United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 08-1638**
	)	**Issued: January 6, 2009**
DEPARTMENT OF THE NAVY, NAVAL AVIATION DEPOT, San Diego, CA, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 20, 2008 appellant filed a timely appeal from a February 14, 2008 decision of the Office of Workers' Compensation Programs denying a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established permanent disabilities due to right hip and lumbar injuries.

FACTUAL HISTORY

The Office accepted that on February 8, 2006 appellant, then a 45-year-old sheet metal worker, sustained a lumbar sprain/strain and an open wound of the right hip and thigh when he fell five feet onto a metal platform. Appellant received emergency treatment directly after the injury to suture the wound.

In reports from March 27 to April 28, 2006, Dr. David I. Kaufer, an attending Board-certified internist, provided a history of injury. He noted significant lumbar pain, slowly

improving with medication and physical therapy. In a May 24, 2006 report, Dr. Kaufer provided permanent work restrictions. Appellant accepted a permanent modified job offer on June 25, 2007.

On January 8, 2007 appellant claimed a schedule award.

In a January 26, 2007 letter, the Office advised appellant that it was unable to determine his entitlement to a schedule award as Dr. Kaufer had not yet found the February 28, 2006 injuries permanent and stationary.

In a March 12, 2007 report, Dr. Kaufer opined that appellant "should have a permanent and stationary state concerning his lumbar area injury."

In October 26 and November 6, 2007 letters, the Office requested that appellant ask Dr. Kaufer to complete enclosed schedule award assessment forms. In response, appellant submitted a February 19, 2007 slip from Dr. Kaufer stating that appellant's lumbar injury had "attained a permanent and stationary state."

Dr. Kaufer completed the schedule award forms on November 12, 2007. He noted limited right hip motion, significant right hip pain and impairment of the lower lumbar nerve roots and decreased strength. Dr. Kaufer stated that appellant had not yet achieved maximum medical improvement of the lumbar spine or right hip injuries.

In a December 7, 2007 report, an Office medical adviser recommended referral to an orthopedic surgeon to determine if appellant had reached maximum medical improvement. On January 4, 2008 the Office referred appellant, the medical record and a statement of accepted facts to Dr. William P. Curran, a Board-certified orthopedic surgeon, for a second opinion examination. The appointment was scheduled for January 28, 2008 at 11:00 a.m. in San Diego.

In a January 28, 2008 telephone memorandum, the Office noted that appellant called the medical scheduler on January 25, 2008 stating that he would not attend the January 28, 2008 appointment. The scheduler telephoned appellant asking why he would not keep the appointment. Appellant did not respond. He did not attend the examination.

In a February 1, 2008 letter, the Office advised appellant that his appointment with Dr. Curran was rescheduled for February 19, 2008 at 9:00 a.m.

In a January 27, 2008 letter received by the Office on February 1, 2008, appellant contended that Dr. Kaufer's February 19, 2007 statement that his condition was permanent and stationary was sufficient to resolve the issue. The Office advised appellant by February 6, 2008 letter to attend the rescheduled appointment with Dr. Curran.

In February 6, 2008 telephone memoranda, the Office noted that appellant wanted to reschedule the February 14, 2008 appointment to "some time after 2:00 p.m. due to preference." It advised appellant to attend the scheduled appointment unless he had good cause for requesting a later time. Appellant telephoned the scheduler on February 11, 2008 stating that he would not attend the February 14, 2008 examination. He did not state his reason for refusal.

By decision dated February 14, 2008, the Office denied appellant's schedule award claim on the grounds that he had not established that he had reached maximum medical improvement. It found that appellant had failed to attend scheduled January 28 and February 14, 2008 second opinion examinations without good cause. The medical evidence indicated that appellant had not yet attained maximum medical improvement. Therefore, he did not establish entitlement to a schedule award.

LEGAL PRECEDENT

The schedule award provisions of the Federal Employees' Compensation Act[1] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[2]

The A.M.A., *Guides* explains that an impairment rating should not be performed until the impairment has attained maximum medical improvement.[3] Maximum medical improvement arises at the point at which an injury has stabilized and will not improve further. This determination is factual in nature and depends primarily on the medical evidence.[4] Schedule award compensation may not be paid until the date the employee reaches maximum medical improvement.[5]

ANALYSIS

The Office accepted that appellant sustained a lumbar sprain/strain and open wound of the right hip. Appellant claimed a schedule award on January 8, 2007. Dr. Kaufer, an attending Board-certified internist, opined on February 19 and March 12, 2007 that appellant had reached maximum medical improvement. However, he stated in a November 12, 2007 report that the lumbar and right hip injuries were not yet permanent and stationary. A schedule award may not be calculated until the accepted injuries attain maximum medical improvement.[6]

To determine whether appellant had attained maximum medical improvement, the Office referred appellant to Dr. Curran, a Board-certified orthopedic surgeon, for a second opinion examination. Appellant failed to attend a scheduled January 28, 2008 appointment or the rescheduled February 14, 2008 appointment. He did not state his reasons. Therefore, the Office

[1] 5 U.S.C. §§ 8101-8193.

[2] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[3] A.M.A., *Guides* 19. *See also Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

[4] *Peter C. Belkind*, 56 ECAB 580 (2005).

[5] *D.R.*, 57 ECAB 520 (2006).

[6] *Supra* note 3.

denied the schedule award claim on the grounds that he had not established the threshold element of maximum medical improvement.

The Board finds that the medical evidence does not establish that the accepted right hip and lumbar injuries were permanent and stationary. Dr. Kaufer's conflicting opinions are insufficient to establish maximum medical improvement. Therefore, the Office properly denied the schedule award claim as appellant did not submit sufficient evidence establishing that the accepted injuries were permanent and stationary.

CONCLUSION

The Board finds that appellant has not established that accepted right hip and lumbar injuries entitled him to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 14, 2008 is affirmed.

Issued: January 6, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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