

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

R.S., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Memphis, TN, Employer**

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**Docket No. 06-1619
Issued: February 21, 2007**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 10, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' May 19, 2006 nonmerit decision, January 25, 2006 merit decision and September 2, 2005 decision denying his claim for a schedule award. Under 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 has sustained any permanent impairment to a scheduled member of his body causally related to his accepted left shoulder condition, thereby, entitling him to a schedule award under 5 U.S.C. § 8107; and (2) whether the Office properly refused to reopen appellant's case for reconsideration of his claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On January 21, 2004 appellant, then a 43-year-old case manager, strained his left shoulder while undergoing physical training. He filed a claim for benefits, which the Office accepted for left shoulder impingement syndrome and partial left rotator cuff tear. On

August 13, 2004 appellant underwent arthroscopic surgery of the left shoulder to repair a partially torn rotator cuff, left anterior labral tear with anterior instability and lesion tear of the left shoulder. The procedure was performed by Dr. Jeffrey A. Dlabach, a specialist in orthopedic surgery.

In a report dated June 2, 2005, Dr. Dlabach found that appellant had a 22 percent permanent impairment of the left upper extremity. He stated that appellant was having no pain and could perform all of his activities. Dr. Dlabach opined that appellant had reached maximum medical improvement as of that date and would have no permanent restrictions. He derived his impairment rating by: (1) utilizing Table 16-26 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition), finding that appellant's labral injury placed him into the category of a subluxing humeral head, which translated to a 12 percent upper extremity impairment; and (2) relying on Table 16-27 at page 506 of the A.M.A., *Guides*, which equated appellant's decompression and rotator cuff repair surgery with a distal clavicle excision procedure, from which he derived a 10 percent upper extremity impairment. Dr. Dlabach combined these impairments for a total 22 percent upper extremity impairment.

On June 28, 2005 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his left upper extremity.

In an impairment evaluation August 2, 2005, an Office medical adviser reviewed Dr. Dlabach's findings. He determined that appellant had a zero percent impairment of the left upper extremity under the A.M.A., *Guides*. The Office medical adviser found that Dr. Dlabach did not properly apply the A.M.A., *Guides* in calculating his impairment rating. He stated:

“Appellant had left rotator cuff repair with debridement of subacromial space and labral tear. At maximum medical improvement, according to Dr. Dlabach's report of June 2, 2005, he had only occasional aches with weather changes; had full range of motion of shoulder; good strength; no pain; no impingement; no tenderness; and a full range of motion of elbow and wrist. According to this report he is not entitled to any impairment of left upper extremity. Dr. Dlabach does not use the A.M.A., *Guides* correctly. Table 16-26 (at page 505) addresses '[s]ymptomatic shoulder instability' which according to his report [appellant] does not have. Table 16-27 addresses impairment following [i]mplant or [r]esection arthroplasty which [appellant], according to operative report, did not have.”

By decision dated September 2, 2005, the Office denied appellant's claim for a schedule award. It found that the opinion of the Office medical adviser, which was entitled to greater weight than the opinion of Dr. Dlabach, established that appellant did not sustain any impairment of his left upper extremity due to his accepted left shoulder condition.

By letter dated December 1, 2005, appellant requested reconsideration. In support of his request, he submitted a September 13, 2005 report from Dr. Dlabach who argued that the A.M.A., *Guides* provided only guidelines, not strict rules, by which to rate impairments. He asserted that, because it was not possible to specifically list every injury or procedure, the A.M.A., *Guides* were used as a guideline to equate certain injuries which might not be listed

specifically with listed diagnoses; *e.g.*, a rotator cuff repair and a subacromial decompression. Dr. Dlabach advised that it is standard protocol in the realm of orthopedic surgery to equate a distal clavicle excision with a rotator cuff tear and subacromial decompression, since there is no specific impairment rating provided in the A.M.A., *Guides* for those procedures. With regard to his impairment rating based on appellant's labral repair, Dr. Dlabach similarly opined that it was fair to equate the effects of this procedure with an injury which resulted in symptomatic instability and a permanent disruption of the normal anatomy regarding his shoulder.

In a January 18, 2006 report, the Office medical adviser reviewed Dr. Dlabach's September 13, 2005 report and found that it contained no basis for a schedule award based on impairment of the left upper extremity. He stated:

"There is no evidence of subluxing humeral head (Table 16-26, page 505 of the A.M.A., *Guides*.) There is no loss of range of motion of the left shoulder (Figures 16-40, 16-43, 16-46, [pages 476, 477, 479] of the A.M.A., *Guides*.)

"[Pursuant to] the A.M.A., *Guides*, surgery for subacromial decompression does not qualify as a permanent impairment. Overall [appellant] is quite functional with his shoulder and upper extremity and has no demonstrable impairment."

By decision dated January 25, 2006, the Office denied appellant's request, finding that the medical evidence that appellant submitted was not sufficient to modify the September 2, 2005 decision denying a schedule award.

On May 8, 2006 appellant requested reconsideration. He submitted an April 13, 2006 report from Dr. Dlabach who essentially reiterated his previously stated disagreements with the findings of the Office medical adviser and his opinion that the A.M.A., *Guides* were not strict rules, but were intended to be used as guidelines to equate certain injuries which might not be specifically listed with those that were specifically enumerated in the A.M.A., *Guides*.

By decision dated May 19, 2006, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act¹ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.² However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has

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

² 5 U.S.C. § 8107(c)(19).

adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.³

ANALYSIS -- ISSUE 1

In the instant case, the Office medical adviser determined that appellant had no ratable permanent impairment under the A.M.A. *Guides* based on Dr. Dlabach's June 2, 2005 report. The Office medical adviser found that Dr. Dlabach did not properly apply the A.M.A., *Guides* in calculating his impairment rating. He stated that Dr. Dlabach rated an impairment based on Table 16-26, page 505 of the A.M.A. *Guides*, which measures impairment based on symptomatic shoulder instability, despite the fact that he found that appellant had only occasional aches with weather changes, full range of motion of shoulder, good strength, no pain, no impingement and no tenderness at maximum medical improvement. In addition, Dr. Dlabach derived impairment from Table 16-27, page 506 of the A.M.A. *Guides*, which rates impairment based on an implant or resection arthroplasty, notwithstanding the fact that appellant underwent a procedure for left rotator cuff repair with debridement of subacromial space and labral tear. The Office medical adviser therefore properly determined that Dr. Dlabach's impairment rating was not calculated in conformance with the applicable standards of the A.M.A. *Guides* and that appellant in fact did not have a ratable impairment pursuant to the A.M.A., *Guides*.

Based on the evidence of record discussed above, the Board finds that the Office medical adviser properly determined that Dr. Dlabach's findings were not sufficient to provide a basis for a schedule award under the Act. The Board therefore affirms the September 2, 2005 Office decision.

Following the September 2, 2005 decision, appellant requested reconsideration and submitted Dr. Dlabach's September 19, 2005 report. Dr. Dlabach argued that the A.M.A., *Guides* provided only guidelines, not strict rules, by which to rate impairments. He asserted that because not every possible entity or injury could be listed specifically, the A.M.A., *Guides* were used as a guideline in an effort to equate certain injuries which might not be listed specifically with listed diagnoses; *e.g.*, a rotator cuff repair and a subacromial decompression. Dr. Dlabach advised that it is standard protocol in the realm of orthopedic surgery to equate a distal clavicle excision with a rotator cuff tear and subacromial decompression, since there is no specific impairment rating provided in the A.M.A., *Guides* for those procedures. With regard to his impairment rating based on appellant's labral repair, Dr. Dlabach similarly opined that it was fair to equate the effects of this procedure with an injury which resulted in symptomatic instability and a permanent disruption of the normal anatomy regarding his shoulder. The Office medical adviser found that Dr. Dlabach's September 13, 2005 report contained no basis for a schedule award based on impairment of the left upper extremity. He noted that there was no evidence of subluxing humeral head pursuant to Table 16-26, page 505 of the A.M.A., *Guides*; no loss of range of motion of the left shoulder pursuant to Figures 16-40, 16-43, 16-46, at pages 476, 477, 479 of the A.M.A., *Guides*; and no permanent impairment accorded for surgery for a subacromial decompression procedure under the A.M.A., *Guides*. As Dr. Dlabach merely expressed disagreement with the Office medical adviser's opinion and restated his previously

³ 20 C.F.R. § 10.404.

stated findings and conclusions, the Office properly found that appellant did not submit medical evidence sufficient to modify its September 2, 2005 decision denying a schedule award.

As there is no other medical evidence establishing that appellant sustained any permanent impairment of a schedule member, the Office properly found that he was not entitled to a schedule award due to his accepted left shoulder condition.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), 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 evidence not previously considered by the Office.⁴ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁵

ANALYSIS -- ISSUE 2

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and he has not constituted relevant and pertinent evidence not previously considered by the Office. The evidence that appellant submitted is not pertinent to the issue on appeal. Dr. Dlabach merely restated arguments which were cumulative and repetitive of arguments which the Office considered and rejected in previous decisions. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.⁶ Dr. Dlabach's report did not present any additional evidence pertaining to the relevant issue of whether appellant sustained a permanent impairment causally related to his accepted left shoulder condition. Appellant's reconsideration request failed to 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. The Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

CONCLUSION

The Board finds that appellant has not sustained any permanent impairment to a scheduled member of his body causally related to his accepted left shoulder condition, thereby, entitling him to a schedule award under 5 U.S.C. § 8107. The Board finds that the Office properly refused to reopen appellant's case for reconsideration on the merits of his claim under 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

⁵ *Howard A. Williams*, 45 ECAB 853 (1994).

⁶ *See David J. McDonald*, 50 ECAB 185 (1998).

ORDER

IT IS HEREBY ORDERED THAT the May 19 and January 25, 2006 and September 2, 2005 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: February 21, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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