

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

A.D., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
CUSTOMS & BORDER PROTECTION,)
BORDER PATROL-TUCSON SECTOR,)
Tucson, AZ, Employer)

Docket No. 13-1617
Issued: December 12, 2013

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 28, 2013 appellant filed a timely appeal from a May 15, 2013 nonmerit decision and a January 23, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 appeal.

ISSUES

The issues are: (1) whether appellant established that he sustained greater than a five percent impairment to his right arm; and (2) whether OWCP properly refused to reopen appellant's case for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 16, 2010 appellant, then a 28-year-old border patrol agent, experienced right shoulder pain when his right arm was pulled while playing basketball. The employing establishment advised that he was in the performance of duty.² OWCP accepted appellant's claim for bursal tear at the supraspinatus insertion of the right shoulder. It authorized surgery for right shoulder type 2 superior labral tear from anterior to posterior (SLAP) repair with arthroscopic debridement. Appellant underwent surgery on October 7, 2010, which was performed by Dr. Joel D. Thompson, a Board-certified orthopedic surgeon.

On March 23, 2011 Dr. Thompson noted that appellant had full symmetric range of motion. He found that appellant reached maximum medical improvement and had no permanent impairment.

On June 15, 2012 appellant filed a claim for a schedule award. On July 27, 2012 OWCP advised him of the medical evidence needed to establish his claim.

Appellant submitted reports dated October 8 and 9, 2012, from Dr. Edward J. Berghausen, a Board-certified orthopedic surgeon, who reviewed appellant's history of injury and treatment and noted that he sustained a labral tear of the right shoulder in an industrial accident at training camp while doing stacking or defensive drills. He had immediate pain and weakness as well as snapping along the medial aspect of the shoulder. Appellant was seen by Dr. Thompson and underwent a "slap repair and AC [acromioclavicular] joint procedure" which was "likely a Mumford procedure." Dr. Berghausen did not have a copy of the surgical notes or the office treatment notes following the procedure. He noted that appellant was working but still had popping and pain along the AC joint anteriorly. Dr. Berghausen advised that appellant was at maximum medical improvement and had 15 percent impairment to the right shoulder. He explained that this was for loss of motion flexion to 150 degrees.

In a November 4, 2012 report, Dr. Ellen Pichey, an OWCP medical adviser, noted appellant's history of injury and treatment and referenced the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (*hereinafter*, A.M.A., *Guides*). She noted that Dr. Berghausen did not explain how he arrived at his impairment rating under the sixth edition of the A.M.A., *Guides*. Dr. Pichey referred to Table 15-5³ to determine the diagnosis-based estimate for labral tear was a class 1, default position C, which represented three percent. Dr. Berghausen noted that clinical studies were used for placement. Dr. Pichey noted that physical examination grade modifier was 2, pursuant to Table 15-8.⁴ Regarding functional history, she stated that appellant qualified for a grade modifier of 2, pursuant to Table 15-7.⁵ Dr. Pichey utilized the net adjustment formula to determine that he had a modification factor of

² The record reflects that appellant noted that his shoulder was first injured during a stacking drill in December and it was not 100 percent since that time.

³ A.M.A., *Guides* 403.

⁴ *Id.* at 408.

⁵ *Id.* at 406.

plus two, which moved the default position to E representing impairment of five percent.⁶ She opined that appellant reached maximum medical improvement on March 23, 2011.

By decision dated January 23, 2013, OWCP granted appellant a schedule award for five percent permanent impairment of the right arm. The award covered the period March 23 to July 10, 2011.

In a letter dated February 16, 2013, appellant requested reconsideration. He noted that Dr. Berghausen had corrected the impairment rating according to the sixth edition of the A.M.A., *Guides* and found 11 percent impairment. In a February 1, 2013 report, Dr. Berghausen noted that he was going to reformulate his rating according to the A.M.A., *Guides* and resubmit. OWCP did not receive a new impairment rating from the physician.

By decision dated May 15, 2013, OWCP denied appellant's request for reconsideration without a review of the merits on the grounds that it did not raise a substantial legal question or included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA,⁷ and its implementing federal regulations,⁸ 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.⁹ For decisions issued after May 1, 2009, the sixth edition will be used.¹⁰

In addressing upper extremity impairments, the sixth edition requires identifying 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

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and

⁶ *Id.* at 411.

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* at § 10.404(a).

¹⁰ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹¹ A.M.A., *Guides* 494-531; *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

¹² *Id.* at 411.

percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.¹³

ANALYSIS

OWCP accepted appellant's claim for bursal tear at the supraspinatus insertion right shoulder and authorized surgery for right shoulder type 2 SLAP repair with arthroscopic debridement. Appellant underwent surgery on October 7, 2010. On March 23, 2011 his treating physician, Dr. Thompson, found that appellant had full symmetric range of motion, had reached maximum medical improvement and had no permanent impairment.

On June 15, 2012 appellant filed a claim for a schedule award. Dr. Berghausen noted appellant's history of injury and treatment. He rated 15 percent impairment to the right shoulder based upon loss of motion of 150 degrees; but did not refer to any specific pages or table of the A.M.A., *Guides*. Thus, Dr. Berghausen opinion is of diminished probative value.¹⁴

Board precedent is well settled that when an attending physician's report gives an estimate of impairment but does not address how the estimate was based upon the A.M.A., *Guides*, OWCP may follow the advice of a medical adviser or consultant where he or she has properly applied the A.M.A., *Guides*.¹⁵

In a November 4, 2012 report, Dr. Pichey noted that Dr. Berghausen did not explain how he arrived at his rating under the sixth edition of the A.M.A., *Guides*. She utilized a diagnosis-based impairment under the sixth edition of the A.M.A., *Guides* and noted that a labral tear fell under class 1, with a default value of C, or three percent under Table 15-5.¹⁶ Dr. Pichey found that the clinical studies were used for placement.¹⁷ Under physical examination adjustment, appellant had a grade 2 modifier for moderate palpatory findings.¹⁸ Under functional history adjustment, he had a grade 2 modifier for moderate problem such as pain or symptoms with normal activity.¹⁹ Applying the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) resulted in a modifier total of plus two, moving from the default grade C to E, a five percent impairment of the right arm.

¹³ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

¹⁴ An opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment. *I.F.*, Docket No. 08-2321 (issued May 21, 2009).

¹⁵ *J.Q.*, 59 ECAB 366 (2008); *Laura Heyen*, 57 ECAB 435 (2006).

¹⁶ A.M.A., *Guides* 403.

¹⁷ *Id.* at 410 (Table 15-9) (Clinical Studies Adjustment: Upper Extremities).

¹⁸ *Id.* at 408 (Table 15-8) (Physical Examination Adjustment: Upper Extremities).

¹⁹ *Id.* at 406 (Table 15-7) (Functional History Adjustment: Upper Extremities).

The Board finds that the impairment rating of Dr. Pichey establishes that appellant has no more than five percent impairment to the right arm. Appellant has not submitted medical evidence conforming with the A.M.A., *Guides* to establish greater impairment.

On appeal, appellant contends that he has 11 percent impairment to the right upper extremity, however, the record before the Board does not contain an impairment rating by Dr. Berghausen conforming to the A.M.A., *Guides*.

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,²⁰ 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 the [OWCP].”²¹

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.²²

ANALYSIS -- ISSUE 2

Appellant disagreed with the denial of his claim for a schedule award and requested reconsideration on February 16, 2013. He argued that his physician had corrected his report utilizing the sixth edition of the A.M.A., *Guides*. Also submitted was a February 1, 2013 report from Dr. Berghausen who indicated that he would submit an updated impairment rating. This new report is not relevant because he does not further address how impairment was calculated pursuant to the A.M.A., *Guides*. The Board also notes that an updated report was not submitted before OWCP’s May 15, 2013 decision. Furthermore, appellant did not make any argument that

²⁰ 5 U.S.C. § 8128(a).

²¹ 20 C.F.R. § 10.606(b).

²² *Id.* at § 10.608(b).

OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP.

Consequently, the evidence submitted by appellant on reconsideration does not satisfy any of the three criterion noted above, for reopening a claim for merit review. 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 sustained greater than five percent impairment to his right arm. The Board also finds that OWCP properly refused to reopen his case for reconsideration of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 15 and January 23, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 12, 2013
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

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