United States Department of Labor
Employees' Compensation Appeals Board

M.T., Appellant	)	
and	)	**Docket No. 06-1059**
	)	**Issued: October 31, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Portsmouth, NH, Employer	)	

Appearances:
James G. Noucas, Jr., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 3, 2006 appellant filed a timely appeal from the March 15, 2006 merit decision of the Office of Workers' Compensation Programs, granting a schedule award for an 11 percent impairment of his right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than an 11 percent impairment of his right upper extremity, for which he received a schedule award.

FACTUAL HISTORY

On June 7, 1994 appellant, then a 37-year-old mail handler, filed an occupational disease claim alleging that he injured his upper back by repeated lifting in the course of his employment. The Office accepted his claim for cervical subluxation and cervical radiculopathy. Appellant subsequently underwent an anterior cervical discectomy and fusion at C5-6 for disc herniation.

On November 18, 2005 appellant requested a schedule award. He submitted a September 28, 2005 report from Dr. Bruce R. Myers, a Board-certified physiatrist, providing an impairment rating. Dr. Myers indicated that appellant experienced residuals of his accepted cervical radiculopathy with weakness in the C6 innervated muscles of the right hand, transient numbness in the C6 nerve root, as well as cervical range of motion loss, especially to right side bend and lateral rotation. He stated that he had pain in the right cervical region, radiating up into the right shoulder at a pain level of "0-3 on a 0-10 scale" and increased discomfort with home maintenance, housework and gardening. Range-of-motion testing revealed 50 percent of flexion, 40 percent of extension, 68 percent of rotation bilaterally and 15 percent of right side flexion. Deep tendon reflexes (DTR) were ¼ at the right brachioradialis, 1+/4 right biceps, and 2/4 right triceps. Grip strength using dynamometer method in three successive trials showed 31/30/31 kilograms on the right. Sensation was intact to light touch and pinprick. Strength/manual muscle testing on the right revealed 5-/5 shoulder flexion; 5/5 extension; 5/5 internal rotation; 4+/5 external rotation; 4+/5 elbow flexion; 5/5 elbow extension; 5-/5 wrist extension;5/5 wrist flexion; 5/5 wrist supination; and 4-/4+ wrist pronation. Spurling's sign was uncomfortable, but did not radiate into the right lower extremity. Dr. Myers opined that appellant had reached maximum medical improvement (MMI) and provided two levels of impairment. Using Chapter 15 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), subheading 15.6, cervical spine, Category 4, he opined that appellant had a 25 percent impairment of the whole person. Noting that Dr. Meyers had been asked to perform a rating of the right upper extremity only, he concluded that appellant had an 8.75 percent upper extremity impairment due to strength loss using Tables 16-13 and 16-1 for cervical radiculopathy at the C6 level. He explained that the 8.75 percent rating was obtained by "using 35 percent x 25 percent, which corresponds to 8.75 percent upper extremity impairment." Noting that normal grip strength in the dominant hand for a man of appellant's age was 49 kilograms, whereas his grip strength on his right side was 31 kilograms, Dr. Myers concluded that appellant had a right hand grip strength loss index of 37 percent, which corresponded to a 20 percent upper extremity impairment. Combining the 8.75 upper extremity impairment for strength loss for cervical radiculopathy at the C6 level and the 20 percent impairment for grip strength loss, Dr. Myers concluded that appellant had a 27 percent upper extremity impairment.

The Office referred Dr. Myers' September 28, 2005 report to an Office medical adviser for review. In a February 13, 2006 report, the medical adviser concluded that appellant had an 11 percent impairment of his right upper extremity. Referencing Table 15-17 at page 424 of the fifth edition of the A.M.A., *Guides* he noted that the maximum upper extremity impairment due to sensory deficit or pain when the C6 nerve root is involved is eight percent. Referencing Table 15-15 at page 424, the medical adviser stated that Grade 4 allows 25 percent for pain that may interfere with some activities. Based on the maximum allowances under these tables, he concluded that appellant had a two percent impairment of the right upper extremity for pain (25 percent x 8 percent = 2 percent). The medical adviser noted that, pursuant to Table 15-16 at page 424, the maximum upper extremity impairment for Grade 4 weakness due to involvement of the C6 nerve root is 35 percent. Indicating that Table 15-16 allows 25 percent for mild weakness, the medical adviser concluded that appellant had a 9 percent impairment for weakness (25 percent x 35 percent = 9 percent). He found no additional impairment for diminished right grip strength, stating that any such diminution was a consequence of C6 nerve root involvement. Referring to the Combined Values Chart at page 604, the medical adviser concluded that the 2 percent impairment rating for pain combined with the 9 percent impairment rating for weakness,

resulted in an 11 percent impairment of the right upper extremity. The medical adviser further opined that the date of maximum medical improvement was March 13, 1997, the date that "the physiatrist reported that the claimant was doing well, he was working full time and he had reached an endpoint."

On March 15, 2006 the Office granted appellant a schedule award for an 11 percent impairment of his right upper extremity. The award was for 34.32 weeks, for the period March 13 through November 8, 1997.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing federal regulation,[2] 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 for all claimants, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.[3] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[4]

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[5]

It is well established that the period covered by the schedule award commences on the date that the employee reaches MMI from the residuals of the accepted employment injury. The Board has explained that MMI means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician, which is accepted as definitive by the Office.[6]

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[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404.

[3] 20 C.F.R. § 10.404(a).

[4] *See* FECA Bulletin No. 01-5 (issued January 29, 2001).

[5] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (March 1995).

[6] *See D.R.,* 57 ECAB ___ (Docket No. 06-668, issued August 22, 2006); *see also Mark A. Holloway,* 55 ECAB ___ (Docket No. 03-2144, issued February 13, 2004).

ANALYSIS

Appellant's claim was accepted for cervical subluxation and radiculopathy. He subsequently underwent an anterior cervical discectomy and fusion at C5-6 for disc herniation. A schedule award may be granted for the spine condition if the condition caused peripheral nerve damage, ultimately causing impairment of the upper extremities.[7] The Board finds that this case is not in posture for decision in that the record does not contain a probative medical opinion on the nature and extent of impairment to appellant's right upper extremity.

Dr. Myers provided a whole person impairment rating of 25 percent. However, schedule awards are not payable under the Act for whole person impairments.[8] Dr. Myers opined alternatively that appellant had a 27 percent upper extremity impairment. Applying his examination findings to Tables 16-11[9] and 16-13[10] for cervical radiculopathy at the C6 level, Dr. Myers concluded that appellant had an 8.75 percent upper extremity impairment due to strength loss. Dr. Myers explained that the 8.75 percent rating was obtained by multiplying the maximum allowable upper extremity impairment rating of 35 percent by the 25 percent deficit allowed for Grade 4 motor loss. Noting that normal grip strength in the dominant hand for a man of appellant's age was 49 kilograms, whereas appellant's grip strength on his right side was 31 kilograms, Dr. Myers concluded that he had a right hand grip strength loss index of 37 percent, which corresponded to a 20 percent upper extremity impairment. Combining the 8.75 percent upper extremity impairment for strength loss for cervical radiculopathy at the C6 level and the 20 percent impairment for grip strength loss, Dr. Myers concluded that appellant had a 27 percent upper extremity impairment. He referenced Tables 16-11 and 16-13 of the A.M.A., *Guides*; however, he did not adequately explain how he arrived at a Grade 4 classification or maximum allowable upper extremity impairment rating of 35 percent, nor did Dr. Myers explain why he applied section 16.5 rather than section 15.12 of the A.M.A., *Guides*, which would have provided for an additional impairment rating for pain.[11] Therefore, his report is of diminished probative value. Moreover, Dr. Myers improperly combined appellant's impairment rating due to strength loss under Tables 16-11 and 16-13 with a rating for grip strength loss. In that strength measurements are functional tests influenced by subjective factors that are difficult to control and the A.M.A., *Guides* for the most part is based on anatomic impairment, the A.M.A., *Guides* does not encourage the use of grip strength in an impairment rating.[12] Only in rare cases

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[7] The 1960 FECA amendments modified the schedule award provision to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Thus, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine. *See Thomas J. Engelhart*, 50 ECAB 319 (1999).

[8] *Phyllis F. Cundiff*, 52 ECAB 439 (2001).

[9] A.M.A., *Guides* 484.

[10] *Id*. at 489.

[11] *Id*. at Table 15-15.

[12] *Id*. at 508.

should grip strength be used and only when it represents an impairing factor that has not been otherwise considered adequately.[13]

The schedule award granted by the Office for impairment to appellant's upper right extremity was based upon the February 13, 2006 report of the medical adviser. The Board finds, however, that the medical adviser's impairment rating failed to conform to the fifth edition of the A.M.A., *Guides*. Referencing Table 15-17 at page 424 of the A.M.A., *Guides*, the medical adviser properly noted that the maximum upper extremity impairment due to sensory deficit or pain when the C6 nerve root is involved is eight percent. However, his reading of Table 15-15,[14] upon which he based his conclusion that appellant had a two percent impairment of the right upper extremity for pain (25 percent x 8 percent = 2 percent), is inaccurate. The medical adviser stated that a Grade 4 classification allows up to 25 percent "for pain that may interfere with some activities." However, the description of Grade 4 pain contained in Table 15-15 includes "minimal abnormal sensations of pain that is *forgotten* during activity." (Emphasis added.) The medical adviser offered no explanation as to why he assigned a Grade 4 classification to appellant's pain, rather than a Grade 3 classification, which comports with his narrative and Dr. Myers' findings. Similarly, he judged appellant's power and motor deficits to be Grade 4, "mild weakness," which allows up to 25 percent for "active movement against gravity with some resistance," pursuant to Table 15-16.[15] Noting that the maximum upper extremity impairment due to weakness when the C6 nerve root is involved is 35 percent,[16] the medical adviser concluded that appellant had a 9 percent impairment for weakness (35 percent of 25 percent = 9 percent). However, he did not address relevant information contained in the underlying report on which his rating was based. The medical adviser made only vague references to Dr. Myers' objective findings and how they related to his impairment rating. Office procedures require the Office to obtain an opinion from an Office medical adviser concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[17] In this case, the opinion of the medical adviser does not provide sufficient rationale and is of diminished probative value.

The Office medical adviser found that appellant reached MMI on March 13, 1997. The Office specified that the period of the schedule award ran from March 13 through November 8, 1997. It is well established that the period of a schedule award commences on the date that the employee reaches MMI from the residuals of the accepted employment injury. The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office.[18] The Board has noted a reluctance to find a date of MMI

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[13] *Mary L. Henninger*, 52 ECAB 408, 409 (2001).

[14] A.M.A., *Guides* 424.

[15] *Id*. at 423.

[16] *Id*. at 424, Table 15-17.

[17] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (March 1995).

[18] *See Mark Holloway, supra* note 6.

which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits.[19] The Board, therefore, requires persuasive evidence of MMI for selection of a retroactive date of MMI.[20] In this case, Dr. Myers stated in his September 28, 2005 report, "At this point in time [appellant] is at MMI." The Office medical adviser found that appellant reached MMI on March 13, 1997 stating that "on this date the physiatrist reported that the claimant was doing well, he was working full time and he had reached an endpoint." However, this falls short of providing the persuasive proof necessary to support a retroactive date of MMI.

The case will be remanded to the Office for further development of the medical evidence, as appropriate, to be followed by a *de novo* decision on appellant's upper extremity impairment and determination of the date of MMI.

CONCLUSION

The Board finds that the case is not in posture for decision and that the schedule award issued in this case must be set aside. The case will be remanded to the Office for further development of the medical evidence, as is appropriate, to determine the date of MMI and for an opinion on the extent of impairment which conforms with the A.M.A., *Guides*.

[19] *James E. Earle,* 51 ECAB 567 (2000).

[20] *Id. See also D.R., supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 15, 2006 is set aside and the case is remanded to the Office for further proceedings in accordance with this decision by the Board.

Issued: October 31, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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