

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

W.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Jefferson City, TN, Employer**

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**Docket No. 08-762
Issued: July 16, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 17, 2008 appellant timely appealed the December 11, 2007 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration, and an April 20, 2007 merit decision granting a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

ISSUES

The issues are: (1) whether appellant has more than 12 percent permanent impairment of the right upper extremity; and (2) whether the Office properly denied appellant's September 5, 2007 request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a 72-year-old distribution clerk, has an accepted occupational disease claim for right rotator cuff tear and left shoulder impingement, which arose on or about July 12, 2002. He filed a claim for a schedule award on November 30, 2005. The Office referred appellant to Dr. Clifford L. Posman, a Board-certified orthopedic surgeon, to determine the extent of any

permanent impairment involving the right upper extremity. Dr. Posman examined appellant on March 8, 2007 and diagnosed right rotator cuff arthropathy. He rated overall impairment of 20 percent to the right upper extremity. Dr. Posman found 15 percent impairment due to loss of motion in the right shoulder. He also assigned an additional five percent impairment for what he characterized as “significant supraspinatus weakness.”

The case file was referred to an Office medical adviser for review. In a report dated April 11, 2007, the Office medical adviser, Dr. James W. Dyer, a Board-certified orthopedic surgeon, found only 12 percent impairment of the right upper extremity. According to him, the additional five percent impairment Dr. Posman had attributed to muscle weakness was inappropriate. Dr. Dyer also noted that the four percent impairment Dr. Posman assigned for loss of right shoulder external rotation actually represented one percent impairment. He otherwise concurred with Dr. Posman’s March 8, 2007 impairment rating based on loss of range of motion.

By decision dated April 20, 2007, the Office granted a schedule award for 12 percent impairment of the right upper extremity. The award covered a period of 37.44 weeks from March 8 to November 25, 2007.

On September 5, 2007 appellant requested reconsideration. The request was accompanied by a copy of the Office’s May 17, 2004 letter advising appellant of the acceptance of his claim for right rotator cuff tear. Appellant resubmitted a copy of Dr. Posman’s March 8, 2007 impairment rating. In a decision dated December 11, 2007, the Office denied appellant’s request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees’ Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.¹ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.² Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).³

ANALYSIS -- ISSUE 1

The Office medical adviser agreed with Dr. Posman with respect to the 11 percent right upper extremity impairment attributable to appellant’s loss of forward elevation, internal rotation

¹ For a total, or 100 percent loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1) (2000).

² 20 C.F.R. § 10.404 (2007).

³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

and abduction. Dr. Posman's March 8, 2007 examination revealed 120 degrees of right shoulder forward elevation, which represents four percent impairment according to Figure 16-40, page 476. Dr. Posman also reported 110 degrees of shoulder abduction. According to Figure 16-43, page 477, this represents three percent impairment of the right upper extremity. With respect to shoulder rotation, Dr. Posman reported 30 degrees internal rotation and 55 degrees external rotation. Pursuant to Figure 16-46, page 479, the loss of internal rotation represented four percent impairment and the loss of external rotation represented one percent impairment. Dr. Posman, however, mistakenly assigned four percent impairment for the loss of external rotation. The Office medical adviser noted Dr. Posman's error with respect to the additional three percent impairment attributed to loss of external rotation. Dr. Dyer also correctly noted that a combination of impairments due to muscle weakness and loss of motion was inconsistent under the A.M.A., *Guides*.⁴ Therefore, Dr. Dyer rejected Dr. Posman's additional five percent upper extremity impairment rating for right "supraspinatus weakness."

Subtracting the 5 percent rating for muscle weakness and the 3 percent miscalculation for external rotation, Dr. Dyer concluded that appellant had 12 percent permanent impairment of the right upper extremity. Dr. Dyer's April 11, 2007 impairment rating is consistent with Dr. Posman's March 8, 2007 examination findings and conforms to the A.M.A., *Guides* (5th ed. 2001). Appellant has not presented any probative medical evidence to establish that he has greater than 12 percent impairment of the right upper extremity.⁵

LEGAL PRECEDENT -- ISSUE 2

The Office has the discretion to reopen a case for review on the merits.⁶ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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.⁷ 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.⁸

⁴ "Decreased strength *cannot* be rated in the presence of decreased motion, painful conditions, deformities or absence of parts ... that prevent effective application of maximal force in the region being evaluated." Section 16.8a, A.M.A., *Guides* 508.

⁵ The Board notes that the record also includes a November 2, 2006 impairment rating from Dr. Guillermo M. Pujadas, a Board-certified orthopedic surgeon and Office medical adviser, who rated impairment of the left upper extremity. As the Office has yet to issue a final decision regarding appellant's entitlement to a schedule award for permanent impairment of the left upper extremity, it is not an issue in this appeal. *See* 20 C.F.R. § 501.2(c).

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ 20 C.F.R. § 10.608(b).

ANALYSIS -- ISSUE 2

Appellant's September 5, 2007 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Therefore, 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).⁹ Appellant also failed to satisfy the third requirement under section 10.606(b)(2). He did not submit any relevant and pertinent new evidence with his September 5, 2007 request. The Office's May 17, 2004 acceptance letter and Dr. Posman's March 8, 2007 impairment rating were already part of the record and considered by the Office. As such, this evidence does not constitute relevant and pertinent new evidence not previously considered by the Office.¹⁰ Consequently, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).¹¹ As appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Office properly denied the September 5, 2007 request for reconsideration.

CONCLUSION

Appellant has not established that he has more than 12 percent permanent impairment of the right upper extremity. The Board further finds that the Office properly denied appellant's September 5, 2007 request for reconsideration.

⁹ 20 C.F.R. § 10.606(b)(2)(i) and (ii).

¹⁰ Submitting additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim. *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

¹¹ 20 C.F.R. § 10.606(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the December 11 and April 20, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 16, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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