

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DESIDERIO MARTINEZ and DEPARTMENT OF THE ARMY,
DIRECTORATE OF PUBLIC WORKS, Fort Sill, OK

*Docket No. 02-1567; Submitted on the Record;
Issued December 5, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant had more than an 18 percent permanent impairment of the right upper extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On April 30, 1998 appellant, then a 50-year-old boiler plant equipment mechanic, sustained a right shoulder musculoskeletal strain in the performance of duty.

On October 14, 1999 appellant sustained a work-related right shoulder rotator cuff tear.

In a report dated November 20, 2001, Dr. Ronald C. Jones, appellant's attending orthopedist, examined appellant and noted right shoulder stiffness and soreness, deep and constant pain in the shoulder and forearm and decreased range of motion. He stated that appellant had a 19 percent permanent impairment of the right upper extremity according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (Pages 475-79) consisting of a 10 percent impairment due to abduction of 90 degrees (4 percent), adduction of 10 degrees (1 percent), flexion of 120 degrees (4 percent) and extension of 30 degrees (1 percent). Dr. Jones also found a 9 percent impairment due to Grade 4 flexion weakness (6 percent) and Grade 4 abduction weakness (3 percent) according to Table 16-35 at page 510 of the A.M.A., *Guides*. He found no motor dysfunction, sensation loss, vascular disorder or decreased internal or external rotation. Dr. Jones stated that appellant had not reached maximum medical improvement and wished to receive additional treatment that might improve his condition.

In a memorandum dated December 13, 2001, Dr. R. Meador, the Office's district medical adviser, determined that appellant had an 18 percent permanent impairment of the right upper extremity based on the December 20, 2001 report of Dr. Jones and the fifth edition of the A.M.A., *Guides*. His determination of impairment corresponded with Dr. Jones' report with the exception that he noted that Dr. Jones had incorrectly added the two impairment percentages, rather than using the Combined Values Chart in the A.M.A., *Guides*.

By decision dated December 20, 2001, the Office granted appellant a schedule award for 56.16 weeks based on an 18 percent permanent impairment of the right upper extremity.

In a letter dated January 22, 2002, appellant requested reconsideration.

In support of his request for reconsideration, appellant submitted evidence previously considered by the Office.

By decision dated January 31, 2002, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted did not warrant reopening the case for a further merit review.¹

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

The schedule award provisions of the Federal Employees' Compensation Act² and its implementing regulation³ 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, 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. It is well settled that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of his employment injury and that maximum improvement means that the physical condition of the injured member has stabilized and will not improve further.⁴

In a report dated November 20, 2001, Dr. Jones, appellant's attending orthopedist, examined appellant and noted right shoulder stiffness and soreness, deep and constant pain and decreased range of motion. He stated that appellant had a 19 percent permanent impairment of the right upper extremity according to the fifth edition of the A.M.A., *Guides* (Pages 475-79) consisting of a 10 percent impairment due to abduction of 90 degrees (4 percent), adduction of 10 degrees (1 percent), flexion of 120 degrees (4 percent) and extension of 30 degrees (1 percent) and a 9 percent impairment due to Grade 4 flexion weakness (6 percent) and Grade 4 abduction weakness (3 percent) according to Table 16-35 at page 510. However, Dr. Jones stated that appellant had not reached his level of maximum medical improvement and wished to receive additional medical treatment that might improve his condition. As noted above, the period covered by a schedule award commences on the date that the employee reaches maximum

¹ The record contains additional evidence that was not before the Office at the time it issued its January 31, 2002 and December 20, 2001 decisions. The Board has no jurisdiction to review this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989).

medical improvement from the residuals of his employment injury and that maximum improvement means that the physical condition of the injured member has stabilized and will not improve further. Since appellant's attending physician stated that appellant had not reached maximum medical improvement, it was premature for the Office to make a determination of appellant's permanent impairment due to his employment injury. Upon return of the case record, the Office should refer appellant either to his attending physician or to an appropriate Board-certified physician for an examination and evaluation and, if appellant has reached his level of maximum medical improvement, the physician should determine his degree of permanent impairment caused by his April 30, 1998 employment injury.

In light of the Board's resolution of the first issue, it is unnecessary to address the second issue in this case.

The decisions of the Office of Workers' Compensation Programs dated December 20 and January 31, 2001 are set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
December 5, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member