United States Department of Labor
Employees' Compensation Appeals Board

W.D., Appellant	)	
and	)	**Docket No. 14-1592**
	)	**Issued: November 10, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Little Rock, AR, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 8, 2014 appellant filed a timely appeal from a February 25, 2014 merit decision and a June 2, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 established more than a one percent impairment of his left arm; and (2) whether OWCP properly refused to reopen his case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that OWCP improperly utilized the report of the second opinion physician who did not use the functional capacity evaluation, did not consider all of his issues and did not give him a fair assessment. He contends that it sent him to a physician that they have contracted to lower or undermine the rating of the treating physician.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On December 21, 2012 appellant, then a 44-year-old mail handler, filed a traumatic injury claim alleging a contusion and bruise of his left wrist during the course of his federal employment. OWCP accepted his claim for contusion of the left wrist and crushing injury of left hand and left wrist.

In an April 24, 2013 report, Dr. Richard S. Wirges, appellant's treating Board-certified surgeon, noted that appellant was four months status post crush injury to the left hand and that his main pain was over the mid portion of the third metacarpal bone and the third metacarpophalangeal joint area. On physical examination, he noted that there was no swelling, bruising, signs of reflex sympathetic dystrophy or complex regional pain syndrome. Dr. Wirges noted decent range of motion, but residual stiffness and soreness. He indicated that appellant was at maximum medical improvement and was ready for an impairment rating as well as a functional capacity evaluation. In a June 25, 2013 report, Dr. Wirges considered appellant's permanent impairment under the fourth edition of the A.M.A., *Guides to the Evaluation of Permanent Impairment* (1993) (A.M.A., *Guides*) and determined that appellant had a four percent left upper extremity impairment based on loss of wrist flexion and extension.

On August 15, 2013 appellant filed a claim for a schedule award.

By letter dated August 23, 2013, OWCP advised appellant that his physician's report was insufficient and asked that he provide a new medical report in support of his claim for a schedule award. It noted that the opinion should utilize the sixth edition of the A.M.A., *Guides,* state when he reached maximum medical improvement, provide the diagnosis on which the impairment is based and a detailed description of the permanent impairment.

In a July 8, 2013 report, Dr. Wirges provided an impairment rating pursuant to the sixth edition of the A.M.A., *Guides.* He noted that appellant's impairment is based mainly on the loss of motion of his wrist with 55 degrees of wrist extension and 40 degrees of wrist flexion. Using the wrist regional grid, Dr. Wirges noted that appellant had wrist pain, post-acute injury/crush injury with healed minor soft tissue skin injuries. He noted a history of painful injury and residual symptoms with consistent objective findings at maximum medical improvement, which would fall into class 1.[2] Dr. Wirges noted that appellant had pain and symptoms with strenuous and vigorous activities, but that medication controlled those symptoms and that appellant was able to perform self-care activities independently. He opined that appellant is a class 1D based on a grade modifier 1 for Functional History (GMFH), a grade modifier 1 for Physical Examination (GMPE) and grade modifier 1 for Clinical Studies (GMCS). Dr. Wirges then concluded that as the impairment range for the upper extremity was between 1 percent and 13 percent, appellant had 8 percent wrist upper extremity impairment.

OWCP sent appellant's file to its medical adviser, who noted that range of motion was not reported in all applicable planes. Dr. Zimmerman, the medical adviser, stated that the report seemed to suggest a rating based on a grid diagnosis without citing the history or examination

[2] Although Dr. Wirges does not specify the exact table of the A.M.A., *Guides*, he appears to be using Table 15-3 on page 395 of the sixth edition of the A.M.A., *Guides.*

findings that were actually considered near the maximum medical improvement date. He opined that the physician chose unsupported grade modifiers to process the rating. Moreover, Dr. Zimmerman noted for a crush injury, there is no grid diagnosis that can be used to offer the eight percent impairment rating. He noted that appellant was eligible for consideration of impairment rating due to the accepted conditions of contusion of the left wrist. Accordingly, Dr. Zimmerman recommended referral for further consideration under the sixth edition of the A.M.A., *Guides* and particularly noted that the rating shall use the instructions of Chapter 15 or in rare instances, Chapter 3.

OWCP sent appellant to Dr. W. Brent Sprinkle, an osteopath, for a second opinion evaluation. In a December 31, 2013 report, Dr. Sprinkle assessed appellant with left wrist contusion and crush injury. He noted, in reviewing prior evaluations, that the functional capacity evaluation was not available for review so it was unclear how this was used to determine his impairment rating. Dr. Sprinkle noted that based on Table 15-3 of the sixth edition of the A.M.A., *Guides*, for a wrist contusion or crush injury there is a class 1 impairment.[3] He noted that appellant did have some residual symptoms but there were no consistent objective findings, rendering a default rating of one percent. Dr. Sprinkle noted a functional history of grade 1 since appellant was able to perform self-care activities independently and a clinical studies grade 1 secondary to imaging studies showing only mild pathology. He allowed a physical examination grade 1 secondary to minimal palpatory findings of tenderness and mild decrease in maximum wrist flexion. Dr. Sprinkle noted that the net adjustment formula calculated out to zero, rendering an impairment of one percent to the left upper extremity.

OWCP's medical adviser reviewed Dr. Sprinkle's report on January 7, 2014 and agreed with the one percent impairment of the left arm was acceptable based on the A.M.A., *Guides.*

By decision dated February 25, 2014, OWCP issued a schedule award for one percent impairment of the left arm.

By letter dated March 5, 2014, appellant requested reconsideration. He contended that Dr. Sprinkle did not conduct a thorough examination and did not consider the functional capacity evaluation. Appellant argued that Dr. Wirges conducted a more thorough examination. He contended that Dr. Wirges gave him an eight percent impairment rating based on his findings and the results of the functional capacity evaluation. Appellant also indicated that Dr. Wirges stated that he had an additional two percent impairment of his ring finger in addition to his wrist. In support of his reconsideration request, he resubmitted the prior reports by Dr. Wirges and a copy of the May 14, 2013 functional capacity evaluation.

In a decision dated June 2, 2014, OWCP denied appellant's request for reconsideration without conducting a merit review.

[3] A.M.A., *Guides* 395.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA[4] and its implementing 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform stands applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[6] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[7] For impairment ratings calculated on or after May 1, 2009, OWCP should advise any physician evaluating per impairment to use the sixth edition.[8]

The sixth edition requires identifying the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] The sixth edition of the A.M.A., *Guides* also provides that range of motion may be selected as an alternative approach in rating impairment under certain circumstances. A rating that is calculated using range of motion may not be combined with a diagnosis-based impairment and stands alone as a rating.[11]

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant had a one percent impairment of his left arm. For schedule award ratings calculated after May 1, 2009, the sixth edition of the A.M.A., *Guides* applies.[12] As Dr. Wirges used the sixth edition of the A.M.A., *Guides* in his June 25, 2013 report, this report was of limited probative value. Although he later attempted to apply the sixth edition of the A.M.A., *Guides* in his July 8, 2013 report, he did not adequately support his conclusion of eight percent impairment of the left arm. Dr. Wirges appears to be using the Wrist Regional Grid found at Table 15-3 of the A.M.A., *Guides.* He discusses class impairment and grade modifiers. Dr. Wirges' conclusion that appellant has an

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.*

[7] *See id.; Jacqueline S. Harris,* 54 ECAB 139 (2002).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

[9] A.M.A., *Guides* 494-531.

[10] *Id.* at 521.

[11] *L.B.*, Docket No. 12-910 (issued October 5, 2012).

[12] *A.W.*, Docket No. 13-621 (issued July 22, 2013).

eight percent impairment of the left arm is not supported by the Table 15-3. It appears that he, after discussing the correct criteria to be applied, simply noted that for all wrist injuries there is a range of 1 percent to 13 percent impairment of the upper extremity allowed and he simply took the average. It is necessary, however, to address the individual impairment classes and not just take an average between the extremes. Therefore, the Board finds that Dr. Wirges did not correctly apply the sixth edition of the A.M.A., *Guides.*

Accordingly, in order to determine the extent and degree of any employment-related permanent impairment, OWCP properly referred appellant to Dr. Sprinkle for a second opinion evaluation. In reviewing his report, its medical adviser noted that Dr. Sprinkle correctly applied the sixth edition of the A.M.A., *Guides.* Dr. Sprinkle noted that appellant had a class 1 impairment. In reaching this conclusion, he indicated that appellant did have some residual symptoms but that they were not consistent objective findings so this would be a default rating of one percent. Dr. Sprinkle then allowed a grade modifier 1 for functional history since appellant was able to perform self-care activities, a grade 1 modifier for clinical studies secondary to imaging studies showing mild pathology and a physical examination modifier of grade 1 secondary to minimal palpatory findings. He noted that the net adjustment formula calculated to equal zero, so he concluded that appellant had an impairment of one percent to the left extremity. As Dr. Sprinkle appropriately applied the sixth edition of the A.M.A., *Guides*, the Board finds that appellant had a one percent permanent impairment of the left arm.

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

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[13] 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.[14] To be entitled to a merit review of an OWCP 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.[15] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[16]

[13] 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[14] 20 C.F.R. § 10.606(b)(3).

[15] *Id.* at § 10.607(a).

[16] *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

On reconsideration, appellant resubmitted medical reports by Dr. Wirges that were already in evidence and previously considered by OWCP. Submitting evidence that repeats or duplicates information already of record does not constitute a basis for reopening a claim.[17] The work capacity evaluation was new evidence, but it was not relevant to the schedule award issue. A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any evidence in this case which was both new and relevant.[18]

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant has not established that he had greater than a one percent impairment of his left arm, for which he had received a schedule award. The Board further finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

[17] *K.M.*, Docket No. 13-1459 (issued December 5, 2013).

[18] *G.T.*, Docket No. 14-859 (issued August 13, 2014).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 2 and February 25, 2014 are affirmed.

Issued: November 10, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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