U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SALVADOR MONDING and DEPARTMENT OF AGRICULTURE, SEQUOIA NATIONAL FOREST, Lake Isabella, CA

Docket No. 03-875; Submitted on the Record;
Issued July 11, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has more than a 15 percent impairment of his left upper extremity for which he has received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

In this case the Office accepted that on August 29, 2000 appellant, then a 66-year-old maintenance worker, sustained a left shoulder and arm sprain, when he attempted to move some heavy equipment in the performance of duty. After further medical development, the Office expanded its acceptance to include left rotator cuff tear, with arthroscopic surgical procedures performed on December 12, 2000 and June 26, 2001.

On April 1, 2002 the Office granted appellant a schedule award for a 12 percent permanent impairment of his left upper extremity. By letter dated July 6, 2002, he requested reconsideration of the Office's prior decision and submitted additional medical evidence in support of his request.

In a decision dated September 27, 2002, the Office found that appellant had a 15 percent permanent impairment of his left upper extremity and, therefore, was entitled to an award of an additional 3 percent over the 12 percent previously received.

By letter dated October 11, 2002, appellant requested reconsideration of the Office's prior decision and submitted additional evidence in support of his request. In a decision dated January 6, 2003, the Office denied appellant's request for reconsideration on the grounds that his request neither raised substantive legal questions nor included new and relevant evidence and, therefore, was insufficient to warrant review of the prior decision.

The Board finds that appellant has no more than a total of 15 percent permanent impairment of his left upper extremity, for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act and its implementing federal regulations set forth the number of weeks of compensation to be paid for the permanent loss of use of the members of the body listed in the schedule.[1] The Act, however, does not specify the manner by which the percentage loss of a member shall be determined. The method used in making such determinations are a matter which rests in the sound discretion of the Office. However, the Board has stated that, 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 standards applicable to all claimants.[2] The Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating permanent impairment for schedule award purposes and the Board has concurred with the Office's adoption of this standard.[3]

Before the A.M.A., *Guides* may be utilized, however, a description of appellant's impairment must be obtained from his attending physician. The Federal (FECA) Procedure Manual provides that, in obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a "detailed description of the impairment which includes, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment."[4] This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations.[5]

In support of his claim, appellant submitted a June 24, 2002 report from Dr. James B. Grimes, his treating Board-certified orthopedic surgeon. In his report, Dr. Grimes stated that appellant's recovery had plateaued and that he presented himself for evaluation of a permanent and stationary status. Dr. Grimes noted that appellant still complained of pain in his left shoulder, in the paracromial region and further complained that he had great difficulty lifting things above his waist level. The physician stated that physical examination of appellant's left shoulder revealed 90 to 120 degrees of forward flexion, 100 degrees of abduction and 80 degrees of internal rotation. Dr. Grimes further noted that appellant had left hand grip strength of 85, 90, 90, as measured with a Jamar Dynamometer and had circumference measurements of the axilla, biceps, elbow and forearm of 12, 10.5, 10.25 and 10 respectively. The physician also noted that x-rays of the left shoulder revealed arthroscopic decompression and a suggestion of slight migration of the humeral head within the glenoid fossa. In conclusion, Dr. Grimes estimated that appellant had "lost approximately 50 percent of his left upper extremity lifting/carrying capacity compared with his preinjury state."

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[1] 5 U.S.C. § 8107(b); 20 C.F.R. § 10.404.

[2] *Renee M. Straubinger*, 51 ECAB 667 (2000); *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[3] *Renee M. Straubinger, supra.*

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(c) (March 1995).

[5] *Noe L. Flores*, 49 ECAB 344 (1998).

At the request of the Office, Dr. Grimes' report was reviewed by Dr. Arthur S. Harris, an Office medical adviser and Board-certified orthopedic surgeon.[6] In a report dated July 22, 2002, Dr. Harris noted that appellant had reached maximum medical improvement by June 24, 2002, the date of Dr. Grimes' evaluation. He also noted that Dr. Grimes' examination findings revealed that appellant had continued complaints of left shoulder pain which interfered with function. Examination demonstrated limited range of motion with flexion 120 degrees, abduction 100 degrees and internal rotation 60 degrees. Appellant was also noted to have residual rotator cuff/deltoid weakness. While Dr. Grimes estimated that appellant had a 50 percent impairment of his left upper extremity, Dr. Harris noted that Dr. Grimes did not calculate this impairment rating based on the A.M.A., *Guides*. Utilizing the fifth edition of the A.M.A., *Guides*,[7] Dr. Harris calculated appellant's left upper extremity impairment as follows: shoulder flexion of 120 degrees equated to a 4 percent impairment (Figure 16-40, page 476) and shoulder abduction of 100 degrees equated to a 4 percent impairment.[8] (Figure 16-43, page 477), Dr. Harris totaled the above percentages to derive at an eight percent total impairment for loss of motion. He additionally noted that appellant had a three percent impairment rating for pain. This was derived as follows: under Table 16-10, page 482, Dr. Harris classified appellant's pain as a Grade 3 (abnormal sensations or slight pain, that interferes with some activities) and attributed a 60 percent sensory deficit. Under Table 16-15, page 492, the axillary nerve/deltoid muscle provides a maximum sensory deficit or pain of 5 percent. Multiplying the 2 percentages together (.60 times 5) equated to a 3 percent total impairment rating for pain. Finally, Dr. Harris noted that appellant had a four percent impairment rating for residual rotator cuff weakness. This was derived as follows: under Table 16-11, page 484, Dr. Harris classified appellant's weakness as a Grade 4 (complete active range of motion against gravity with some resistance) and attributed 25 percent motor deficit. Under Table 16-15, page 492, the suprascapular nerve provides a maximum motor deficit of 16 percent. Multiplying the 2 percentages together (.25 times 16) equated to a 4 percent total impairment rating for weakness. Dr. Harris then utilized the Combined Values Chart, page 604, for the eight percent impairment in loss of motion, three percent impairment for pain and four percent impairment for weakness to find the current total impairment for the left upper extremity equaled fifteen percent. Dr. Harris concluded that this was a 3 percent increase over his previous rating of 12 percent.

As the report of the Office medical adviser provided the only evaluation which conformed with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.[9]

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[6] 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.6 Because Dr. Grimes' opinion was not based on the A.M.A., *Guides* and, therefore, could not establish an impairment rating, the Office properly requested that its medical adviser review Dr. Grimes' reports and determine a proper rating; *see Denise D. Cason*, 48 ECAB 530, 531 (1997), (finding that although appellant's physician found a greater impairment rating, he failed to explain the basis of his opinion).

[7] Under FECA Bulletin 01-5 (issued January 29, 2001), any new schedule award decision issued after February 1, 2001 must be based on the fifth edition of the A.M.A., *Guides*. The Board notes that the Office properly utilized the fifth edition of the A.M.A., *Guides* in this case.

[8] The Board notes that although not specifically stated by Dr. Harris, under Figure 16-46, page 479, an internal rotation of 80 degrees equates to a 0 percent impairment.

[9] *Richard F. Kastan*, 48 ECAB 651 (1997).

Therefore, the Office, by awards of compensation dated April 1 and September 27, 2002, properly granted appellant a schedule award for a total of 15 percent permanent impairment of his left upper extremity.

The Board further finds that, with respect to the Office's January 6, 2003 decision denying reconsideration, the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[10] Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[11]

By letters received October 11 and October 28, 2002, appellant stated that he was requesting reconsideration of the Office's September 27, 2002 decision on the grounds that his treating physician, Dr. Grimes, had rated his impairment at 50 percent, not 15 percent. As appellant's letters neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered by the Office, he 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). Finally, while appellant did submit a June 24, 2002 report from Dr. Grimes in support of his claim, the Board notes that this report was previously contained in the record and, in fact, was the basis for the Office's September 27, 2002 award granting appellant an additional three percent impairment. The Board has held that material which duplicates that already in the case record is of no evidentiary value and does not constitute a basis for reopening a claim.[12] Consequently, appellant is not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(2).

As appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

[10] 20 C.F.R. § 10.606(b)(2) (1999).

[11] 20 C.F.R. § 10.608(b) (1999).

[12] *Linda I. Sprague*, 48 ECAB 386 (1997).

The decisions of the Office of Workers' Compensation Programs dated January 6, 2003, September 27 and April 1, 2002 are hereby affirmed.

Dated, Washington, DC
July 11, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member