United States Department of Labor
Employees' Compensation Appeals Board

R.J., Appellant	)	
	)	**Docket No. 09-613**
and	)	**Issued: October 16, 2009**
	)	
DEPARTMENT OF DEFENSE, PENTAGON, Washington, DC, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 2, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 29, 2008 which denied his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly denied appellant's claim for a schedule award.

FACTUAL HISTORY

This is the second appeal in the present case. In a March 28, 2005 decision, the Board affirmed the Office decisions dated May 20 and July 29, 2004. The Board found that appellant failed to establish that he sustained a neck strain causally related to his February 23, 2004 employment incident and that the Office properly denied his request for reconsideration without

conducting a merit review. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.[1]

Appellant subsequently requested reconsideration and, in an October 11, 2006 decision, the Office accepted appellant's claim for a cervical spine strain.

On January 27, 2007 appellant filed a claim for a schedule award. He submitted a magnetic resonance imaging scan of the cervical spine dated April 11, 2005 which revealed a broad-based left paracentral herniation of the posterior margin of the L5-S1 disc superimposed on a mild annular bulge without significant stenosis. Also submitted were reports dated January 10 to March 19, 2007 from Dr. Thomas Dunn, a Board-certified orthopedist, who diagnosed chronic symptoms of internal disc disruption at C5-6 and opined that appellant's condition was caused by a whiplash injury sustained during a defense tactics class on February 23, 2004. Appellant was also treated at Fairfax Family Practice from December 3, 2004 to February 20, 2006 for his work-related injury. On April 5, 2007 the Office expanded appellant's claim to include displacement of cervical intervertebral disc at C5-6 without myelopathy.

On April 10, 2007 the Office requested that appellant submit a detailed report from his treating physician which provided an impairment evaluation pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] (A.M.A., *Guides*).

Appellant submitted a January 3, 2008 report from Dr. Marius Maxwell, a Board-certified neurosurgeon, who treated appellant for headaches and numbness resulting from a February 23, 2004 injury. Dr. Maxwell noted findings upon physical examination of symmetric reflexes, normal range of motion of the cervical spine, tingling and numbness in the left right finger with normal gait and station. He diagnosed mild cervical degeneration, myofascial disorder and migraine headaches and recommended an electromyogram.

In a decision dated September 29, 2008, the Office denied appellant's claim for a schedule award. It noted that it had not received medical evidence indicating that he had reached maximum medical improvement or that he had permanent impairment of a scheduled body member.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] 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

[1] Docket No. 05-108 (issued March 28, 2005).

[2] A.M.A., *Guides* (5th ed. 2001).

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

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 regulations as the appropriate standard for evaluating schedule losses.[5]

The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. A schedule award is not payable until maximum improvement of the claimant's condition has been reached.[6] Maximum improvement means that the physical condition of the injured member's body has stabilized and will not improve further.[7] The question of when maximum medical improvement has been reached is a factual one which depends on the medical evidence of record. The determination of such date in each case is to be made based upon the medical evidence.[8]

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[9] As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.[10] The Board notes that section 8101(19) specifically excludes the back from the definition of "organ."[11] However, 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.[12]

ANALYSIS

Appellant alleges that he is entitled to a schedule award for permanent partial impairment of the neck and back from his work injury. The Office accepted appellant's claim for cervical spine strain and displacement of cervical intervertebral disc at C5-6 without myelopathy. However, as noted above, the Act does not permit a schedule award based on impairment to the back or spine. Appellant may only be awarded a schedule award for impairment to the upper or lower extremities if such impairment is established as being due to his accepted cervical spine conditions.

In the instant case, appellant was asked to submit a medical opinion from his treating physician addressing his degree of permanent impairment under the A.M.A., *Guides* and the date

[5] *See id*.; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[6] *See Robert L. Mitchell, Jr.*, 34 ECAB 8 (1982).

[7] *Joseph R. Waples*, 44 ECAB 936 (1993).

[8] *Richard Larry Enders*, 48 ECAB 184 (1996); *Joseph R. Waples*, *id*.

[9] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[10] *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[11] 5 U.S.C. § 8101(19).

[12] *Thomas J. Engelhart*, *supra* note 9.

of maximum medical improvement. However, he did not submit sufficient medical evidence to establish entitlement to a schedule award for his accepted cervical spine strain and displacement of cervical intervertebral disc at C5-6 without myelopathy. Appellant submitted reports from Dr. Dunn from January 10 to March 19, 2007, who diagnosed chronic symptoms of internal disc disruption at C5-6. Dr. Dunn opined that appellant was injured on February 23, 2004 in a defense tactics class and sustained a whiplash injury to his back and head. Other reports from Fairfax Family Practice dated December 3, 2004 to February 20, 2006 noted treatment for a back injury sustained while participating in training exercises at work. Also submitted was a report from Dr. Maxwell dated January 3, 2008 who diagnosed mild cervical degeneration, myofascial disorder and migraine headaches. However, none of the reports from Drs. Dunn and Maxwell included an impairment rating nor did the physicians provide an adequate description of appellant's physical condition so that an impairment rating could be determined by an Office medical adviser. For instance, Dr. Maxwell noted in his report dated January 3, 2008 findings of symmetric reflexes, normal range of motion of the cervical spine, tingling and numbness in the left right finger and normal gait and station; however, he failed to explicitly specify any impairment in terms of the A.M.A., *Guides*, *i.e.*, whether it was based on findings of pain, loss of range of motion or loss of strength.[13] Additionally, none of the physicians made a finding that maximum medical improvement had been reached.[14] The Board notes that it is well established that a schedule award cannot be determined and paid until a claimant has reached maximum medical improvement.[15]

In order to determine entitlement to a schedule award appellant's physician must provide a sufficiently detailed description of his condition so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[16] As Drs. Dunn and Maxwell did not make a finding that maximum medical improvement had been reached or adequately describe appellant's condition or correlate his findings with the A.M.A., *Guides*, their reports are insufficient to establish that appellant has permanent impairment to a scheduled member of the body such as an arm. Without the necessary reasoned medical opinion evidence establishing the type and extent of appellant's impairment correlated with the A.M.A., *Guides*, and explaining the causal relationship between these findings and his accepted employment injury, appellant has failed to establish that he

[13] *Lela M. Shaw*, 51 ECAB 372 (2000) (where the Board found that a physician's opinion which does not explicitly define impairment in terms of the A.M.A., *Guides*, *i.e.*, whether it be based on findings of pain, loss of range of motion or loss of strength, is insufficient to establish that appellant sustained any permanent impairment due to her accepted employment injury).

[14] *See Joseph R. Waples*, *supra* note 7.

[15] *See supra* notes 6-7; *see also L.H.*, 58 ECAB ___ (Docket No. 06-1691, issued June 18, 2007) (the question of when maximum medical improvement has been reached is a factual one that depends upon the medical findings in the record; the determination of such date is to be made in each case on the basis of the medical evidence).

[16] *Renee M. Straubinger*, 51 ECAB 667, 669 (2000) (where the Board found in providing an estimate of the percentage loss of use of a member of the body listed in the schedule provisions, a description of a claimant's impairment must be obtained from his or her physician which is in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment and its resulting restrictions and limitations).

sustained a permanent impairment as a result of his accepted conditions.[17] Consequently, the Office properly found that appellant is not entitled to receive a schedule award.

On appeal, appellant asserts that he was entitled to a schedule award because he sustained permanent damage to his neck and noted that the Office's denial of his claim was premature as he did not formally request a schedule award and was continuing to undergo medical treatment. However, the Board notes that on January 27, 2007 appellant filed a CA-7 claim for a schedule award. Appellant further asserted that as a result of his work injuries he sustained debilitating headaches, numbness in his left hand, worsening range of motion all of which has limited his career. The Board has held that a schedule award does not take into account the effect that the impairment has on employment opportunities, wage-earning capacity, sports, hobbies or other lifestyle activities.[18]

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award.

[17] *Id.*; *see also Lela M. Shaw*, *supra* note 13.

[18] *Ruben Franco*, 54 ECAB 496 (2003).

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 16, 2009
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