United States Department of Labor
Employees' Compensation Appeals Board

J.P., Appellant	)	
and	)	**Docket No. 08-832**
	)	**Issued: November 13, 2008**
U.S. POSTAL SERVICE, POST OFFICE, City of Industry, CA, Employer	)	

Appearances:
Thomas L. Martin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 22, 2008 appellant filed a timely appeal from schedule award decisions of the Office of Workers' Compensation Programs dated April 3 and November 28, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUE

The issue is whether appellant has more than a 20 percent impairment of the right arm for which he received a schedule award.

FACTUAL HISTORY

On October 21, 2004 appellant, then a 53-year-old distribution clerk, sustained injury to his neck while pulling down letter mail. He stopped work and was seen that day by Dr. Ralph N. Steiger, a Board-certified orthopedic surgeon. On December 20, 2004 the Office accepted that appellant sustained an employment-related cervical strain. Appellant returned to part-time limited duty four hours a day on December 6, 2004 and he received wage-loss compensation for

four hours a day. He again stopped work on January 20, 2005, returning to four hours of limited duty on May 24, 2005.[1]

The Office referred appellant to Dr. J. Pierce Conaty, Board-certified in orthopedic surgery, for a second opinion evaluation. By report dated January 26, 2005, Dr. Conaty diagnosed a C7-T1 herniated disc with radiculopathy on the right. He recommended surgery and provided restrictions to appellant's physical activity. Dr. Conaty advised that appellant could return to limited duty for four hours a day. On February 1, 2005 the Office accepted that appellant sustained an employment-related herniated disc at C7-T1.[2]

The Office referred appellant to Dr. H. Harlan Bleecker, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an October 24, 2006 report, Dr. Bleecker provided findings on examination, including range of motion and motor and sensory testing. He advised that maximum medical improvement had not been reached because the accepted conditions could be treated surgically. Dr. Bleecker recommended right shoulder surgery and an anterior discectomy and fusion at C7-T1. He agreed that appellant could not perform his date-of-injury position but could work four hours a day with physical restrictions.

On February 15, 2007 Dr. Steiger reviewed the report of Dr. Bleecker. He disagreed with the opinion that appellant had not reached maximum medical improvement. Dr. Steiger noted that appellant elected not to undergo surgery. He stated, "I believe that the patient has reached maximum medical improvement; however, his cervical spine condition has not resolved and will never resolve as he has permanent findings in the cervical spine."

On March 23, 2007 an Office medical adviser reviewed the medical evidence and stated that maximum medical improvement was reached on October 24, 2006, the date of Dr. Bleecker's report. The Office medical adviser applied the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*)[3] to find a right upper extremity impairment of 20 percent and no impairment to the left arm.[4]

By decision dated April 3, 2007, the Office granted appellant a schedule award for 20 percent impairment to the right upper extremity. The date of maximum medical improvement was October 24, 2006 and the award ran from March 18, 2007 to May 27, 2008.

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[1] Appellant has additional accepted claims for a right shoulder injury, Office file number xxxxxx829 and a lumbar strain/sprain, Office file number xxxxxx232. The instant claim was adjudicated by the Office under file number xxxxxx241.

[2] The record reflects that on October 18, 2005 the Office denied appellant's claim for wage-loss compensation from January 21 to May 23, 2005. On January 22, 2007 the Office denied modification of this decision. Appellant did not seek an appeal from these decisions to the Board.

[3] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[4] The Office medical adviser found that appellant had a 12 percent total impairment for loss of shoulder motion and a 9 percent sensory loss which, when combined, yielded a 20 percent right upper extremity impairment.

In a May 2, 2007 letter, appellant's attorney stated that appellant was surprised to receive the schedule award since he had not filed a claim. Appellant was concerned that the award would displace his four hours of wage-loss compensation. In a June 5, 2007 letter, the Office noted that Dr. Steiger, his attending physician, had advised that appellant was at maximum medical improvement as he declined surgical treatment of his cervical condition. It noted that appellant could request a hearing.

A hearing was held on September 25, 2007. Counsel stated that the impairment rating was not at issue. Rather, he argued that maximum medical improvement had not been reached. He also contended that, under *Marie J. Born*,[5] appellant would be adversely affected because he was only working four hours daily and, due to the schedule award, he would not receive compensation for four hours of wage loss a day. Appellant testified regarding his condition and reiterated that he did not want to undergo surgery for either his neck or right shoulder.

By decision dated November 28, 2007, an Office hearing representative affirmed the April 3, 2007 schedule award decision.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[6] and section 10.404 of the implementing federal regulation,[7] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, 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*[8] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[9]

It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.[10] Office procedures provide that, to support a schedule award, the file must contain competent 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 to include, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment and the percentage of

[5] 27 ECAB 623 (1976); *petition for recon denied*, 28 ECAB 89 (1976).

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] A.M.A., *Guides*, *supra* note 3.

[9] *See Joseph Lawrence, Jr., supra* note 3; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[10] *Tammy L. Meehan*, 53 ECAB 229 (2001).

impairment should be computed in accordance with the fifth edition of the A.M.A., *Guides*. The procedures further 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.[11]

ANALYSIS

The Board finds that the case is not in posture for decision.

Dr. Bleecker provided range of motion measurements for appellant's right shoulder and the Office referred his report to an Office medical adviser for review.[12] Dr. Bleecker found 90 degrees of abduction which, under Figure 16-43 represents four percent impairment;[13] forward flexion of 90 degrees which, under Figure 16-40 is six percent impairment;[14] and external rotation of 90 degrees, which under Figure 16-46 represents no impairment. However, his measurement for internal rotation was described as "hand to sac joint," which the Office medical adviser found represented two percent impairment.[15] The Board notes that Dr. Bleecker did not express the loss of internal rotation in terms of active degrees of motion and it is not readily apparent how the medical adviser applied Figure 16-46 to determine that such physical description resulted in two percent impairment. For this reason, the Board cannot confirm the 12 percent total loss in range of right shoulder motion as found by the medical adviser.

The Office medical adviser also applied Table 16-13, page 489, to determine impairment to the right upper extremity due to combined motor and sensory deficits. Table 16-13 provides a maximum combined motor and sensory impairment of the C7 nerve of 38 percent. The medical adviser determined that the extent of impairment was Grade 4, or 25 percent under Tables 16-10 and 16-11, which totaled 9 percent impairment. However, the Board notes that multiplying the maximum impairment of 38 percent under Table 16-13 by the 25 percent grade results in 9.5 percent impairment, which under Office procedures should be rounded to 10 percent.[16] For these reasons, the Board finds that the medical evidence of record does not support the extent of permanent impairment determined by the Office. The case will be remanded to the Office for further development on this issue.

On appeal, counsel for appellant notes that appellant was in receipt of wage-loss compensation for the four hours a day he did not work and had not filed a claim for a schedule

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Evaluation of Schedule Awards*, Chapter 2.808.6(b-d) (August 2002).

[12] *See Thomas J. Fragale*, 55 ECAB 619 (2004).

[13] A.M.A., *Guides*, *supra* note 3 at 477.

[14] *Id*. at 476.

[15] *Id*. at 479.

[16] The policy of the Office is to round the calculated percentage of impairment to the nearest whole number. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3b (June 2003). Fractions are rounded up from .50. *See Carl J. Cleary*, 57 ECAB 563 (2006).

award. The Board notes that, under Office procedures, a schedule award may be made when it can be medically determined that the claimant has reached maximum medical improvement.[17] Dr. Bleecker opined that appellant had not reached maximum medical improvement because he required surgery of both the right shoulder and an anterior discectomy and fusion at C7-T1. However, Dr. Steiger disagreed on this point noting that appellant declined undergoing surgery in treatment of his accepted condition. Therefore, the attending physician advised that maximum medical improvement had been reached. This was reiterated by appellant at the September 25, 2007 hearing when he stated that he did not want surgery of his neck or right shoulder. Therefore, the weight of medical opinion from his attending physician establishes that appellant reached maximum medical improvement in the treatment of his accepted cervical condition.

On appeal, counsel also contends that *Marie J. Born* is applicable to the facts of this case as appellant was in receipt of wage-loss compensation for four hours a day at the time the schedule award was issued.[18] In the *Born* case, the Board found that the employee was adversely affected because the Office retroactively converted wage-loss compensation benefits paid into a schedule award. Such is not the situation here. In the April 3, 2007 decision, the Office noted that maximum medical improvement was reached on October 24, 2006. In this case, the period of the award ran from April 18, 2007 to May 27, 2008 because it was disadvantageous to convert compensation payments already made for wage loss since October 24, 2006 into schedule award benefits. The schedule award granted in this case was not retroactive as found in *Born*. At the expiration of his award, appellant is entitled to the reinstatement of his wage-loss compensation benefits.[19]

CONCLUSION

The Board finds that the case is not in posture for decision.

[17] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(1) (June 2003).

[18] *Marie J. Born, supra* note 5.

[19] If payment for wage-loss disability is interrupted to make a schedule award, such payments must be resumed at the end of the schedule award. *See Goldie Washington*, 31 ECAB 239 (1979).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 3, 2007 be set aside and the case remanded for further development consistent with this decision.

Issued: November 13, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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