United States Department of Labor
Employees' Compensation Appeals Board

P.C., Appellant	)	
and	)	**Docket No. 10-2033**
	)	**Issued: June 21, 2011**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, BLUE RIDGE PARKWAY, Asheville, NC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 3, 2010 appellant filed a timely appeal from a May 20, 2010 decision of the Office of Workers' Compensation Programs denying her claim for an additional schedule award and a June 11, 2010 Office decision that denied her request for reconsideration. Pursuant to the Federal Employees' Compensation Act[1] and 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 met her burden of proof to establish that she has more than a 10 percent impairment of the right upper extremity for which she received a schedule award; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

On appeal appellant asserts that the opinion of her physician should be given the weight of medical evidence.

FACTUAL HISTORY

On August 25, 1999 appellant, then a 40-year-old telecommunications equipment operator, sustained a right elbow strain lifting a box at work. On January 12, 2001 Dr. Gordon I. Groh, an attending Board-certified orthopedic surgeon, performed arthroscopic repair of a very small rotator cuff tear. On February 5, 2002 appellant filed a traumatic injury claim, alleging that she sustained a right biceps tear while performing physical therapy due to the 1999 employment injury. The claim was accepted for right shoulder impingement and a consequential right bicep tear. Dr. Groh performed repair of the biceps tear on March 13, 2002. Appellant returned to modified duty on May 6, 2002. On January 15, 2003 she was granted a schedule award for 10 percent permanent impairment of the right arm.

On June 27, 2008 appellant filed a traumatic injury claim alleging that she injured her right shoulder lifting a heavy box.[2] In an August 8, 2008 report, Dr. Groh reported findings on physical examination and diagnosed a right shoulder rotator cuff injury. A September 13, 2008 magnetic resonance imaging (MRI) scan of the right shoulder, with a September 17, 2008 addendum, demonstrated a thin full thickness tear. The Office accepted aggravation of right rotator cuff tear. On March 3, 2009 Dr. Groh performed right shoulder arthroscopic subacromial decompression and rotator cuff repair. He submitted reports describing appellant's postsurgical treatment. Appellant returned to modified duty on June 9, 2009. A November 3, 2009 functional capacity evaluation (FCE) demonstrated near full effort. Dr. Groh recommended that appellant work at a light physical demand level, with infrequent work above the shoulder. Right shoulder range of motion demonstrated 93 degrees of flexion, 95 degrees of abduction, 85 degrees of medial rotation and 80 degrees of lateral rotation. In a November 6, 2009 report, Dr. Groh advised that, given her right shoulder surgical repair, appellant had 14 percent permanent impairment of the right upper extremity.

On January 20, 2010 appellant filed a schedule award claim. By letter dated February 10, 2010, the Office advised her and Dr. Groh that schedule award evaluations were to be completed in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[3] It noted that Dr. Groh's November 6, 2009 report was not sufficient because he failed to explain how he arrived at his impairment rating. The Office provided a permanent impairment worksheet for the physician to complete. On February 23, 2010 Dr. Groh appended a note to the worksheet, stating, "see attached dictation dated [November 6, 2009]." He resubmitted the November 6, 2009 report.

In a May 17, 2010 report, Dr. Howard P. Hogshead, a Board-certified orthopedic surgeon and Office medical adviser, advised that maximum medical improvement was reached on November 6, 2009. He noted that Dr. Groh did not provide any explanation for rating appellant

[2] Appellant was then working as an office automation assistant at the employing establishment. The case files for the 1999 and 2008 injuries were doubled.

[3] A.M.A., *Guides* (6th ed. 2008).

at 14 percent impairment. The November 3, 2009 FCE demonstrated active right shoulder range of motion measurements. Dr. Hogshead stated that, under Table 15-34 of the sixth edition of the A.M.A., *Guides*, appellant had 6 percent impairment based on 95 degrees of forward elevation, a 4 percent impairment based on 95 degrees of abduction, and no impairment based on 85 degrees of internal rotation and 80 degrees of external rotation or a total right upper extremity impairment of 10 percent.

By decision dated May 20, 2010, the Office found that as appellant previously received a schedule award for 10 percent right upper extremity impairment, she was not entitled to an increased schedule award. It explained that Dr. Groh's report was not sufficient to support a finding of 14 percent impairment rating because he did not provide any explanation for his opinion.

On May 25, 2010 appellant requested reconsideration, stating that she was entitled to 14 percent permanent impairment based on Dr. Groh's opinion. She submitted duplicates of medical evidence previously of record.

In a nonmerit decision dated June 11, 2010, the Office denied appellant's reconsideration request, finding that she submitted no new relevant argument and that the evidence submitted was duplicative.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act,[4] and its implementing federal regulations,[5] set 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7] For decisions issued after May 1, 2009, the sixth edition will be used.[8]

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).[9] Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment Class for the Diagnosed Condition (CDX), which is then adjusted by

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.* at § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[8] FECA Bulletin No. 09-03 (issued March 15, 2009).

[9] A.M.A., *Guides*, *supra* note 4 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[10] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[11]

Although the diagnosis-based approach is the preferred method of evaluating permanent impairment under the sixth edition of the A.M.A., *Guides*,[12] Table 15-5, Shoulder Regional Grid, provides that, if loss of motion is present, the impairment may alternatively be assessed under section 17-7, range of motion impairment.[13] A range of motion impairment stands alone and is not combined with a diagnosis-based impairment.[14]

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.[15]

ANALYSIS -- ISSUE 1

The Board finds that appellant has no more than a 10 percent impairment of the right arm, for which she received a schedule award. It is well established that, when the attending physician fails to provide an estimate of impairment conforming with the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment.[16] Contrary to appellant's assertion on appeal, Dr. Groh's November 6, 2009 report is of insufficient probative value to establish greater impairment. He merely provided a general opinion that appellant sustained 14 percent permanent impairment of the right upper extremity; he did not provide any explanation for his rating or reference the A.M.A., *Guides*.

On February 10, 2010 the Office asked Dr. Groh to provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides.* Dr. Groh, however, returned a blank worksheet and merely referenced his November 6, 2009 report. He did not identify the impairment class for the diagnosed condition or provide analysis of the grade modifiers based on functional history, physical examination, or use the net adjustment formula as described in section 15.3 of the sixth edition.[17] Nor did Dr. Groh provide range of motion measurements as

[10] *Id*. at 385-419.

[11] *Id*. at 411.

[12] *Id*. at 461, section 15.7.

[13] *Id*. at 401-05.

[14] *Id*. at 461.

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[16] *Linda Beale*, 57 ECAB 429 (2006).

[17] A.M.A., *Guides*, *supra* note 3 at 405-09.

described in section 15.7g of the sixth edition.[18] When the examining physician does not provide an estimate of impairment conforming to the proper edition of the A.M.A., *Guides*, the Office may rely on the impairment rating of an Office medical adviser.[19] The Office properly referred the medical record to Dr. Hogshead, an Office medical adviser, for review.

By report dated May 17, 2010, Dr. Hogshead noted that Dr. Groh merely concluded that appellant had 14 percent right upper extremity impairment without providing any explanation for his opinion. The Office medical adviser found that range of motion best revealed the extent of the right shoulder impairment, as provided in the November 3, 2009 FCE. Table 15-5 of the sixth edition of the A.M.A., *Guides*, relevant to determining shoulder impairments, provides that a shoulder full thickness rotator cuff tear yields from a one to seven percent shoulder impairment, depending on the class of impairments and grade modifiers.[20] Table 15-5 marks this diagnosis with an asterisk that indicates that, if motion loss is present, the shoulder impairment may alternatively be assessed using loss of range of motion.[21] The impairment due to loss of range of motion stands alone and is not combined with a diagnosis-based impairment.[22]

The Office medical adviser utilized Table 15-34 and found that 95 degrees of flexion yielded 6 percent impairment, 95 degrees of abduction yielded 4 percent impairment, and that 85 degrees of internal rotation and 80 degrees of external rotation yielded no impairment, for a total right upper extremity impairment of 10 percent. The Board notes, however, that the FCE demonstrated 93 degrees of flexion and, under Table 15-34, either 93 degrees, as found in the FCE, or 95 degrees, as reported by Dr. Hogshead, constitutes three percent impairment, not the six percent as identified.[23] Moreover, 95 degrees of abduction under Table 15-34 also constitutes three percent impairment, not the four percent identified by Dr. Hogshead.[24] These errors, however, are harmless, as the total right upper extremity impairment of 6 percent is less than appellant's previous rating of 10 percent impairment of the right arm. There is no evidence in conformance with the sixth edition of the A.M.A., *Guides* showing a greater impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[25] Section 10.608(a) of the Code of Federal Regulations provide that a

[18] *Id*. at 472-76.

[19] *See J.Q.*, 59 ECAB 366 (2008).

[20] A.M.A., *Guides*, *supra* note 3 at 403.

[21] *Id*.

[22] *Id*. at 475.

[23] *Id*.

[24] *Id*.

[25] 5 U.S.C. § 8128(a).

timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[26] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (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.[27] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[28]

Office procedures provide that claims for increased schedule awards may be based on incorrect calculation of the original award or new exposure.[29] To the extent that a claimant is asserting that the original award was erroneous based on his medical condition at that time, this would be a request for reconsideration. A claim for an increased schedule award may be based on new exposure or on medical evidence indicating the progression of an employment-related condition, without new exposure to employment factors, resulting in a greater permanent impairment than previously calculated.[30]

ANALYSIS -- ISSUE 2

On May 25, 2010 appellant requested reconsideration, contending that she had 14 percent right upper extremity impairment. She did not show that the Office erroneously applied or interpreted a specific point of law and her argument repeats or duplicates that previously of record. Appellant's argument does not constitute a basis for reopening her case.[31] Consequently, appellant was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[32]

With respect to the third above-noted requirement under section 10.606(b)(2), the medical evidence submitted by appellant with her reconsideration request was previously of record. Evidence that repeats or duplicates evidence of record has no evidentiary value and does not constitute a basis for reopening a case.[33] While a claim for an increased schedule award may be based on the progression of an employment-related condition, without new exposure to

[26] 20 C.F.R. § 10.608(a).

[27] *Id.* at § 10.608(b)(1) and (2).

[28] *Id.* at § 10.608(b).

[29] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.7(b) (March 1995).

[30] *A.A.*, 59 ECAB 726 (2008).

[31] *M.E.*, 58 ECAB 694 (2007).

[32] 20 C.F.R. § 10.606(b)(2).

[33] *Freddie Mosley*, 54 ECAB 255 (2002).

employment factors, resulting in a greater permanent impairment than previously calculated,[34] the claim must be supported by relevant and pertinent new evidence to warrant merit review of the claim. Appellant submitted no such evidence in this case. As she did not show that the Office erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by the Office, the Office properly denied her reconsideration request.

CONCLUSION

The Board finds that appellant did not establish that she has greater than a 10 percent impairment of the right upper extremity for which she received a schedule award, and that the Office properly refused to reopen her case for further consideration of the merits of her claim 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 11 and May 20, 2010 be affirmed.

Issued: June 21, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

[34] *A.A.*, *supra* note 30.