United States Department of Labor
Employees' Compensation Appeals Board

LARRY WAYNE ODOM, Appellant	)	
	)	**Docket No. 05-508**
and	)	**Issued: June 8, 2005**
DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, Texarkana, TX, Employer	)	

Appearances:
Larry Wayne Odom, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On December 22, 2004 appellant filed a timely appeal of an April 22, 2004 merit decision the Office of Workers' Compensation Programs, which denied his claim for a schedule award, and a November 2, 2004 decision, which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of the case.

ISSUES

The issues on appeal are: (1) whether the Office properly denied appellant's claim for a schedule award for permanent partial impairment of the left upper extremity; and (2) whether the Office properly denied appellant's request for reconsideration without a merit review.

FACTUAL HISTORY

On August 10, 2001 appellant, a 48-year-old pipe fitter, sustained a left elbow injury when his left arm was struck by a backhoe bucket at work. The Office accepted that appellant

sustained a contusion of the left elbow and paid appropriate compensation benefits. Appellant stopped work on August 10, 2001 and returned on August 21, 2001.

On August 10, 2001 appellant was treated in the emergency room by Dr. John P. Young, a Board-certified orthopedist, for a left elbow injury sustained at work. He diagnosed soft tissue contusion of the left arm and took appellant off work for two weeks. An x-ray of the elbow revealed soft tissue swelling ventrally in the forearm suggesting blunt trauma and a possible hematoma but there was no evidence of a fracture. On August 21, 2004 Dr. Young treated appellant in follow-up and noted significant swelling and tenderness of the elbow and diagnosed healing left arm crush injury. On September 4, 2001 he noted that appellant's left elbow injury was improving and released him to full duty. In a report dated October 30, 2001, Dr. Young diagnosed atrophy of muscle status post crush injury of the elbow. In an attending physician's report dated December 28, 2001, he diagnosed a crush injury to the left forearm, atrophy along the flexor pronator and denervation along the flexor pronators.

On February 13, 2002 appellant filed a claim for a schedule award.

In a letter dated April 1, 2002, the Office requested that appellant's treating physician provide an evaluation as to the extent of permanent partial impairment of the left upper extremity in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment,*[1] (A.M.A., *Guides*). Dr. Young did not respond to the Office's request for an impairment rating.

The Office referred appellant for a second opinion to Dr. Barry M. Green, a Board-certified orthopedic surgeon, for an evaluation of the degree of permanent impairment of the left upper extremity in accordance with the A.M.A., *Guides*. In a report dated April 17, 2002, Dr. Green noted that maximum medical improvement occurred on April 17, 2002. He diagnosed contusion of the left elbow. Dr. Green noted that range of motion was normal,[2] that there were no motor or sensory deficits,[3] no vascular deficits,[4] no decrease in grip strength,[5] no atrophy or ankylosis.[6] He advised that appellant had a zero percent impairment of the left upper extremity in accordance with the A.M.A., *Guides.*

In a memorandum dated February 19, 2004, the Office referred the case record to the Office's medical adviser for evaluation as to the extent of any permanent partial impairment of the left upper extremity in accordance with the A.M.A., *Guides*. In a report dated March 4, 2004, the Office medical adviser determined that appellant had no permanent impairment of the

[1] A.M.A., *Guides* (5th ed. 2001).

[2] *See id.* at Table 16-34, 16-37, pages 472, 474.

[3] *See id.* at Table 16-10, 16-11, pages 482, 484.

[4] *See id.* at Table 16-17, page 498.

[5] *See id.* at Table 16-34, 16-35, pages 509-10.

[6] *See id.* at Table 16-36, page 473.

left upper extremity based on the report of Dr. Green. The Office medical adviser noted that there was normal range of motion[7] and no sensory or motor deficits.[8]

In a decision dated April 22, 2004, the Office denied appellant's claim for a schedule award for the left upper extremity.

By letter dated August 25, 2004, appellant requested reconsideration and submitted additional evidence, including a functional capacity evaluation dated August 17, 2004 which noted that he was able to work in a medium category of work for eight hours per day. The evaluation noted that appellant was able to lift in the heavy category occasionally; however, this limitation did not conform to his current work position which required that he work in the heavy category. Also submitted was an electromyography (EMG) dated August 24, 2004 which revealed mild to moderate radial neuropathy below the elbow.

In a decision dated November 2, 2004, the Office denied appellant's reconsideration request on the grounds that his letter neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[9] and its implementing regulation[10] sets 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, 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[11]

ANALYSIS -- ISSUE 1

On appeal, appellant contends that he is entitled to a schedule award for permanent partial impairment of the left upper extremity.

The Office referred appellant for a second opinion to Dr. Green who issued a report dated April 17, 2002. In his report, Dr. Green noted that maximum medical improvement was reached on April 17, 2002. He diagnosed contusion of the left elbow. Dr. Green determined that there was no category which qualified appellant for a permanent impairment rating. He noted that

[7] *Id.* at 472, 474.

[8] *Id.* at 482, 484.

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404 (1999).

[11] *Id.*

appellant did not exhibit decreased range of motion,[12] motor or sensory deficits,[13] vascular deficits,[14] decrease in grip strength,[15] atrophy or ankylosis.[16] Dr. Green further determined that appellant's complaints of pain were not ratable as he indicated that there was no category appellant qualified for an impairment rating. He therefore determined appellant's impairment rating was zero percent.

The Office medical adviser properly reviewed the findings in Dr. Green's April 17, 2002 report, and correlated them to specific provisions in the A.M.A., *Guides* (5th ed.) to determine that there was no impairment rating. The Office medical adviser reiterated Dr. Green's findings and reported no basis on which to attribute any permanent impairment under the A.M.A., *Guides*.

The Office also requested that appellant's physician, Dr. Young, evaluate appellant's impairment in conformance with the A.M.A., *Guides*. However, Dr. Young did not submit a report containing any findings that would merit an impairment rating under the A.M.A., *Guides*. The Board finds that the medical evidence does not establish that appellant sustained a ratable impairment of the left arm, pursuant to the A.M.A., *Guides.*

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[17] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[18] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> "(ii) advances a relevant legal argument not previously considered by the [Office]; or
>
> "(iii) constitutes relevant and pertinent new evidence not previously considered by [the Office]."

[12] *Id.* at 472, 474.

[13] *Id.* at 482, 484.

[14] *Id.* at 498.

[15] *Id.* at 509-10.

[16] *Id.* at 473.

[17] 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.606(b).

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 the Office without review of the merits of the claim.[19]

ANALYSIS -- ISSUE 2

Appellant's August 25, 2004 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office.

Appellant's request for reconsideration advised that he underwent a functional capacity evaluation which proves that he was physically impaired. However, appellant's letter did not show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Consequently, appellant 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). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, the functional capacity evaluation dated August 17, 2004 addressed appellant's capacity to work in a medium category of work for eight hours per day and was able to lift in the heavy category occasionally. Also submitted was an EMG dated August 24, 2004 which revealed mild to moderate radial neuropathy below the elbow. However, these reports are not relevant because they do not establish that appellant has any ratable permanent impairment of the left arm pursuant to the A.M.A., *Guides*.[20] Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office."[21] Therefore, appellant did not submit relevant evidence not previously considered by the Office.

The Board finds that the Office properly determined that appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied his August 25, 2004 request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award for the left upper extremity and that the Office properly denied appellant's request for reconsideration without conducting a merit review.

[19] 20 C.F.R. § 10.608(b).

[20] The functional capacity evaluation provides some strength measurements. However, this cannot be considered medical evidence as a physician did not sign or initial the evaluation. *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

[21] 20 C.F.R. § 10.606(b).

ORDER

IT IS HEREBY ORDERED THAT the November 2 and April 22, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 8, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member