United States Department of Labor
Employees' Compensation Appeals Board

G.S, Appellant	)	
and	)	**Docket No. 07-1867**
	)	**Issued: December 10, 2007**
DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS, Huntington, WV, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 6, 2007 appellant filed a timely appeal from the January 8 and May 16, 2007 merit decisions of the Office of Workers' Compensation Programs awarding him a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this appeal.

ISSUES

The issues are: (1) whether appellant has more than a five percent permanent impairment of his left upper extremity and more than a three percent impairment of his right upper extremity; and (2) whether the Office correctly determined the pay rate in issuing appellant's schedule award payment.

FACTUAL HISTORY

On October 4, 2004 appellant, then a 57-year-old ironworker, filed a claim alleging that he developed carpal tunnel syndrome as a result of repetitive work activities. The Office

accepted his claim for bilateral carpal tunnel syndrome. Appellant underwent a right median nerve release on September 14, 2004 and a left median nerve release on February 14, 2005.

On October 3, 2005 appellant filed a claim for a schedule award. By letter dated October 18, 2005, the Office asked appellant to substantiate his schedule award claim of permanent partial impairment by providing a physician's report which contained a rationalized opinion on the degree of permanent impairment and as to whether he had reached maximum medical improvement.

Appellant submitted a December 20, 2005 work capacity evaluation from Dr. James Duthie, a treating physician, who indicated that appellant could work eight hours per day, provided that he was not required to use his hands and that he had not yet reached maximum medical improvement. He also submitted an August 23, 2005 electromyogram (EMG) report, which revealed "severe compression of left median nerve in the carpal tunnel" and moderate compression of right median nerve in the carpal tunnel."

By decision dated January 19, 2006, the Office denied appellant's claim on the grounds that the evidence established that he had not reached maximum medical improvement. On February 13, 2006 appellant requested an oral hearing. At the May 23, 2006 hearing, appellant expressed his belief that he had reached maximum medical improvement and stated that he would submit a doctor's report to that effect. The hearing representative indicated that the record would remain open for 30 days for submission of additional evidence.

Appellant submitted a letter dated May 26, 2006 from Dr. Duthie, who indicated that appellant still suffered residuals from his accepted condition. Dr. Duthie opined that appellant had reached maximum medical improvement.

By decision dated July 18, 2006, the hearing representative affirmed the Office's January 19, 2006 decision denying appellant's request for a schedule award, on the grounds that he had not reached maximum medical improvement at that time. However, in light of the medical evidence establishing that maximum medical improvement had been reached as of May 26, 2006, he remanded the case for further development of the medical evidence.

By letter dated July 26, 2006, the Office asked Dr. Duthie to provide a report containing an opinion as to whether appellant had reached maximum medical improvement, and on the degree of appellant's permanent impairment, based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.* The record does not contain a response from Dr. Duthie.

On August 22, 2006 the Office referred appellant, together with a statement of accepted facts and the entire medical record, to Dr. Robert W. Lowe, a Board-certified orthopedic surgeon, for a second opinion evaluation and an opinion as to the degree of permanent impairment to appellant's upper extremities.

On September 28, 2006 appellant requested reconsideration of the July 18, 2006 decision. He contended that the evidence of record established that he had reached maximum medical improvement; that, pursuant to Dr. Singh's August 23, 2005 report, he had "severe left median nerves and moderate right median nerves" that should qualify him for "maximum percentage left

hand and somewhere 50 [to] 70 percent of maximum percentage in the right hand;" and that examination by another doctor was a waste of money.

In a September 22, 2006 work capacity evaluation, Dr. Lowe stated that appellant was able to work eight hours per day with restrictions, which limited repetitive wrist and elbow movements to two hours per day and precluded climbing or lifting more than 25 pounds. Appellant was advised to take 15-minute breaks every 2 hours.

In a September 22, 2006 narrative report, Dr. Lowe agreed with Dr. Duthie that appellant had reached maximum medical improvement as of May 26, 2006. He reviewed the medical record and provided findings on examination. In the right hand, Dr. Lowe noted thickening of the distal interphalangeal (DIP) joints with a maximum of 15 degrees flexion; in the left hand, the second DIP joint flexed only to 5 degrees. Range of motion testing of the bilateral wrists revealed: dorsiflexion -- 52 degrees; palmar flexion -- 65 degrees; adduction -- 25 degrees abduction 30 degrees. Metacarpophalangeal joints flexed at 90 degrees. Appellant was able to make a near-normal grip with his fingers, limited by motion of the DIP, which had arthritis. Phalen's test was essentially negative bilaterally. Tinel's sign was positive on the right and negative on the left. The two-point discrimination test for sensation showed sensation relatively intact. Dr. Lowe noted that, "if anything, [appellant] has less sensation in the ulnar nerve distribution than medial distribution in the right hand; left hand sensation is normal." He stated that appellant was status post bilateral carpal tunnel syndrome (CTS) with persistent positive nerve conduction studies and mild changes in the right ulnar nerve and mild decreased sensation in the ulnar nerve distribution in the right hand. Dr. Lowe indicated that appellant did not have reflex sympathetic dystrophy or limitation of motion in excess of the normal arthritic condition of the injury. He noted that he did not give a "residual" for a sensory deficit in the ulnar nerve distribution in the right hand, in that the two-point discrimination was, at times, normal. In response to the Office's question as to whether appellant had residuals from arthritis that contributed to his impairment, Dr. Lowe stated that he did have gout and "nearly stiff DIP joints." Referring to page 495 of the A.M.A., *Guides*, he opined that appellant had a three percent right upper extremity impairment and a five percent left upper extremity impairment.

On October 19, 2006 an Office medical adviser recounted Dr. Lowe's findings and determined that appellant had a five percent impairment of his left upper extremity and a three percent impairment of his right upper extremity. He concluded that the date of maximum medical improvement was May 26, 2006.

The record contains a copy of a November 27, 2006 memorandum of a telephone call reflecting that appellant's hourly wage on "DDB (October 4, 2003)" was $22.12. The record also contains the second page of an undated CA-7 form indicating that appellant took leave without pay from October 4, 2003 to July 24, 2004.

In a decision dated January 8, 2007, the Office granted appellant a schedule award for an eight percent impairment to his upper extremities (five percent -- right; three percent -- left). The Office determined that maximum medical improvement occurred on May 26, 2006. The period of the award was from May 26 to November 16, 2006 (24.96 weeks). The effective date-of-pay rate was October 4, 2003, with a weekly pay rate of $887.78.

On February 26, 2007 appellant requested reconsideration. He contended: that his left hand was "worse" than his right hand, and that he should receive the "maximum percentage" for his left hand, pursuant to Dr. Singh's August 23, 2005 report; that the date of maximum medical improvement should be the date of his respective surgeries; that his pay rate for schedule award purposes should be based on his work schedule, which included overtime and shift differential for evenings worked; and that he should be reimbursed for annual leave he was required to use. Appellant submitted a time and attendance sheet reflecting days missed from October 3, 2003 through July 24, 2004. He also submitted a copy of Dr. Singh's August 23, 2005 EMG report.

By decision dated May 16, 2007, the Office denied modification of the January 8, 2007 decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act[1] authorizes the payment of schedule awards for the loss, or loss of use, of specified members, organs or functions of the body. Such loss, or loss of use, is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[2]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for bilateral carpal tunnel syndrome. Appellant underwent a right carpal tunnel release on September 14, 2004 and a left carpal tunnel release on December 14, 2005. He requested a schedule award on October 3, 2005. The Board finds that this case is not in posture for a decision, as further development of the medical evidence is required.

Chapter 16 of the A.M.A., *Guides* provides the framework for assessing upper extremity impairments.[3] With regard to carpal tunnel syndrome, the A.M.A., *Guides* provides that, if after an optimal recovery time following surgical decompression, an individual continues to complain of pain, paresthesias, and/or difficulties in performing certain activities, three possible scenarios can be present:

> "1. Positive clinical findings of median nerve dysfunction and electrical conduction delay(s): the impairment due to residual [carpal tunnel syndrome] is rated according to the sensory and/or motor deficits as described [in Tables 16-10a and 16-11a].
>
> "2. Normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal [electromyogram] testing of the thenar muscles: a

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001).

[3] A.M.A., *Guides* 433-521.

residual [carpal tunnel syndrome] is still present and an impairment rating not to exceed five percent of the upper extremity may be justified.

"3. Normal sensibility (two-point discrimination and Semmes-Weinstein monofilament testing), opposition strength and nerve conduction studies: there is no objective basis for an impairment rating."[4]

In order to ascertain the degree of permanent impairment to appellant's upper extremities, as well as the date of maximum medical improvement, the Office properly referred him to Dr. Lowe for a second opinion examination. The Office advised Dr. Lowe to provide his opinion based on the fifth edition of the A.M.A., *Guides*. However, Dr. Lowe's report does not resolve the issue of the degree of permanent impairment of appellant's upper extremities, as he failed to explain how he arrived at his impairment rating based upon a correct application of the A.M.A., *Guides*.[5]

Although Dr. Lowe referred to page 495, he did not specifically indicate, or discuss why, appellant fell into Category 2, rather than Category 1, of the standards for determining impairment for carpal tunnel syndrome. He provided numerous findings on examination, including range of motion measurements; however, he did not explain how those results applied to his impairment rating. Dr. Lowe indicated that appellant was status post bilateral CTS with persistent positive nerve conduction studies, and that he appeared to have two-point discrimination in both the medial and ulnar distributions of both hands "at times" and "at times not." He noted the August 23, 2005 nerve conduction study which revealed "severe compression of the left median nerve; moderate compression right median nerve." However, Dr. Lowe did not explain why Category 1 of the standards for determining impairment for carpal tunnel syndrome was not applicable to these positive clinical findings. The Office medical adviser did not clarify Dr. Lowe's report, but rather merely reiterated Dr. Lowe's findings and agreed with his conclusion that appellant was entitled to a schedule award for a five percent left upper extremity impairment and a three percent right upper extremity impairment. Based on the reports of Dr. Lowe and the medical adviser, the Board is unable to render an informed judgment as to whether the recommended impairment rating is in conformance with the protocols of the A.M.A., *Guides*.

Having undertaken further development of the medical opinion evidence by sending appellant to an Office referral physician for an impairment rating, the Office should not have issued a final decision on the matter without obtaining a medical rating, based on correct application of Office procedures and the A.M.A., *Guides*, that resolves the issue. The Board will therefore set aside the schedule award decisions and remand the case for further development of the medical evidence. On remand, the Office should refer appellant to Dr. Lowe for clarification of his September 22, 2006 report, or to another appropriate medical specialist for a thorough impairment evaluation based on correct application of the relevant sections of the A.M.A., *Guides* and Office procedures.

[4] *Id*. at 495.

[5] *See Robert Kirby*, 51 ECAB 474 (2000); *Mae Z. Hackett*, 34 ECAB 1421 (1983) (in these cases the report of the Office referral physician did not resolve the issue in the case).

The Board notes that the Office's award of five percent for the right upper extremity and three percent for the left upper extremity does not conform to the recommendations of Dr. Lowe and the Office medical adviser, who recommended ratings of five percent for the left upper extremity and three for the right upper extremity. The error was likely typographical. However, on remand the Office should clarify the correct percentages for each upper extremity, as an incorrect award at this time may affect appellant's rights to a future request for an additional schedule award.

On appeal, appellant objects to the date selected as the date of maximum medical improvement (MMI), contending that the date should coincide with the dates of his respective carpal tunnel surgeries. However, a retroactive date for MMI carries with it certain disadvantages and may result in payment of less compensation. Therefore, the Board has been reluctant to find a date of MMI which is retroactive to the award and requires persuasive proof of MMI in the selection of a retroactive date.[6] The determination ultimately rests with the medical evidence[7] and is usually considered to be the date of the evaluation by the physician which is accepted as definitive by the Office.[8] Thus, the Office improperly selected May 26, 2006 as the date of MMI, in that the date of the examination on which the Office relied in fashioning the schedule award was September 22, 2006. The Board finds, however, that the case is not in posture for a decision as to the date of MMI, as further development of the medical evidence is required.[9]

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act provides that compensation for a schedule award shall be based on the employee's monthly pay.[10] For all claims under the Act, compensation is to be based on the pay rate as determined under section 8101(4), which defines monthly pay as:

> "The monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."[11]

In applying section 8101(4), the statute requires the Office to determine monthly pay by determining the date of the greater pay rate, based on the date of injury, date of disability or the

[6] *J.C.*, 58 ECAB ___ (Docket No. 06-1018, issued January 10, 2007).

[7] *L.H.*, 58 ECAB ___ (Docket No. 06-1691, issued June 18, 2007).

[8] *Mark Holloway*, 55 ECAB 321, 325 (2004).

[9] The Board notes that appellant's request for reimbursement for annual leave taken is not relevant to the schedule award issue.

[10] 5 U.S.C. § 8107.

[11] 5 U.S.C. § 8101(4).

date of recurrent disability. The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).[12]

Section 8114(d) of the Act provides that average annual earnings are determined: (1) if the employee worked in the employment in which the employee was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay -- (A) was fixed, the average annual earnings are the rate of pay; or (B) was not fixed, the average annual earnings are the product obtained by multiplying the daily wage for the particular employment or the average thereof if the daily wage has fluctuated, by 300 if the employee was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week, and 260 if employed on the basis of a 5-day week.[13]

ANALYSIS -- ISSUE 2

The Board has duly reviewed the case record and concludes that the Office did not properly determine appellant's pay rate for computation of his schedule award.

The Office utilized appellant's monthly pay at the time his disability began, October 4, 2003, as the basis for determination of his pay rate.[14] However, in all situations, including those involving a schedule award, compensation is to be based on the pay rate either at the time of injury, the rate at the time disability for work begins, or the rate at the time of recurrence of disability of the type described in section 8101(4) of the Act, whichever is greater.[15] The Office's selection of the date of disability for calculation of monthly pay, without evaluation of whether date-of-injury monthly pay would be greater, constitutes error.[16]

In schedule award claims where an injury is sustained over a period of time, as in this case, to determine the date of injury, the Office must ascertain the date of last exposure to employment factors, as well as the date of the medical evaluation which substantiates the degree of permanent impairment.[17] Where exposure to work factors continues, as in this case, the date of injury is the date of the relevant medical examination, *i.e.*, the date of the medical examination upon which the extent of permanent impairment has been determined.[18] The Board finds that the Office improperly determined appellant's pay rate based upon his monthly pay on the date of disability, without evaluation of monthly pay on the date of injury as described above.

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[12] *See Robert A. Flint*, 57 ECAB ___ (Docket No.05-1106, issued February 7, 2006).

[13] 5 U.S.C. § 8114(d).

[14] The record contains a copy of a memorandum of a telephone call dated November 27, 2006, reflecting that appellant's wage on "DDB (October 4, 2003)" was $22.12. The record also contains the second page of an undated CA-7 form indicating that appellant took leave without pay from October 4, 2003 to July 24, 2004.

[15] *See Charles P. Mulholland*, 48 ECAB 604 (1997).

[16] *Barbara A. Dunnavant*, 48 ECAB 517 (1997).

[17] *Id.; Leonard E. Redway*, 28 ECAB 242 (1977).

[18] *Id.*

Appellant contends that his pay rate should be calculated based on his actual earnings, which were not fixed, and which included substantial overtime pay and shift differential for evenings worked. The evidence of record is insufficient to determine appellant's annual rate under section 8114(d) of the Act. The Board has long recognized in interpreting the statute for pay rate purposes that the objective is to arrive at as fair an estimate as possible of the claimant's future earning capacity and that this can best be accomplished by considering appellant's employment activities during the year preceding the injury.[19] With the exception of information provided by appellant, the record is devoid of any evidence showing the number of hours worked in the year prior to his injury. Given the circumstances of this case, the Office should obtain further information to properly calculate appellant's average annual earnings, once the appropriate date of injury is determined.

CONCLUSION

The Board finds that this case is not in posture for decision. The case is remanded for further development of the medical evidence and evidence relating to appellant's pay rate.

ORDER

IT IS HEREBY ORDERED THAT the May 16 and January 8, 2007 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this opinion.

Issued: December 10, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[19] *See Billy Douglas McClellan*, 46 ECAB 208 (1994); *John D. Williamson*, 40 ECAB 1179 (1989); *Wendell Alan Jackson*, 37 ECAB 118 (1985); *Irwin E. Goldman*, 23 ECAB 6 (1971).