United States Department of Labor
Employees' Compensation Appeals Board

S.H., Appellant	)	
and	)	**Docket No. 07-645**
	)	**Issued: July 19, 2007**
DEPARTMENT OF THE ARMY, DSS MAINTENANCE, Fort Sheridan, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 8, 2007 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated January 27 and September 22, 2006 which found that he was not entitled to an increased schedule award. He also appealed a December 5, 2006 decision which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c), 501.3, the Board has jurisdiction over this case.

ISSUES

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

FACTUAL HISTORY

This case has previously been before the Board. In a July 26, 2005 decision, the Board found that the case was not in posture for decision as a conflict in medical evidence arose

between appellant's attending physiatrist, Dr. Subbanna Jayaprakash, and an Office medical adviser, Dr. James Bicos, regarding whether appellant was entitled to an increased schedule award for his right upper extremity. The Board remanded the case to the Office for referral of appellant to an appropriate Board-certified physician for an impartial medical evaluation.[1] The law and facts of the previous Board decision are incorporated herein by reference.

On September 28, 2005 the Office referred appellant to Dr. Paul A. Cederberg, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an October 26, 2005 report, Dr. Cederberg noted the history of injury and findings on examination including shoulder range of motion measurements. He diagnosed history of impingement syndrome of the right shoulder, status post decompressive surgery and resolved contusion of the right shoulder secondary to a motor vehicle accident on January 6, 1999.

By letter dated November 8, 2005, the Office requested that Dr. Cederberg reference the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] in support of his conclusion that appellant had a two percent right upper extremity impairment. In a November 15, 2005 report, Dr. Cederberg noted that he had referred to Figures 16-40 and 16-43 of the fifth edition of the A.M.A., *Guides* in reaching his conclusion. On December 11, 2005 an Office medical adviser, Dr. Ravi K. Ponnappan, found that maximum medical improvement had been reached on January 6, 2001. He agreed with Dr. Cederberg that appellant had a two percent right upper extremity impairment, finding that under Tables 16-10 and 16-15 of the A.M.A., *Guides*, appellant would be entitled to a one percent impairment for Grade 4 occasional pain in the distribution of the supraspinatus nerve in his right shoulder and an additional one percent for decreased forward flexion, as found in Figure 16-40.

On December 14, 2005 the Office asked Dr. Cederberg whether appellant's diagnosed adhesive capsulitis was caused by the January 6, 1999 employment injury and whether the condition had resolved. In a January 17, 2006 letter, Dr. Cederberg advised that appellant's adhesive capsulitis was a preexisting condition not caused by the January 6, 1999 work injury and, as the condition had not resolved, maximum medical improvement had not been reached.

By decision dated January 27, 2006, the Office found that appellant was not entitled to an increased schedule award for his right upper extremity. On May 5, 2005 the Office requested that his attending Board-certified family practitioner, Dr. Scott Dresden, provide an impairment analysis.

On May 25, 2006 appellant requested reconsideration and submitted a copy of a May 8, 2006 report in which Dr. Dresden noted the history of injury. Dr. Dresden advised that appellant's pain was 4/10, right shoulder forward elevation 120 degrees, backward 30 degrees, abduction 120 degrees, adduction 20 degrees, internal rotation 40 degrees, external rotation 80 degrees and extension 30 degrees, which would equal a 12 percent right upper extremity impairment for loss of range of motion. He rated appellant's rotator cuff strength at 3/5 for a 5 percent impairment, for a total right upper extremity impairment of 17 percent.

[1] Docket No. 05-1984 (issued July 26, 2005).

[2] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

The Office determined that a conflict in the medical evidence had been created between the opinions of Drs. Dresden and Cederberg, and on July 5, 2006 referred appellant to Dr. Alan A. Hyman, a Board-certified orthopedic surgeon, for a referee examination. The appointment with Dr. Hyman was cancelled.

The Office noted that a conflict had initially been created between Dr. Jayaprakash and the Office medical adviser. On August 22, 2006 it referred appellant to Dr. Stephen E. Barron, a Board-certified orthopedic surgeon, for an impartial evaluation.

On August 23, 2006 appellant submitted additional medical evidence from the Mayo Clinic including a July 14, 2006 magnetic resonance imaging (MRI) scan and x-ray of the cervical spine that demonstrated degenerative changes. An x-ray of the right shoulder demonstrated postoperative changes and irregularity of the greater tuberosity suggestive of impingement. In a July 14, 2006 treatment note, Ronald W. Egge, a physician's assistant, noted appellant's medical history and findings on physical examination. A July 21, 2006 electromyography (EMG) revealed evidence of right-sided cervical radiculopathy. Mild bilateral ulnar neuropathies could not be excluded. In a July 22, 2006 treatment note, Dr. Karen L. Newcomer, a Board-certified physiatrist, reviewed appellant's studies and diagnosed chronic neck and right shoulder pain and numbness and tingling in the right arm after a motor vehicle accident. In a July 24, 2006 treatment note, Dr. John W. Sperling, Board-certified in orthopedic surgery, noted that appellant was seen for right shoulder pain. Physical findings included active and passive elevation of 160, rotation of 30, and internal rotation of sacrum. Strength was 5/5 with mild pain present. Dr. Sperling reviewed appellant's shoulder x-rays and diagnosed status-post decompression and distal clavicle excision.

In a September 14, 2006 report, Dr. Barron described the employment injury and noted his review of the medical record, including a January 28, 1999 MRI scan of the right shoulder. Right shoulder range of motion demonstrated 180 degrees of abduction and forward flexion, 75 degrees of internal and external rotation, and 75 degrees of extension with negative impingement signs and excellent grip strength bilaterally. Sensory examination in both upper extremities was normal, and there were no areas of acute tenderness or evidence of spasm. Reflexes at the biceps, triceps and brachioradialis were +2/+2 and equal bilaterally. In response to specific Office questions, Dr. Barron advised that appellant sustained a sprain of his right shoulder on January 6, 1999 and the diagnosis of adhesive capsulitis of the right shoulder preexisted and was thus not a consequence of the January 6, 1999 employment injury. He noted that appellant had no objective findings on examination of his right shoulder with full range of motion and a negative neurologic examination and negative impingement signs, opining that the adhesive capsulitis and the employment injury had resolved. Dr. Barron concluded that, due to the lack of objective findings on examination of the cervical spine and right shoulder with an associated negative neurologic examination, appellant had no permanent impairment relative to the right upper extremity.

By decision dated September 22, 2006, the Office determined that the opinion of Dr. Barron represented the weight of medical opinion. It found that appellant was not entitled to a schedule award greater than the two percent previously awarded.

On September 28, 2006 appellant requested reconsideration, stating that he continued to be in pain from his shoulder injury and that Dr. Barron's report was flawed because he did not review the complete medical record including the August 17, 2006 MRI scan which he took to the examination. In a June 30, 2006 report, Dr. Joel P. Carroll, Board-certified in emergency medicine, advised that appellant had persistent right shoulder pain following the January 1999 motor vehicle accident. He diagnosed shoulder impingement syndrome with trapezius and cervical fascial strain secondary to the employment injury. In a July 11, 2006 report, Dr. Lynn A. Biese, a chiropractor, noted that appellant had been a patient since 1999 and had been treated for cervicalgia and right arm tingling and numbness. In a July 21, 2006 treatment note, Dr. Newcomer noted the EMG and cervical MRI scan findings and reiterated her diagnoses. An August 17, 2006 MRI scan of the right shoulder demonstrated postoperative changes, tendinopathy and mild partial tearing of the supraspinatus and infraspinatus, a mildly attenuated subscapularis tendon suggestive of a partial thickness tear, mild degenerative changes of the greater tuberosity and glenohumeral joint, and mild subluxation of the humeral head. On August 18, 2006 Dr. Sperling reiterated his examination findings and diagnosis. In reports dated September 11, 2006, Dr. Newcomer noted her review of the shoulder MRI scan and reiterated her diagnoses.

By decision dated December 5, 2006, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was duplicative or not relevant to the issue of permanent impairment.

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of the Federal Employees' Compensation Act[3] and section 10.404 of the implementing federal regulation,[4] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[5] Chapter 16 provides the framework for assessing upper extremity impairments.[6]

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*. However, all factors that prevent a limb from functioning

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *See Joseph Lawrence, Jr., supra* note 2; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[6] A.M.A., *Guides*, *supra* note 2 at 433-521.

normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.[7]

No schedule award is payable for permanent loss of, or loss of use of, anatomical members or functions or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such an award.[8] Amendments to the Act, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[9]

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant did not establish that he is entitled to greater than the two percent right upper extremity impairment previously awarded. In a comprehensive September 14, 2006 report, Dr. Barron described the employment injury and noted his review of the medical record, including a January 28, 1999 MRI scan of the right shoulder. Right shoulder range of motion demonstrated 180 degrees of abduction and forward flexion, 75 degrees of internal and external rotation, and 75 degrees of extension with negative impingement signs and excellent grip strength bilaterally. Sensory examination in both upper extremities was normal, and there were no areas of acute tenderness or evidence of spasm. Reflexes at the biceps, triceps and brachioradialis were +2/+2 and equal bilaterally. In response to specific Office questions, Dr. Barron advised that appellant sustained a sprain of his right shoulder on January 6, 1999 and the diagnosis of adhesive capsulitis of the right shoulder preexisted and was thus not a consequence of the January 6, 1999 employment injury. He noted that appellant had no objective findings on examination of his right shoulder with full range of motion and a negative neurologic examination and negative impingement signs, opining that the adhesive capsulitis and the employment injury had resolved. Dr. Barron concluded that, because of the lack of objective findings on examination of the cervical spine and right shoulder, with an associated negative neurologic examination, appellant had no permanent impairment relative to the right upper extremity.

[7] *Robert V. Disalvatore*, 54 ECAB 351 (2003).

[8] The Act specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19); *see Jesse Mendoza*, 54 ECAB 802 (2003); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[9] *See Tomas Martinez*, 54 ECAB 623 (2003); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[10] 5 U.S.C. § 8123(a).

Dr. Barron's findings of 180 degrees of abduction and forward flexion would equal a 0 degree impairment under Figures 16-40 and 16-41 of the A.M.A., *Guides*, respectively.[11] His finding of 75 degrees of internal and external rotation would also equal a 0 degree impairment under Figure 16-46.[12] His finding of 75 degrees of extension would yield a 0 degree impairment under Figure 16-40.[13] Appellant would thus not be entitled to an increased schedule award based on shoulder range of motion findings. Dr. Barron also reported that appellant had no objective findings on examination of his right shoulder with a normal neurologic examination.

As Dr. Barron provided examination findings and rationale for his opinions and conclusions, the Board finds that his report is entitled to the special weight accorded an impartial examiner and therefore constitutes the weight of the medical evidence.[14] Appellant therefore did not establish entitlement to an increased schedule award.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Office 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.[15] 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.[16] Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.[17] Likewise, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[18]

ANALYSIS -- ISSUE 2

In his letter requesting reconsideration, appellant asserted that he continued to be in pain from his shoulder injury and that Dr. Barron's report was flawed because he did not review the complete medical record, specifically the August 17, 2006 MRI scan. While Dr. Barron did not specifically mention the August 17, 2006 MRI scan, his review of the medical record encompasses the record forwarded to him by the Office. Regarding appellant's diagnosed rotator

[11] A.M.A., *Guides*, *supra* note 2 at 476-77.

[12] *Id.* at 479.

[13] *Id.* at 476.

[14] *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

[15] 20 C.F.R. § 10.606(b)(2).

[16] 20 C.F.R. § 10.608(b).

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

[18] *Kevin M. Fatzer*, 51 ECAB 407 (2000).

cuff tear, while preexisting impairments to a scheduled member are to be included in an impairment rating,[19] the January 28, 1999 MRI scan of appellant's right shoulder, performed shortly after the employment injury, showed no evidence of a rotator cuff tear. Thus, the findings of tears on the August 17, 2006 MRI scan would be a subsequently acquired condition which, without a finding that these were causally related to the employment injury, would not entitle appellant to an increased schedule award. The MRI scan is therefore irrelevant to the issue of whether appellant was entitled to an increased schedule. Dr. Barron provided rationale for his findings and conclusions. The Board finds that appellant did not demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument 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).[20]

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted no medical evidence relevant to whether he was entitled to an increased schedule award or whether his adhesive capsulitis was employment related. While he submitted medical evidence including a July 11, 2006 report from Dr. Biese, a chiropractor, the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist, and subject to regulation by the Secretary.[21] Dr. Biese merely noted that appellant had been a patient since 1999 and had been treated for cervicalgia and right arm tingling and numbness. He would therefore not be considered a physician under the Act, and his report is not probative medical evidence. The reports of Drs. Carroll and Newcomer and the August 17, 2006 MRI scan contain no findings that could be extrapolated for an impairment rating. These reports are therefore irrelevant. While Dr. Sperling provided shoulder range of motion measurements, his physical examination predated that of the referee examiner, Dr. Barron. Appellant therefore did not submit relevant and pertinent new evidence not previously considered by the Office, and by its decision dated September 28, 2005, the Office properly denied his reconsideration request.

CONCLUSION

The Board finds that appellant has failed to establish that he is entitled to a schedule award greater than the two percent right upper extremity impairment previously awarded. The Board further finds that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[19] *See Michael C. Milner*, 53 ECAB 446 (2002).

[20] 20 C.F.R. § 10.606(b)(2).

[21] *Paul Foster*, 56 ECAB ___ (Docket No. 04-1943, issued December 21, 2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 5, September 22 and January 27, 2006 be affirmed.

Issued: July 19, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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