not previously considered by OWCP. The fact that Dr. Graves may or may not perform second opinion evaluations for OWCP is not pertinent to the underlying issue of whether OWCP properly determined appellant's permanent impairment. Appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also did not submit relevant and pertinent new evidence not previously considered by OWCP. The November 2, 2010 medical report from Dr. Graves, while new, is not relevant as he does not specifically address appellant's degree of permanent impairment pursuant to the A.M.A., *Guides*. Dr. Graves merely stated that appellant's diagnoses related to his work injury should be right rotator cuff tear and AC joint arthritis. This report is also duplicative of Dr. Graves' July 16, 2010 report with regard to his opinion as to which conditions were work related.⁶

The evidence submitted by appellant did not show that OWCP erroneously applied or interpreted a specific point of law; advance a relevant legal argument not previously considered or constitute relevant and pertinent new evidence not previously considered by OWCP. As appellant did not meet any of the necessary regulatory requirements, the Board finds that he is not entitled to further merit review.⁷

On appeal, appellant argued that Dr. Graves' November 2, 2010 report showed that additional diagnoses should have been accepted as he clearly explained what his diagnoses were and how the diagnoses were aggravated by appellant's work injury. The Board notes that appellant's argument goes to the merits of the case, over which it has no jurisdiction.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁶ *Id.*

⁷ *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 17, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board