

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

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C.H., Appellant )

and )

DEPARTMENT OF THE TREASURY, )  
INTERNAL REVENUE SERVICE, )  
Greensboro, NC, Employer )

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**Docket No. 09-1832  
Issued: May 13, 2010**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 13, 2009 appellant filed a timely appeal from the February 18, 2009 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration of her case. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review that denial.

**ISSUE**

The issue is whether the Office properly denied further merit review of appellant's case.

**FACTUAL HISTORY**

On January 31, 1997 appellant, then a 38-year-old management assistant, sustained an injury in the performance of duty when she leaned back in her chair and it fell over backwards. The Office accepted a contusion and sprain of the left shoulder and recurrent left shoulder dislocation. On August 30, 1997 appellant underwent surgery for Bankart repair with capsular reefing.

On November 9, 1998 the Office issued a schedule award for a 46 percent impairment of appellant's left upper extremity. On February 21, 2006 the Office issued a schedule award for an additional 10 percent impairment of her left upper extremity following a March 23, 2005 excision of the distal clavicle and left shoulder fusion. On July 12, 2006 an Office hearing representative affirmed the additional award and on January 17, 2007 the Office reviewed the merits of appellant's case and denied modification of the prior schedule awards.

On December 14, 2007 the Office accepted appellant's claim for the additional conditions of consequential left shoulder proximal humerus fracture and chronic distal radial-ulnar joint instability of the left wrist.<sup>1</sup>

Appellant wrote to the Office on December 20, 2008: "I am writing to request reconsideration of the decision made on my request for a higher disability rating which your office denied." She enclosed an October 13, 2008 report from Dr. Gary G. Poehling, a Board-certified orthopedic surgeon and professor, whom the Office authorized as the treating physician.

Dr. Poehling noted appellant's chief complaint of left wrist pain, numbness and weakness. He related her history of injury and left shoulder surgeries. Dr. Poehling described his findings on examination, including a fixed left shoulder, forward flexed and internally rotated about 30 degrees, so that her hand was at her abdomen. He assessed left wrist joint pain and offered an opinion on permanent impairment:

"It is my opinion that this patient, when looking at the [w]orkers' [c]omp[ensation] guide, as far as reading her shoulder, it states that ankylosis in optimum position of the shoulder results in 50 percent of the arm and added 5 percent if there is resection of the end of the clavicle. To my mind, this patient is at the extreme with seven operations, no deltoid musculature at all, hyperparesthesias about the arm and pain in her wrist, which is all part and parcel of this injury that she sustained back in 1997. I would rate this patient at 70 percent of the left upper extremity. In my opinion, this patient will not be able to use the left upper extremity."

On February 12, 2009 an Office medical adviser reviewed Dr. Poehling's report and explained that a fixed left shoulder in 30 degrees flexion/internal rotation with resection of the distal end of the left clavicle represented a 39 percent impairment of the left upper extremity.<sup>2</sup> He noted that Dr. Poehling gave no basis for rating left wrist pain and concluded that the evidence provided no additional objective clinical data to support an increase in the 56 percent impairment rating appellant previously received.

In a decision dated February 18, 2009, the Office denied appellant's December 20, 2008 request for reconsideration. It found that her request was untimely and failed to present clear evidence of error in the Office's most recent merit decision on January 17, 2007. The Office

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<sup>1</sup> The Office also accepted osteoarthritis.

<sup>2</sup> The Office medical adviser cited the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001), Figures 16-40 to 16-46 (pages 476-79) and Table 16-27 (page 506).

noted that Dr. Poehling provided no objective information to support his impairment rating of 70 percent.

On appeal, appellant contends that the new medical evidence was not properly considered.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act<sup>3</sup> authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.<sup>4</sup>

### **ANALYSIS**

Appellant requested reconsideration on December 20, 2008. However, she was not arguing error in the Office's most recent merit decision. Appellant presented evidence in support of her claim of increased impairment due to her accepted conditions. The Board notes there is no one-year time limitation on requesting an increased schedule award. The Office improperly reviewed the evidence under section 8128 and the clear evidence of error standard.

The Board will set aside the Office's February 18, 2009 decision denying reconsideration and will remand the case for an appropriate final decision on the merits of appellant's claim for an increased schedule award. After such further development, as it deems necessary, it shall issue a merit decision on the extent of permanent impairment to appellant's left arm.<sup>5</sup>

### **CONCLUSION**

The Board finds that the Office improperly reviewed appellant's claim for an increased schedule award under section 8128(a).

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

<sup>5</sup> 20 C.F.R. § 10.126 (the Office decision shall contain findings of fact and a statement of reasons).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 18, 2009 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further action consistent with this decision.

Issued: May 13, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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