United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 06-2072**
	)	**Issued: January 19, 2007**
NATIONAL AERONAUTICS & SPACE ADMINISTRATION, DRYDEN FLIGHT RESEARCH CENTER, Edwards, CA, Employer	)	

Appearances:
Marvin Kaplan, Esq., for the appellant
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 September 11, 2006 appellant filed a timely appeal of an August 29, 2006 merit decision of the Office of Workers' Compensation Programs with respect to a schedule award. 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 the Office properly issued a schedule award for a three percent permanent impairment to his left arm commencing January 5, 2005.

FACTUAL HISTORY

On April 26, 2004 appellant, then a 49-year-old aircraft mechanic, filed an occupational disease claim (Form CA-2) alleging that he sustained a cervical and left arm injury as a result of his federal employment. The Office accepted the claim for aggravation of cervical degenerative disc disease with left radiculopathy.

Appellant submitted an April 27, 2005 report from Dr. Benito Gallardo, Jr., a family practitioner, who provided a history and results on examination. With respect to permanent impairment, he identified the diagnosis-related estimates (DRE) for the cervical spine at Table 15-5 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition). Dr. Gallardo opined that appellant had an eight percent whole person impairment based on this table, with an additional three percent for a mild pain-related impairment that interfered with daily activities.

An Office medical adviser opined in a November 1, 2005 report that the report from Dr. Gallardo was not probative on the issue of permanent impairment as the spine was not a member of the body under the Federal Employees' Compensation Act. The Office referred the case for a second opinion examination by Dr. Randy Pollet, an orthopedic surgeon. In a report dated January 5, 2006, Dr. Pollet provided a history and results on examination. He identified the C7 nerve root and referred to Table 16-13 of the A.M.A., *Guides*. For sensory impairment at C7, Dr. Pollet graded the impairment as Grade 4 and indicated that appellant had a one percent impairment for sensory deficit or pain. For motor deficit, Dr. Pollet indicated that appellant had 5 percent of the maximum 35 percent, or a 2 percent impairment. The second opinion examiner concluded that appellant had a three percent left arm impairment.

An Office medical adviser reviewed the evidence and concurred with the three percent impairment in a February 3, 2006 report. The medical adviser identified Table 15-17, which also provides maximum impairments for a C7 nerve root impairment affecting the upper extremity. The medical adviser graded the sensory impairment at 10 percent of the maximum 5 percent, for a 1 percent impairment. For the motor impairment, the medical adviser graded the impairment at 5 percent of the maximum 35 percent, or 2 percent. The medical adviser also stated that the date of maximum medical improvement was the date of evaluation by Dr. Pollet, which he erroneously stated was January 5, 2005.

By decision dated March 15, 2006, the Office issued a schedule award for a three percent left arm permanent impairment. The period of the award was 9.36 weeks from January 5, 2005.

Appellant requested reconsideration by letter dated August 7, 2006. He argued that Dr. Gallardo's report was sufficient to create a conflict in the medical evidence regarding the degree of permanent impairment. By decision dated August 29, 2006, the Office denied modification of the prior decision.

LEGAL PRECEDENT

Under section 8107 of the Act[1] and section 10.404 of the implementing federal regulation,[2] 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

[1] 5 U.S.C. §§ 8101-8193.

[2] 20 C.F.R. § 10.404.

there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[3]

ANALYSIS

Appellant submitted a report from Dr. Gallardo regarding a permanent impairment. Although appellant argues that this report was in conformity with the A.M.A., *Guides*, Dr. Gallardo's opinion is of little probative value with respect to schedule awards under the Act. To be entitled to a schedule award, there must be a permanent impairment to a scheduled member of the body. Neither the Act nor its regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of "organ" under the Act.[4] Dr. Gallardo referred to Table 15-6, which is for impairments to the cervical spine, and the impairment is expressed as a whole person impairment. This table is not appropriate for a schedule award determination under the Act. Dr. Gallardo also referred to an additional three percent for pain, without citing any tables or otherwise explaining how the pain impairment was calculated. The Board finds his opinion is of diminished probative value to the issue presented.

The second opinion examiner, Dr. Pollet, found a one percent impairment for sensory deficit or pain for the C7 nerve root. Under the A.M.A., *Guides*, Table 16-13 provides a maximum impairment of 5 percent for C7 nerve root sensory deficit or pain, and 35 percent for motor deficit.[5] The impairments are graded by severity according to Table 16-10 for sensory deficit and Table 16-11 for motor deficit.[6] Dr. Pollet indicated that he would grade the impairment at five percent of the maximum impairment for sensory and motor deficit, resulting in one percent for sensory deficit and two percent for motor deficit.

The Office medical adviser concurred with the impairment rating, although he relied on Table 15-17. This table provides a similar impairment method, as Table 15-17 provides the same maximum impairments for the C7 nerve root.[7] The impairments are graded under Table 15-15 for sensory deficit and Table 15-16 for motor deficit, and these tables are similar to the tables used by Dr. Pollet.[8] The medical adviser also concluded that appellant had a three percent left arm impairment, based on one percent for sensory deficit and two percent for motor deficit.

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

[4] *See James E. Jenkins*, 39 ECAB 860 (1988); 5 U.S.C. § 8101(20).

[5] A.M.A., *Guides* 489, Table 16-13.

[6] *Id.* at 482, Table 16-10, and 484, Table 16-11.

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

[8] *Id.* at 424, Tables 15-15 and 15-16.

Based on the probative medical evidence of record, the Office properly concluded that appellant had a three percent left arm impairment. The report of Dr. Gallardo is not of sufficient probative value to create a conflict for the reasons noted above.

The Board notes that the number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). The maximum number of weeks of compensation for the loss of use of the arm is 312, therefore, appellant was entitled to three percent, or 9.36 weeks.

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.[9] The medical adviser indicated that this was the date of the examination by Dr. Pollet, but he inadvertently found that this was January 5, 2005, rather than January 5, 2006. The schedule award improperly used the January 5, 2005 date as the date of maximum medical improvement.

CONCLUSION

The probative medical evidence of record does not establish more than a three percent left arm impairment. The case will be remanded to the Office for a proper determination of the date of maximum medical improvement and the appropriate pay rate for compensation purposes. After such further development as the Office deems necessary, it should issue an appropriate decision.

[9] *Albert Valverde*, 36 ECAB 233, 237 (1984).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 29, 2006 is affirmed with respect to the number of weeks of compensation; it is set aside as to the period of the award and the case remanded for further action consistent with this decision of the Board.

Issued: January 19, 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