

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

A.M., Appellant

and

**DEPARTMENT OF THE ARMY, MILITARY
ENLISTMENT PROCESSING COMMAND,
Seattle, WA, Employer**

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**Docket No. 11-1609
Issued: March 1, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 29, 2011 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) March 24, 2011 decision, which denied further merit review and a February 24, 2011 schedule award decision. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained permanent impairment; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 7, 2010 appellant, then a 63-year-old utility worker, was injured when he felt a pop in his right shoulder while he was throwing trash into a dumpster. He did not stop work until February 4, 2010. OWCP accepted appellant's claim for supraspinatus tear on the right and authorized surgical repair.

A January 14, 2010 magnetic resonance imaging (MRI) scan read by Dr. Kelly J. Krizan, a Board-certified diagnostic radiologist, revealed a complete tear of the supraspinatus tendon, but no retraction and a strain or partial tear in the superior aspect of the subscapularis tendon. The infraspinatus tendon was unremarkable. There was a high signal in the distal aspect of the tendon for the short head of the biceps, suggesting a strain of that structure. No significant effusion was present. The anterior glenoid labrum and superior glenoid labrum were within normal limits and the acromioclavicular (AC) joint was unremarkable.

On February 4, 2010 Dr. Alan Alyea, a Board-certified orthopedic surgeon, performed a surgical repair of the subscapularis and supraspinatus rotator cuff tendons, biceps tenodesis and revision acromioplasty of the right shoulder.² He released appellant to regular work on October 6, 2010.

On November 8, 2010 appellant requested a schedule award. On November 9, 2010 OWCP advised him of the medical evidence needed to establish a claim of permanent impairment.

In reports dated January 12 and 13, 2011, Dr. Larry K. Lamb, a Board-certified physiatrist, performed an impairment evaluation. He reviewed appellant's work injury and treatment by Dr. Alyea, including prior right shoulder surgery in 2003. On examination there was occasional pain in the anterior or lateral aspect of the shoulder, primarily with resisted activity with the arm extended out in front or laterally out to the side and no radicular symptoms in the right upper extremity. On palpation, Dr. Lamb determined that the AC joint had minimal to no tenderness. He noted that appellant was virtually pain free with 180 degrees of range of motion, both in flexion and in abduction. Appellant had 85 degrees of external rotation and 80 degrees of internal rotation. Neurovascular examination was normal. Dr. Lamb advised that appellant had excellent postsurgical recovery, and he had returned to his job without restrictions and had been doing well for several months. He found that appellant had excellent range of motion in terms of flexion, abduction, internal and external rotation, as well as adduction. Dr. Lamb opined that "[g]iven that the patient has had such excellent recovery from his surgery, including excellent return in range of motion in all planes, he is not afforded partial permanent disability." As to the acromioplasty under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), the procedure usually warranted 10 percent upper extremity impairment. However, Dr. Lamb explained that the most recent surgical procedure was a revision of a prior acromioplasty, which was a preexisting condition. He concluded that appellant was entitled to a 10 percent impairment of the right arm, which was preexisting.

² The record reflects that on July 9, 2003 Dr. Alyea performed a right shoulder anterior acromioplasty and distal clavicle resection.

In a February 17, 2011 report, OWCP's medical adviser noted appellant's history of injury and treatment, which included a repair subscapularis and supraspinatus rotator cuff tendons, biceps tenodesis and revision acromioplasty of the right shoulder. He utilized the January 12, 2011 report of Dr. Lamb and found that appellant was not functionally impaired as there was a full range of motion, normal muscle strength and normal neurological examination. The medical adviser referred to Table 15-34³ for shoulder range of motion and agreed there was no ratable impairment due to range of motion deficit. He also opined that there was no basis for impairment in terms of the rotator cuff repair or the tenodesis. The medical adviser stated that testing indicated that the AC joint was normal, noted that Dr. Lamb found the AC joint normal on physical examination and found there was no other medical evidence showing that the shoulder was anatomically modified by surgery in such a way that it was ratable as a distal clavicle resection. He concluded that there was no ratable range of motion impairment, no ratable functional impairment and not ratable anatomic deformity.

By decision dated February 24, 2011, OWCP denied appellant's claim for a schedule award. It found that the medical evidence of record did not support any permanent impairment to a scheduled member or function of the body.

On March 14, 2011 appellant requested reconsideration. He contended that Dr. Lamb only examined him for 10 minutes and questioned how he could formulate an opinion in such a short time frame. Appellant indicated that Dr. Alyea was an excellent orthopedic surgeon and an expert on shoulders.

In a March 2, 2011 report, Dr. Alyea noted that appellant was upset with the evaluation that was performed by Dr. Lamb. He noted that appellant indicated that it was very brief and did not take into consideration his present condition. Dr. Alyea noted that appellant had significant deficits and was in pain every day. Appellant was unable to participate in recreational activities such as hunting as it caused sharp pain in his shoulder. Dr. Alyea also indicated that "any outreach exertion gives him quite a bit of difficulty." He examined appellant and determined that he had weakness of abduction, external rotation and flexion. Dr. Alyea found restriction of internal rotation where appellant could bring his hand to hip pocket level, but no further, which was not normal inside the shoulder. He opined that appellant would have lifelong difficulties with his shoulder and another repair was not possible. Dr. Alyea explained that appellant had "incurred further damage since his first surgery that is permanent in nature, and right now there is no surgery or other treatment that I know of that will make him more comfortable or more functional." OWCP also received medical evidence previously of record.

By decision dated March 24, 2011, OWCP denied appellant's request for reconsideration without a review of the merits as it was repetitious and did not raise any substantial legal questions or include new and relevant evidence.

³ A.M.A., *Guides* 475.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA,⁴ and its implementing federal regulations,⁵ 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, FECA 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶ For decisions issued after May 1, 2009, the sixth edition will be used.⁷

ANALYSIS -- ISSUE 1

The evidence of record is insufficient to establish that appellant sustained permanent impairment of his right shoulder under the sixth edition of the A.M.A., *Guides*.

Appellant provided the January 12 and 13, 2011 reports from Dr. Lamb. The Board notes that, while he provided findings and calculated 10 percent preexisting impairment,⁸ he utilized the fifth edition of the A.M.A., *Guides*. However, as noted above, the sixth edition of the A.M.A., *Guides* was to be utilized effective May 1, 2009.⁹ The Board has held that a medical opinion not based on the appropriate edition of the A.M.A., *Guides* has diminished probative value in determining the extent of a claimant's permanent impairment.¹⁰ As Dr. Lamb's impairment determination was made under the fifth edition, it is insufficient to establish appellant's current impairment.

Board precedent is well settled however that, when an attending physician's report gives an estimate of impairment, but does not indicate that the estimate is based upon the application of the A.M.A., *Guides* or improperly applies the A.M.A., *Guides*, OWCP is correct to follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.¹¹

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a).

⁷ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁸ It is well established that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included. *Peter C. Belkind*, 56 ECAB 580, 586 (2005). However, where a claimant does not demonstrate any permanent impairment caused by the accepted condition, the claim is not ripe for consideration of any preexisting impairment. *Thomas P. Lavin*, 57 ECAB 353 (2006). As discussed, *infra*, appellant has not established permanent impairment due to the accepted condition and surgery.

⁹ *See supra* note 6.

¹⁰ *Carolyn E. Sellers*, 50 ECAB 393, 394 (1999).

¹¹ *See Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

OWCP properly referred the case to OWCP's medical adviser who, on February 17, 2001, utilized the findings provided by Dr. Lamb. The medical adviser noted appellant's history of injury and treatment and utilized the sixth edition of the A.M.A., *Guides*. He explained that Dr. Lamb did not provide any findings to warrant impairment. For example, Dr. Lamb reported full range of motion, normal muscle strength and normal neurological examination. The medical adviser correctly referred to Table 15-34¹² for shoulder range of motion and determined that there was no ratable impairment due to range of motion deficit as the findings provided by Dr. Lamb were normal. Regarding appellant's authorized right shoulder surgery, he explained that testing indicated that the AC joint was normal. The medical adviser explained that there was nothing in the operative report, or subsequent physical examinations, to suggest that the shoulder was surgically anatomically modified in such a way that it was ratable as a distal clavicle resection. He determined that there was no ratable range of motion loss and functional or anatomical impairment that was ratable. Based on this, the medical adviser found that there was no objective evidence to support impairment to the right shoulder.

Appellant did not submit any other medical evidence to support that he was entitled to a schedule award, under the A.M.A., *Guides*, for a scheduled member of the body under FECA. Accordingly, the Board finds that he has not established entitlement to a schedule award.

On appeal, appellant disagreed with the findings of Dr. Lamb and he provided new medical evidence. The Board is unable to review new evidence for the first time on appeal.¹³ However, 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.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,¹⁴ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”¹⁵

¹² A.M.A., *Guides* 475.

¹³ 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

¹⁴ 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.¹⁶

ANALYSIS -- ISSUE 2

Appellant disagreed with the amount of his schedule award and requested reconsideration on March 14, 2011. He questioned Dr. Lamb's examination. Appellant's request did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. The underlying issue on reconsideration was whether he had ratable permanent impairment of his right arm due to his work injury. However, appellant did not provide any relevant or pertinent new evidence to the issue of whether he had ratable permanent impairment.

In his March 14, 2011 request for reconsideration, appellant alleged that he was entitled to a greater award and enclosed the March 2, 2011 report from Dr. Alyea. However, while his report is new, Dr. Alyea did not provide any impairment rating. Thus, his report is not relevant to the issue of whether appellant has ratable permanent impairment attributable to his accepted condition and authorized surgery. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁷

Appellant also provided a duplicate copy of a previously received report. 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.¹⁸

Consequently, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, advanced a relevant new argument not previously submitted, or submitted relevant and pertinent new evidence not previously considered by OWCP. Therefore, OWCP properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he is entitled to a schedule award. The Board also finds that OWCP properly refused to reopen his case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

¹⁶ *Id.* at § 10.608(b).

¹⁷ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹⁸ *Khambandith Vorapanya*, 50 ECAB 490 (1999); *John Polito*, 50 ECAB 347 (1999); *David J. McDonald*, 50 ECAB 185 (1998).

ORDER

IT IS HEREBY ORDERED THAT the March 24 and February 24, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 1, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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