U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL J. LEWIS and DEPARTMENT OF THE AIR FORCE, AIR FORCE SYSTEMS COMMAND, EDWARDS AIR FORCE BASE, CA

Docket No. 03-484; Submitted on the Record; Issued September 29, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether appellant has greater than a nine percent permanent impairment of his right upper extremity, for which he has received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's request for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Office accepted that on March 5, 1999 appellant, then a 43-year-old engineering equipment operator, sustained back strain, neck strain and cervical radiculitis, for which he underwent a cervical discectomy and right shoulder strain and right shoulder impingement, for which he underwent a right shoulder arthroscopy, when he tried to remove tightened tire nuts from a water tanker. He returned to light work on March 10, 1999; he thereafter received appropriate compensation and medical benefits as necessary.

Appellant continued in treatment for right shoulder pain in the subsequent months, which was brought about by a return to full duty. On September 7, 1999 Dr. John T. Harbaugh, Jr., a Board-certified family practitioner also specializing in occupational medicine, provided work-activity limitations for appellant, indicating that he could sit, stand and walk for 8 hours a day, bend, squat, kneel and twist for 4 hours per day, lift no more than 20 pounds and not pull or push with his right arm. Dr. Harbaugh noted that appellant had a disc injury in his neck and that his 20-pound lifting limit was likely to be permanent.

Despite working limitations appellant continued to experience right shoulder discomfort, for which he was treated by Drs. Harbaugh and George H. Rubens, a Board-certified orthopedic surgeon.

By report dated November 2, 2000, Dr. Harbaugh reviewed appellant's factual and medical history, discussed his current symptomatology, measured his ranges of motion of his neck and shoulders, measured for atrophy of the affected extremity, tested grip strength with a dynamometer, which showed loss of strength on the right, tested sensation and reviewed his diagnostic studies. He found appellant's condition to be permanent and stationary with mild

occasional right neck pain at rest, increased with motion, mild grip weakness consistent with disuse, mild losses in range of motion and subjective decreased sensation in the right hand. A November 7, 2000 report was consistent with the earlier findings.

By a final comprehensive report dated March 19, 2002, appellant was found to be permanent and stationary following his treatment for a cervical disc herniation. Dr. Harbaugh reviewed appellant's factual and medical history, discussed his current symptomatology and noted that appellant's right shoulder had no redness, ecchymosis or gross deformity, had two well-healed arthroscopic port scars and had active range of motion as follows: flexion 140/140; abduction 135/140; extension 50/50; internal rotation 90/90 (reaching L2 on the right and T12 on the left); external rotation 80/80; and adduction 35/45 (affected side measurements first). He noted that impingement tests and arm drop tests were negative, as was Adson's test. Strength testing results in all planes were all normal, including shoulder abduction, flexion, extension and adduction. Dr. Harbaugh noted arm circumference comparative measurements and found no atrophy, but found, on Jamar Grip testing on the right: 105, 110, 105 pounds, but on the left 120, 98 and 94 pounds. Dr. Harbaugh noted that appellant's right grip was weaker than it was on November 2, 2000, when it measured 120, 110 and 110 on the right and 127, 120 and 125 on the left, which, he opined, probably represented disuse weakness. He found sensation testing essentially normal, including fingers and hands. Pinch strength testing was found to be normal. Dr. Harbaugh diagnosed chronic right shoulder pain caused by labral tear and degeneration with chondromalacia of the humeral articular cartilage and status postcervical discectomy and fusion. He opined that appellant had reached maximum medical improvement and could perform light duty and summarized that his subjective factors as right shoulder pain, which accelerated with moderate activity, his objective factors were a slightly decreased abduction compared to the left and about a 16 percent less strength in the right hand grip relative to the left. Dr. Harbaugh opined that appellant should be precluded from lifting more than 20 to 30 pounds or working overhead with his right arm.

On April 22, 2002 appellant filed a Form CA-7 claim for a schedule award.

By letter dated May 8, 2002, the Office directed appellant to make an appointment with Dr. Harbaugh to determine the nature and degree of any disability remaining as a result of his accepted employment injuries.

On a form report dated May 18, 2002, Dr. Harbaugh noted with regard to loss of function due to pain, discomfort or sensory disturbances, that appellant had frequent slight, occasional moderate right shoulder pain with reaching and overhead working or repetitive lifting of greater than 20 pounds. He noted that appellant had decreased right shoulder abduction and 16 percent loss of strength on the right, when compared with the left, but he found no sensory loss and he noted the pain was localized to the right shoulder. Dr. Harbaugh noted forward elevation in

degrees of 140/140;[1] backward elevation of 50/50;[2] abduction of 135/140;[3] adduction of 35/45;[4] internal rotation of 90/90;[5] external rotation of 80/80;[6] and extension to 50/50.[7] No shoulder weakness was ascertained. Dr. Harbaugh opined that March 19, 2002 was the date of maximum medical improvement.

By report dated September 3, 2002, the Office medical adviser, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, reviewed Dr. Harbaugh's reports and determined that appellant's date of maximum medical improvement was March 19, 2002. Dr. Harris noted that appellant's right shoulder demonstrated 140 degrees of flexion, 50 degrees of extension, 135 degrees of abduction, 35 degrees of adduction, 90 degrees of internal rotation and 80 degrees of external rotation, without muscle atrophy, weakness or instability. He referred to the fifth edition the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) for the purposes of determining appellant's schedule award entitlement and found as follows: appellant had a three percent impairment for loss of shoulder flexion (Figure 16-40/page 476); a two percent impairment for loss of shoulder abduction (Figure 16-43/page 477); and a one percent impairment for loss of shoulder adduction (Figure 16-43/page 477), which resulted in a combined six percent permanent impairment of the right upper extremity for loss of motion.

Dr. Harris noted that appellant had Grade 3 pain/decreased sensation that interfered with some activity 60 percent (Table 16-10/page 482) of the axillary nerve/deltoid muscle 5 (Table 16-15/page 492), which resulted in a 3 percent permanent impairment of the right upper extremity for pain that interferes with some activity. Utilizing the Combined Values Chart, Dr. Harris combined the six percent impairment for loss of motion with the three percent impairment for pain which interferes with function, which resulted in a total of nine percent permanent impairment of the right upper extremity. He is noted that this nine percent impairment of the right upper extremity was the sole impairment of the right upper extremity resulting from the employment injury.

On September 30, 2002 the Office granted appellant a schedule award for a 9 percent permanent impairment of his right upper extremity for the period March 19 to October 1, 2002 for a total of 28.08 weeks of compensation.

By letter dated October 30, 2002, appellant requested reconsideration of the schedule award claiming that he did not receive consideration for his 16 percent loss of strength in the

[1] Normal is 180 degrees.

[2] Normal is 50 degrees.

[3] Normal is 170 degrees.

[4] Normal is 40 degrees.

[5] Normal is 80 degrees.

[6] Normal is 90 degrees.

[7] Normal is 50 degrees.

right dominant handgrip, when compared with the left, as documented by Dr. Harbaugh. He also argued that his limitation on lifting more than 30 pounds demonstrated his weakness.

By decision dated November 15, 2002, the Office denied merit reconsideration of the September 30, 2002 award, finding that no new medical evidence had been submitted and that the arguments presented in support of the reconsideration request did not raise a substantive legal question.

The Board finds that appellant has no greater than a nine percent permanent impairment of his right upper extremity, for which he has received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act[8] and its implementing regulation[9] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members of the body. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[10] However, the Act 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 standards applicable to all claimants. The fifth edition the A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[11]

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.[12] However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.

Dr. Harbaugh discussed appellant's current complaints of residual pain in the right shoulder and popping, which affected use, provided range-of-motion measurements and provided grip strength comparisons between the affected and the unaffected side. On a March 19, 2002 form report, which asked about muscle weakness or atrophy, Dr. Harbaugh responded that appellant had a 16 percent loss of strength in the right dominant upper extremity as opposed to

---

[8] 5 U.S.C. §§ 8101-8193.; *see* 5 U.S.C. § 8107(c).

[9] 20 C.F.R. § 10.304.

[10] 5 U.S.C. § 8107(c)(19).

[11] 20 C.F.R. § 10.404 (1999). FECA Transmittal No. 02-12 (issued August 30, 2002) explains that all permanent impairment awards determined on or after February 1, 2001, the effective dated of the A.M.A., *Guides* application, regardless of the date of the medical examination, should be based on the fifth edition of the A.M.A., *Guides*.

[12] *See William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

the left due to weakness, but he did not provide an overall impairment rating in accordance with the A.M.A., *Guides* nor did he provide any rating for pain or loss of range of motion.

Dr. Harris evaluated Dr. Harbaugh's objective findings and noted that appellant's right shoulder demonstrated 140 degrees of flexion, 50 degrees of extension, 135 degrees of abduction, 35 degrees of adduction, 90 degrees of internal rotation and 80 degrees of external rotation, without muscle atrophy, weakness or instability. He referred to the fifth edition of the A.M.A., *Guides,* for the purposes of determining appellant's schedule award entitlement and found as follows: Appellant had a three percent impairment for loss of shoulder flexion (Figure 16-40/page 476); a two percent impairment for loss of shoulder abduction (Figure 16-43/page 477); and a one percent impairment for loss of shoulder adduction (Figure 16-43/page 477), which resulted in a combined six percent permanent impairment of the right upper extremity for loss of motion. Dr. Harris noted that appellant had Grade 3 pain/decreased sensation that interfered with some activity 60 percent (Table 16-10/page 482) of the axillary nerve/deltoid muscle (5) (Table 16-15/page 492), which resulted in a 3 percent permanent impairment of the right upper extremity for pain that interferes with some activity. Utilizing the Combined Values Chart Dr. Harris combined the six percent impairment for loss of motion with the three percent impairment for pain which interferes with function, which resulted in a total of nine percent permanent impairment of the right upper extremity. Dr. Harris noted that this nine percent impairment of the right upper extremity was the sole impairment of the right upper extremity resulting from the employment injury.

The Board notes that the A.M.A., *Guides,* at section 16.8, explains that impairment ratings, for the most part, are based on anatomic impairment, with functional impairment, such as loss of grip and pinch strength, because of its subjective nature, taking a lesser role.[13] The A.M.A., *Guides* notes that, in certain cases, a rating for strength could be combined with other impairments only if based on unrelated etiologic or pathomechanical causes. Otherwise, the impairment ratings based on objective anatomic findings take precedence. The A.M.A., *Guides* further notes that decreased strength cannot be rated in the presence of decreased motion or painful conditions, both of which exist in this case that prevent effective application of maximal force in the region being evaluated. Therefore, an impairment rating for appellant in this case should be based upon Dr. Harbaugh's objective range of motion testing results and pain evaluation which caused objective impairment, rather than upon his grip strength testing results. Moreover, the A.M.A., *Guides* states that, with loss of strength relating to conditions not resulting from peripheral nerve disorders as discussed in section 16.8, the evaluator should not apply impairment values from both sections, loss due to sensory deficits that interfere with some activity and loss due to weakness, to the same condition. The Board notes that Table 16-11[14] used with Table 16-15[15] would apply if the loss of grip strength was due to a peripheral nerve disorder and this would be combined with the sensory loss and loss of range of motion, however,

[13] Many subjective or nonmeasurable factors, including fatigue, handedness, time of day, age, nutritional state, pain and the individual's cooperation, further influence strength measurements.

[14] Entitled "Determining Impairment of the Upper Extremity Due to Motor and Loss-of-Power Deficits Resulting From Peripheral Nerve Disorders Based on Individual Muscle Rating."

[15] Entitled "Maximum Upper Extremity Impairment Due to Unilateral Sensory or Motor Deficits or to Combined 100 percent Deficits of the Major Peripheral Nerves."

appellant's impairment is not due to a peripheral nerve disorder. Dr. Harris properly based appellant's permanent impairment rating on losses in range of motion and pain and discomfort, which affected use only, rather than on weakness and atrophy.

Appellant's claim that he should be entitled to a greater schedule award as he was not rated for his weakness, but only for pain and loss of motion has no basis as he is not entitled to such a rating under the A.M.A., *Guides.*

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for further review on its merits.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[16]

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. When a claimant fails to meet one of the above-mentioned standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[17] Evidence or argument that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case for further review on its merits.[18]

In this case, appellant reiterated that he did not receive consideration for his 16 percent loss of strength in the right dominant handgrip, when compared with the left, as documented by Dr. Harbaugh. He also argued that his limitation on lifting more than 20 to 30 pounds demonstrated his weakness. These arguments have been previously dealt with in this case and, therefore, do not constitute a basis for reopening the case for further review on its merits. As no other arguments were made or evidence presented, appellant failed to "present relevant and pertinent new evidence not previously considered by the Office" which would warrant a reopening of the case for further reconsideration on its merits.

---

[16] 5 U.S.C. § 8128(a).

[17] 20 C.F.R. 10.608(b); *see Mohamed Yunis,* 46 ECAB 827 (1995); *Elizabeth Pinero*, 46 ECAB 123 (1994).

[18] *Helen E. Paglinawan*, 51 ECAB 591 (2000).

Consequently, the decisions of the Office of Workers' Compensation Programs dated November 15 and September 30, 2002 are hereby affirmed.

Dated, Washington, DC
September 29, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member