

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

P.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Washington, DC, Employer**

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**Docket No. 10-1868
Issued: June 23, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 7, 2010 appellant filed a timely appeal of the March 23, 2010 decision by the Office of Workers' Compensation Programs issuing a schedule award for five percent impairment of the left thumb. The appeal is also timely filed from a June 29, 2010 nonmerit decision of the Office that denied her request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant has more than five percent impairment of her left thumb, for which she received a schedule award; and (2) whether OWCP properly refused to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that her thumb has deteriorated since she had surgery; that she was being penalized for her treating physician's failure to timely submit an opinion with

¹ 5 U.S.C. § 8101 *et seq.*

regards to her schedule award; and that she spent more than the sum awarded under the schedule for pain pills and supplies for treatment of her thumb.

FACTUAL HISTORY

On July 2, 2004 appellant, then a 56-year-old review clerk, filed a traumatic injury claim alleging that on that date she injured her hand while she was taking mail out of bin and her hand “gave out” on her. The Office accepted her claim for left hand and wrist tendinitis. In a medical report dated August 28, 2006, Dr. Ellen D. Finkelman, appellant’s treating family practitioner, indicated that appellant had de Quervains tenosynovitis of her left thumb. She opined that appellant lost 50 percent use of her left thumb since its strength was impaired and her ability to grasp and hold onto heavy objects was not possible.

On July 12, 2006 appellant filed a claim for a schedule award. In an August 28, 2006 report, Dr. Finkelman indicated that appellant had lost 50 percent use of her left thumb and lower arm arches. On October 11, 2007 appellant underwent a left trigger thumb release.

On February 23, 2009 the Office medical adviser indicated that an impairment rating cannot be given at this time, and that appellant should see her treating physician and have detailed measurements of thumb motion at the metacarpophalangeal (MP) and proximal interphalangeal (PIP) joints and that he should determine if there is any persistent loss of grip or strength that could be quantified. He noted that Dr. Finkelman’s August 28, 2006 report is no longer a valid assessment of appellant’s impairment as she underwent surgery on November 11, 2007, so her situation should have changed.

By letter dated March 17, 2009, the Office asked appellant to have her physician make an assessment for schedule award purposes. It noted that the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (A.M.A., *Guides*) was appropriate. On the same date the Office asked Dr. Finkelman to make an assessment of appellant’s impairment under the sixth edition of the A.M.A., *Guides*. No timely response was received to the Office’s request.

On April 17, 2009 the Office denied appellant’s claim for a schedule award.

On August 5, 2009 appellant requested reconsideration. In support thereof, she submitted a July 22, 2009 report wherein Dr. Robert H. Wilson, a Board-certified orthopedic surgeon with a subspecialty in surgery of the hand, indicated that under the fifth edition of the A.M.A., *Guides*, appellant was entitled to a rating of 27 percent for the thumb, which converts to an 11 percent impairment of the hand or a 10 percent impairment of the upper extremity.² In an undated letter, Dr. Wilson indicated that his office does not have a copy of the sixth edition of the A.M.A., *Guides*, but noted that the Office had ordered a copy and requested time to complete a necessary rating. In a letter dated October 7, 2009, the Office manager for Dr. Wilson’s office noted that his office had been unable to obtain a copy of the sixth edition of the A.M.A., *Guides*, and it was informed that it would not be released by the publisher until December 2009.

² Using the fifth edition of the A.M.A., *Guides*, Dr. Wilson stated that an impairment rating can be calculated using the loss of active motion due to the position of the thumb as its stands.

The Office ordered a second opinion by Dr. Robert Draper, a Board-certified orthopedic surgeon, by letter dated October 7, 2009. In a report dated November 4, 2009, Dr. Draper diagnosed appellant with stenosing tenosynovitis of the flexor pollicis longus tendon (left thumb). He applied the sixth edition of the A.M.A., *Guides* and determined that appellant had five percent impairment of the left thumb. Using Table 15-2, page 392, digit regional grid of the sixth edition of the A.M.A., *Guides*, Dr. Draper stated that the impairment class is digital stenosing tenosynovitis trigger digit and this fits a patient in class 1, grade C, which would give appellant a six percent impairment of the thumb using the grid. He then assigned grade modifiers of 1 for Functional History (GMFH), 1 for Physical Examination (GMPE) and 0 for Clinical Studies (GMCS). Using the net adjustment formula set forth in the sixth edition of the A.M.A., *Guides*, Dr. Draper determined that appellant had a net adjustment of negative 1.³ Applying the net adjustment of negative 1 to Table 15-2, page 392, he determined that this gave her a grade of B, class 1, which equaled a five percent impairment of the left thumb. The Office forwarded Dr. Draper's report to the Office medical adviser. In a November 4, 2009 memorandum, the Office medical adviser noted that pursuant to the digital regional grid of the sixth edition of the A.M.A., *Guides*, he agreed that digital stenosing tenosynovitis trigger digit was the diagnosis, which equaled a class 1, grade C which equaled a six percent impairment of the thumb. He agreed with Dr. Draper's downward adjustment when applying the net adjustment formula, and determined that the net adjustment was minus 1, which equaled a five percent impairment of the left thumb.

In a November 24, 2009 decision, the Office found that the evidence established a five percent permanent partial impairment of the left thumb.

On March 23, 2010 the Office issued a schedule award for five percent impairment of the left thumb.

On March 29, 2010 appellant requested reconsideration of the November 22, 2009 schedule award.

In a May 5, 2010 report, Dr. Wilson noted that appellant was originally sent to him for a disability rating in 2007, but at that time he did not feel that her problem had been adequately addressed, and that he suggested that her trigger finger be treated. He noted that her problem did not improve with a trigger release and that she was adamant about getting a disability rating and that he explained to her that based on her problem, she would not get a substantive rating. Dr. Wilson noted that when he did provide a rating, he used the fifth edition of the A.M.A., *Guides* and noted that he had been unable to get a sixth edition of the A.M.A., *Guides* from the publisher.⁴

³ Dr. Draper stated that appellant's Class of Diagnosis (CDX) was 1. He noted that the net adjustment formula equals $GMFH-CDX + GMPE-CDX + GMCS - CDX$. He then perform the calculations $(1-1) + (1-1) + (0-1)$ and calculated and adjustment of negative 1.

⁴ Dr. Wilson wrote this in response to a complaint filed by appellant against him with the District of Columbia Government Department of Health.

By decision dated June 29, 2010, the Office denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act⁵ provides for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁶

Schedule award decisions issued between February 1, 2001 and April 30, 2009 utilize the fifth edition of the A.M.A., *Guides*.⁷ Effective May 1, 2009, the Office adopted the sixth edition of the A.M.A., *Guides*,⁸ as the appropriate edition for all awards issued after that date.⁹ The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).¹⁰ Under the sixth edition of the A.M.A., *Guides*, the evaluator identifies the impairment class for the CDX, which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.¹¹ The net adjustment formula is GMFH - CDX + GMPE - DCX + GMCS - CDX.

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for left hand and wrist tendinitis. Appellant underwent a left trigger thumb release on October 11, 2007.

Following appellant's surgery, she submitted a report by her treating Board-certified orthopedic surgeon, Dr. Wilson. In Dr. Wilson's July 22, 2009 report, he applied the fifth edition of the A.M.A., *Guides* and determined that appellant had 27 percent impairment of the thumb. However, effective May 1, 2009 the Office began utilizing the sixth edition of the

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

⁸ FECA Bulletin No. 09-03 (issued March 15, 2009) (expired May 1, 2010); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

⁹ *Supra* note 7 at Chapter 3.700, Exhibit 1 (January 2010).

¹⁰ A.M.A., *Guides* page 3, section 1.3 (6th ed. 2009), *ICF: A Contemporary Model of Disablement*.

¹¹ A.M.A., *Guides* 494-531 (6th ed. 2009).

A.M.A., *Guides* in determining impairment rating. As Dr. Wilson did not provide a rating pursuant to the A.M.A., *Guides*, it properly referred appellant to Dr. Draper for a second opinion. Dr. Draper, applied the A.M.A., *Guides* and determined that appellant had five percent impairment of her left thumb and the Office medical adviser agreed. The reports indicated that for the diagnosis of stenosing tenosynovitis trigger digit, appellant had a class 1, grade C impairment of the left thumb for a six percent impairment.¹² Using the net adjustment formula, Dr. Draper and the Office medical adviser determined that appellant had a GMFH adjustment of 1, a GMPE adjustment of 1 and a GMCS modifier of 0. Applying the net adjustment formula, he and the Office medial adviser stated that appellant had a net adjustment of minus 1, which changed appellant from a grade C to a grade B, which is five percent impairment of the left thumb.

The Board finds that the Office medical adviser and Dr. Draper applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides*. No other physician provided a greater rating pursuant to the sixth edition of the A.M.A., *Guides*. Therefore, the Office properly determined that appellant had a five percent impairment to her left thumb pursuant to the A.M.A., *Guides*.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹³ the Office regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.¹⁵ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁶

ANALYSIS -- ISSUE 2

Appellant did not make any new argument tending to demonstrated that the Office erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by the Office. The only new evidence of record, Dr. Wilson's May 5, 2010 report, is not relevant to the issue of whether appellant had greater than five percent impairment of her left thumb for which she received a schedule award. Thus,

¹² *Id.* at 392, Table 15-2

¹³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(2).

¹⁵ *Id.* at 10.608(b).

¹⁶ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

his report does not constitute pertinent new and relevant evidence sufficient to warrant further merit review. The Board therefore finds that appellant did not meet any of the standards of 20 C.F.R. § 10.606(b)(2). Accordingly, the Board finds that the Office properly denied appellant's application for reconsideration without review of the merits of the claim

CONCLUSION

The Board finds that appellant has not established that she had more than five percent impairment of her left thumb, for which she received a schedule award. The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 29 and March 23, 2010 are affirmed.

Issued: June 23, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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