

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

W.T., Appellant

and

**U.S. POSTAL SERVICE, GLENRIDGE
STATION, Atlanta, GA, Employer**

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**Docket No. 11-1994
Issued: May 22, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 7, 2011 appellant filed a timely appeal from a May 10, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for an additional schedule award and a June 10, 2011 decision that denied his request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award decision.

ISSUES

The issues are: (1) whether appellant has more than a 15 percent impairment of the right arm for which he received a schedule award; and, (2) whether OWCP 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.

FACTUAL HISTORY

This case has previously been before the Board. In a February 1, 2008 decision, the Board found that appellant failed to establish that he had a right arm impairment greater than the 15 percent previously awarded and that OWCP properly refused to reopen his case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).² The law and the facts of the previous Board decision are incorporated herein by reference.

On March 8, 2011 appellant submitted a schedule award claim. In a February 28, 2011 report, Dr. William M. Craven, an attending Board-certified orthopedic surgeon, advised that he had evaluated appellant's right shoulder in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).³ He found that appellant had a diagnosis-based impairment of class 1 for the right shoulder rotator cuff tear, with a grade of C and a grade 1 modifier for functional history. Under clinical studies, Dr. Craven reported that appellant had a positive magnetic resonance imaging study. He concluded that appellant had an upper extremity impairment of 15 percent.⁴

In a March 11, 2011 report, an OWCP medical adviser reviewed the record and advised that current right shoulder range of motion measurements should be obtained to determine if the range of motion method should be used in evaluating appellant's schedule award claim. By letter dated April 1, 2011, OWCP advised appellant that, based on OWCP's medical adviser's review, a current medical assessment was needed to include right shoulder range of motion measurements.

In an April 8, 2011 report, Dr. Craven provided right shoulder examination findings, including range of motion measurements. Forward flexion was measured at 150 degrees, abduction of 145 degrees, internal rotation of 15, external rotation of 15, extension of 20, and adduction of 30. Dr. Craven diagnosed right shoulder adhesive capsulitis and traumatic rotator cuff tear. He advised that appellant had reached maximum medical improvement and repeated his impairment analysis under the A.M.A., *Guides*, stating that the diagnosis-based calculation was consistent with appellant's range of motion deficits. Dr. Craven reiterated that appellant had 15 percent right upper extremity impairment.

By report dated May 4, 2011, a second OWCP medical adviser reviewed the record. He advised that maximum medical improvement was reached on September 23, 2010. Under Table 15-34, Shoulder Range of Motion, forward elevation (flexion) of 150 degrees yielded a 3 percent impairment, backward elevation (extension) of 20 degrees yielded a 2 percent impairment, abduction of 145 degrees yielded a 3 percent impairment, adduction of 30 degrees yielded a 1 percent impairment, internal rotation of 15 degrees yielded a 4 percent impairment,

² Docket No. 07-1048 (issued February 1, 2008). In the instant case, adjudicated under file number xxxxxx973, on May 21, 2003 OWCP accepted that appellant had work-related chronic right shoulder tendinitis. In a March 30, 2006 decision, appellant was granted a schedule award for a 15 percent impairment of the right arm.

³ A.M.A., *Guides* (6th ed. 2008).

⁴ Appellant also submitted a number of treatment notes from Dr. Craven and other physicians dated September 19, 2006 to September 30, 2010 that did not contain an impairment evaluation.

and external rotation of 15 degrees yielded a 2 percent impairment, for a total right upper extremity impairment of 15 percent. The medical adviser concluded that, as appellant previously received a schedule award for a 15 percent right arm impairment, the evidence did not establish greater impairment.

By decision dated May 10, 2011, OWCP denied appellant's claim for an additional schedule award on the grounds that the medical evidence did not establish that he had more than a 15 percent impairment of the right arm, for which he was granted a schedule award on March 30, 2006.

On June 2, 2011 appellant requested reconsideration asserting that he had no use of his right shoulder starting in March 2003. He submitted a May 2, 2005 report in which Dr. Earl Thurmond, Board-certified in internal medicine, stated that appellant became totally disabled on March 3, 2003 due to right rotator cuff tendinopathy and degenerative disc disease of the lumbar spine, complicated by kidney stones, hepatitis C and hypertension.

In a nonmerit decision dated June 10, 2011, OWCP denied appellant's reconsideration request. It found that his argument was irrelevant to the issue of permanent impairment and that the May 2, 2005 medical report was previously of record and duplicative.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA,⁵ and its implementing federal regulations,⁶ 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, FECA 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, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸ For decisions issued after May 1, 2009, the sixth edition will be used.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, for upper extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁹ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹⁰ A.M.A., *Guides*, *supra* note 3 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

Clinical Studies (GMCS).¹¹ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹² The sixth edition of the A.M.A., *Guides* also provides that, under certain circumstances, range of motion may be selected as an alternative approach in rating impairment. An impairment rating that is calculated using range of motion may not be combined with a diagnosis-based impairment and stands alone as a rating.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant did not establish that he is entitled to greater than the 15 percent right upper extremity impairment previously awarded.

In a February 26, 2011 report, Dr. Craven, an attending orthopedist, advised that appellant had a diagnosis-based impairment of class 1 for a right shoulder rotator cuff tear, with a grade of C, which yielded an upper extremity impairment of 15 percent. Table 15-5, Shoulder Regional Grid, indicates that a class 1, full thickness rotator cuff tear, has a maximum impairment of 13 percent.¹⁴ This default rating can then be adjusted by utilizing the grade modifiers found in the net adjustment formula.¹⁵ Dr. Craven indicated that appellant had a grade 1 impairment for functional history; but did not provide a grade for physical examination or clinical studies and did not apply the net adjustment formula. His February 28, 2011 report is therefore insufficient to establish that appellant has greater than 15 percent right arm impairment.

In an April 8, 2011 report, Dr. Craven provided range of motion measurements for appellant's right shoulder and concluded that he had a 15 percent impairment of his right arm, explaining that the diagnosis-based calculation under the A.M.A., *Guides* was consistent with appellant's range of motion measurements. As found by the medical adviser in a May 4, 2011 report, under Table 15-34, Dr. Craven's finding of 150 degrees of flexion yields a 3 percent impairment; 20 degrees of extension yields a 2 percent impairment 145 degrees of abduction yields a 3 percent impairment; 30 degrees of adduction yields a 1 percent impairment; 15 degrees of internal rotation yields a 4 percent impairment; and 15 degrees of external rotation yields a 2 percent impairment. The medical adviser properly added the abnormal shoulder motion values to total 15 percent right upper extremity impairment.¹⁶

There is no other medical evidence of record submitted subsequent to the March 30, 2006 schedule award that was affirmed by the Board in its February 1, 2008 decision that provides a rating for appellant's right shoulder impairment. Appellant therefore did not establish that he is entitled to a schedule award greater than the 15 percent awarded on March 30, 2006.

¹¹ *Id.* at 385-419.

¹² *Id.* at 411.

¹³ *Id.* at 390. The A.M.A., *Guides* explains that diagnoses in the grid that may be rated using range of motion are followed by an asterisk.

¹⁴ *Id.* at 403.

¹⁵ *Id.* at 405-12, section 15.3.

¹⁶ *Id.* at 474, section 16.4i.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP 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.¹⁷ Section 10.608(a) of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if OWCP 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).¹⁸ 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 OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁹ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.²⁰

OWCP procedures provide that claims for increased schedule awards may be based on incorrect calculation of the original award or new exposure.²¹ 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.²²

ANALYSIS -- ISSUE 2

With his June 2, 2011 reconsideration request, appellant asserted that he had no use of his right shoulder beginning in 2003. It is the claimant's burden to establish permanent impairment of a scheduled member or function as a result of an employment injury. OWCP procedures provide that, to support a schedule award, the file must contain medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred ("date of maximum medical improvement"), describes the impairment in sufficient detail, and gives a percentage of impairment based on a specific diagnosis, in accordance with the relevant edition of the A.M.A., *Guides*.²³

¹⁷ 5 U.S.C. § 8128(a).

¹⁸ 20 C.F.R. § 10.608(a).

¹⁹ *Id.* at § 10.608(b)(1) and (2).

²⁰ 20 C.F.R. § 10.608(b).

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.7(b) (January 2010).

²² A.A., 59 ECAB 726 (2008).

²³ Federal (FECA) Procedure Manual, *supra* note 21 at 2.808(6)(b) (January 2010).

Appellant's assertion, without supportive medical evidence,²⁴ is insufficient to demonstrate that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Consequently, he was 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).²⁵

With respect to the third above-noted requirement under section 10.606(b)(2), on reconsideration appellant submitted a May 2, 2005 report from Dr. Thurmond that had previously been reviewed by both OWCP and the Board. Evidence that repeats or duplicates evidence of record has no evidentiary value and does not constitute a basis for reopening a case.²⁶

As appellant did not show that OWCP 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 OWCP, it properly denied his reconsideration request.²⁷

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant failed to establish that he is entitled to a schedule award greater than the 15 percent right upper extremity impairment previously awarded. The Board further finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²⁴ See discussion *infra*.

²⁵ 20 C.F.R. § 10.606(b)(2).

²⁶ *Freddie Mosley*, 54 ECAB 255 (2002).

²⁷ *Supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 10 and May 10, 2011 are affirmed.

Issued: May 22, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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