

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

E.W., Appellant

and

**U.S. COAST GUARD, COAST GUARD YARD,
Curtis Bay, MD, Employer**

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**Docket No. 14-1977
Issued: June 26, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 12, 2014 appellant filed a timely appeal of an April 7, 2014 merit decision and May 23, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.

ISSUES

The issues are: (1) whether appellant has established that he is entitled to a greater than 46 percent right upper extremity impairment, for which he received schedule awards; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal appellant argues that his disability rating should be increased as he had another surgery and severe arthritis as well as atrophy and numbness in his shoulder. He also argued that he has been in constant pain since the injury and should be compensated for his loss of mobility and pain.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On February 22, 1998 appellant, then a 24-year-old electrician, filed a traumatic injury claim alleging that on February 18, 1994 he dislocated his right shoulder when he reached back while bending over. OWCP assigned File No. xxxxxx559 and accepted the claim for recurrent dislocated right shoulder. Under File No. xxxxxx586, OWCP accepted that appellant sustained a right shoulder and upper arm strain due to a September 27, 1991 employment injury. Under File No xxxxxx121 OWCP accepted that appellant sustained a right shoulder dislocation as the result of a January 27, 1994 employment injury. On October 28, 1996 OWCP combined File Nos. xxxxxx121 and xxxxxx586 with File No. xxxxxx559, with the latter as the master file number. As a result of all of the accepted injuries, it granted appellant schedule awards totaling 46 percent impairment of the right upper extremity.

By decision dated October 1, 2010, the Board set aside an October 27, 2009 OWCP decision denying appellant's request for an additional schedule award.² The Board found that OWCP medical adviser's impairment rating required further clarification as it was incomplete. OWCP medical adviser did not evaluate the grade modifiers for clinical studies and functional history when determining appellant's final impairment rating. The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference.

The evidence relevant to appellant's claim for a schedule award includes an October 12, 1995 OWCP decision which granted him an award for a five percent permanent impairment of the right upper extremity. By decision dated March 6, 1998, OWCP granted appellant a schedule award for an additional 13 percent permanent impairment of his right upper extremity, resulting in a total 18 percent right upper extremity impairment. On December 30, 1998 it granted him a schedule award for an additional 28 percent for his right upper extremity, resulting in a total 46 percent right upper extremity impairment.

On November 12 and 19, 2009 OWCP received an undated letter from appellant requesting an additional schedule award. Appellant related that he has had three surgeries on his right shoulder and is unable to throw a ball with his daughter or do any kind of sports. He stated that he wished to be compensated for his constant fatigue, loss of mobility and constant right shoulder arthritis pain.

As instructed by the Board in its October 1, 2010 decision, OWCP requested clarification from an OWCP medical adviser regarding appellant's permanent impairment. The medical adviser concluded that appellant did not have impairment greater than that previously awarded.

By decision dated December 15, 2010, OWCP denied appellant's request for an additional schedule award.

By decision dated July 27, 2011, OWCP expanded appellant's claim to include permanent aggravation of right shoulder localized primary osteoarthritis. It authorized right shoulder joint reconstruction, which was performed on August 29, 2011.

² Docket No. 10-312 (issued October 1, 2010).

On February 28 and June 16, 2012 appellant filed claims for an additional schedule award.

By decision dated August 13, 2012, OWCP denied appellant's claims for an additional schedule award.

On August 20, 2012 counsel requested a telephonic hearing before an OWCP hearing representative, which was held on November 14, 2012. In support of his request for an increased schedule award, appellant submitted evidence.

In an August 14, 2012 report, Dr. Stuart J. Goodman, an examining Board-certified neurologist, provided a medical and employment injury history, performed a neurological examination, and diagnosed recurrent right shoulder dislocation and right shoulder localized primary osteoarthritis. Appellant stated that he continued to have pain in the right shoulder region. A review of an April 11, 2011 magnetic resonance imaging (MRI) scan revealed chromial clavicular joint degenerative changes, advanced glenohumeral osteoarthritis, and an absent biceps. A neurological examination of the right upper extremity revealed decreased range of motion; intact distal musculature; negative Romberg; normal finger to nose testing; intact touch vibration and position testing; and tenderness on movement. Based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Goodman concluded that appellant had a 26 percent right upper extremity impairment. He determined that appellant's condition resulted in a grade modifier of 3 for a severe problem using the adjustment grid and grade modifiers. Using Table 15-7, page 406 for functional history, Dr. Goodman assigned a grade modifier of 3. Next, using Table 15-8, page 408, he found a grade modifier of 3 for physical examination. Using Table 15-9, he found a grade modifier of 3 for clinical studies. Using Table 15-10, page 412, Dr. Goodman determined that appellant was a class 3 based on grade and impairment rating resulting in a 26 percent right upper extremity impairment.

By decision dated January 31, 2013, an OWCP hearing representative affirmed the denial of appellant's claim for an additional schedule award.

On January 13 and February 10, 2014 appellant filed claims for a schedule award.

By decision dated April 7, 2014, OWCP denied appellant's claim for an additional schedule award.

On April 21, 2014 OWCP received appellant's request for reconsideration. He argued that his disability rating should be increased as he had another surgery and severe arthritis as well as atrophy and numbness in his shoulder. Appellant also argued that he has been in constant pain since the injury and should be compensated for his loss of mobility and pain.

By decision dated May 23, 2014, OWCP denied reconsideration of the merits.

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of FECA³ and section 10.404 of the implementing federal regulations,⁴ schedule awards are payable for permanent impairment of specified body members, functions or organs. FECA, 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 implementing regulations as the appropriate standard for evaluating schedule losses.⁵

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).⁶ Under the sixth edition, the evaluator identifies the impairment for the Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).⁷ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁸

ANALYSIS -- ISSUE 1

Appellant has been compensated for a total right arm impairment of 46 percent. On January 13 and February 10, 2014 he filed claims for an increased schedule award due to his accepted work injuries.

The Board finds that appellant has not submitted any medical evidence showing that he has more than a 46 percent permanent impairment of his right upper extremity, for which he received schedule awards. The most recent evidence regarding appellant's claim for an increased schedule award is an August 14, 2012 report by Dr. Goodman, an examining Board-certified neurological surgeon, which contains a rating for permanent impairment of appellant's right upper extremity of 26 percent, which does not exceed the 46 percent impairment for which he has already been compensated. Using the sixth edition of the A.M.A., *Guides*, Dr. Goodman determined that appellant's condition resulted in a grade modifier of 3 for a severe problem using the adjustment grid and grade modifiers. Using Table 15-7, page 406 for functional history, he assigned a grade modifier of 3. Next, using Table 15-8, page 408, Dr. Goodman found a grade modifier of 3 for physical examination. Using Table 15-9, he found a grade modifier of 3 for clinical studies. Using Table 15-10, page 412, Dr. Goodman determined appellant was a class 3 based on grade and impairment rating resulting in a 26 percent right upper extremity impairment.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *D.J.*, 59 ECAB 620 (2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁶ A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

⁷ A.M.A., *Guides* (6th ed. 2009), pp. 383-419.

⁸ *Id.* at page 411.

The Board finds that Dr. Goodman correctly calculated grade modifier values and applied the net adjustment formula. Thus, the medical evidence does not establish that appellant is entitled to an additional schedule award as he had previously been granted a schedule award for 46 percent right upper extremity impairment.

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. Appellant has not provided any argument or medical evidence supporting his request for an increased schedule award. Thus, OWCP properly denied his request.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁹ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁰ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹¹ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹²

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.

ANALYSIS -- ISSUE 2

On April 7, 2014 OWCP denied appellant's request for an additional schedule award for his right shoulder conditions. On April 21, 2014 it received his request for reconsideration of this decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant argued that he has been in constant pain since the injury and should be compensated for his loss of mobility and pain. He raised this argument in a prior reconsideration request in November 2012. Moreover, the underlying issue

⁹ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

¹⁰ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

¹¹ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

¹² 20 C.F.R. § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

in this case is whether appellant submitted sufficient medical evidence to establish that he had more than a 46 percent right upper extremity permanent impairment. As this is a medical issue it must be addressed by relevant medical evidence.¹³ A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit such evidence in support of his request. He, therefore, did not satisfy this criterion.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant has not established that he is entitled to an additional schedule award. The Board further finds that OWCP properly denied appellant's request for further review of the merits of his 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 May 23 and April 7, 2014 are affirmed.

Issued: June 26, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

¹³ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).