

to include right elbow ulnar nerve compression neuropathy. Appellant filed a claim for a schedule award.

In a July 11, 2002 report, Dr. Nicholas Diamond, an attending family practitioner, provided a history of appellant's condition and physical findings on examination. He diagnosed a post-traumatic right elbow contusion and abrasion with residual pronator compartment syndrome caused by his April 23, 2001 employment injury. Dr. Diamond determined that appellant had a 59 percent permanent impairment of the right upper extremity based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). This impairment estimate was based on 30 percent for right grip strength deficit according to Table 16-34 at page 509, 9 percent for 4/5/ motor strength deficit of the right pronators, 31 percent for sensory deficit of the right median nerve according to Tables 16-11 and 16-15 at page 492 and 3 percent for pain-related impairment, according to Figure 18-1 at page 574. He stated that appellant had reached maximum medical improvement as of July 11, 2002.

In a report dated February 18, 2003, Dr Gregory S. Maslow, a Board-certified orthopedic surgeon and an Office referral physician, provided a history of appellant's condition and physical findings on examination and diagnosed a right elbow abrasion and a contusion or stretch injury at the right elbow ulnar nerve with resultant ulnar neurapraxia. He determined that appellant had a 34 percent impairment of the right upper extremity which included 3.5 percent for sensory deficit and 32 percent for motor deficit according to Tables 16-10, 16-11 and 16-15 of the A.M.A., *Guides*. In a supplemental report dated April 1, 2003, Dr. Maslow stated that an electromyogram and nerve conduction study performed on March 11, 2003 confirmed ulnar compression neuropathy and opined that appellant's impairment would be decreased with surgical intervention. He stated that the medial nerve entrapment at the carpal tunnel was not causally related to appellant's April 23, 2001 employment injury.

In order to resolve the conflict in the medical opinion evidence between Dr. Diamond and Dr. Maslow regarding a diagnosis of appellant's condition and the degree of permanent impairment in his right upper extremity, the Office referred appellant, together with the case record, statement of accepted facts and a list of questions, to Dr. Howard Zeidman, a Board-certified orthopedic surgeon.

In an October 16, 2003 report, Dr. Zeidman provided a history of appellant's condition and physical findings on examination and diagnosed right elbow ulnar nerve compression neuropathy. He stated that appellant had no sensory loss and intermittent weakness. Dr. Zeidman stated:

“[T]he difference between Dr. Maslow's findings and my findings at this time are probably consistent with the difference in date of examination, as well as a probable progression of [appellant's] problem. Dr. Maslow did not notice any intrinsic atrophy and first dorsal interosseous muscle atrophy is evident at this time.

“I do not believe [appellant] has achieved maximum medical improvement; in fact, he appears to be slowly losing function in the hand. I would certainly agree

with Dr. Maslow's comments that surgical decompression would be an appropriate consideration....

"Dr. Maslow's use of the Tables 16-10, 11 and 15 are appropriate. However, at this time, I find no sensory loss on examination, but with [appellant's] history and previous reports by Dr. Maslow, I would feel that [G]rade [4] is appropriate. The percentage of sensory deficit of 10 percent multiplied by the maximum percent upper impairment of 7 percent would give a 1 percent loss on a sensory basis.

"In a similar manner, the [G]rade [4] loss of muscle function is appropriate, with a motor deficit of 25 percent related to this and a maximum according to Table 16-15 of 46 percent, which multiplied would come to 12 percent. A combined figure would then be 12 percent impairment for the right upper extremity.

"I do not feel [appellant] has reached the state of maximum medical improvement, but that additional treatment consisting of surgical decompression would be indicated."

By decision dated January 26, 2004, the Office denied appellant's schedule award claim on the grounds that the weight of the medical evidence, as represented by the report of Dr. Zeidman, the impartial medical specialist, did not establish that he had reached maximum medical improvement. Therefore, he was not eligible for a schedule award for permanent impairment.

Appellant requested a hearing that was held September 28, 2004. Appellant testified that physical therapy had not improved his right elbow condition but he had decided not to undergo surgery because no physician had been able to assure him that his condition would improve.

By decision dated December 7, 2004, the Office hearing representative affirmed the January 26, 2004 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² sets 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 to 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 regulation as the appropriate standard for evaluating schedule losses.

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

It is a well-settled rule that maximum medical improvement arises at the point at which the injury has stabilized and will not improve further. This determination is factual in nature and depends primarily on the medical evidence.³ The determination of maximum medical improvement is not to be based on surmise or prediction of what may happen in the future.⁴ A schedule award is appropriate where the physical condition of an injured member has stabilized, despite the possibility of an eventual change in the degree of functional impairment in the member.⁵

Although the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence.⁶

ANALYSIS

The Office properly determined that there was a conflict in the medical opinion evidence between Dr. Diamond and Dr. Maslow as to the diagnosis of appellant's condition and the degree of permanent impairment of his right upper extremity. Section 8123(a) of the Act provides that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁷ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁸

Dr. Zeidman, the impartial medical specialist, provided a history of appellant's condition and physical findings on examination and diagnosed right elbow ulnar nerve compression neuropathy. He provided his determination of appellant's right upper extremity impairment but stated: "I do not feel [appellant] has reached the state of maximum medical improvement, but that additional treatment consisting of surgical decompression would be indicated."

The Board finds that the report of Dr. Zeidman requires further clarification. It is not clear from his report whether Dr. Zeidman found that appellant's medical condition had not stabilized at the time of his examination or whether he was predicting that it would improve after surgical intervention.⁹ He did not provide a full explanation on the issue of maximum medical improvement. Dr. Zeidman did not provide any discussion as to whether appellant's permanent

³ *Peter C. Belkind*, 56 ECAB ___ (Docket No. 05-655, issued June 16, 2005).

⁴ *See Delmer Jones*, 28 ECAB 39 (1976).

⁵ *Santo Panzica*, 15 ECAB 458 (1964).

⁶ *Willie James Clark*, 39 ECAB 1311 (1988).

⁷ 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁸ *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

⁹ *See John A. Solesbee*, Docket No. 04-82 (issued February 13, 2004) (the Board found that it was unclear whether the examining physician found that the claimant's condition had not stabilized or whether he was predicting possible improvement after surgery).

impairment would improve and stabilize only after surgery. Appellant testified that he declined surgery because his physicians could not advise him of expected improvement following surgery. A claimant does not have to undergo surgery, even if recommended, before a finding of maximum medical improvement can be made if in fact the condition has stabilized.¹⁰ Therefore, the Office improperly denied appellant's schedule award based on the report of Dr. Zeidman. The Office should request Dr. Zeidman to clarify his opinion on maximum medical improvement in light of the fact that appellant has elected not to undergo surgery.

CONCLUSION

The Board finds Dr. Zeidman's report requires further clarification. This case must be remanded for further development. On remand, the Office should refer appellant to Dr. Zeidman for an examination and evaluation of the permanent impairment of his right upper extremity and a supplemental report in support of his determination regarding maximum medical improvement.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 7, 2004 is set aside and the case is remanded for further action consistent with this decision.

Issued: August 17, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹⁰ See *Leisa D. Vassar*, 40 ECAB 1287 (1989).