United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 12-481**
	)	**Issued: November 7, 2012**
DEPARTMENT OF VETERANS AFFAIRS, SOUTHEAST LOUISIANA VETERANS HEALTH CARE SYSTEM, New Orleans, LA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On January 3, 2012 appellant filed a timely appeal from a November 14, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] By decision dated January 4, 2012, OWCP denied modification of the November 14, 2011 denial of his claim for a schedule award. The Board and OWCP may not have concurrent jurisdiction over the same issue in a case. Consequently, any decision by OWCP on an issue pending before the Board is null and void. *Douglas E. Billings*, 41 ECAB 880 (1990). As OWCP issued the January 4, 2012 decision after appellant's appeal to the Board on January 3, 2012 and as it is on the same issue pending before the Board, *i.e.*, entitlement to a schedule award, it is null and void. *See* 20 C.F.R. § 501.2(c)(2).

ISSUE

The issue is whether appellant has reached maximum medical improvement, warranting consideration of a schedule award pursuant to 5 U.S.C. § 8107.

FACTUAL HISTORY

On June 3, 2009 appellant, then a 56-year-old mason, filed a traumatic injury claim alleging that on that day he sustained an injury to his right foot and toes when his right foot got caught between the hydraulic lift and wall. He stopped work that day, and returned to light-duty work on October 5, 2009 and full-duty work on November 5, 2009. OWCP accepted the claim for right ankle, foot and toes crush injury and paid appropriate compensation.

On January 20, 2010 filed a claim for a schedule award.

On January 26, 2010 OWCP received a January 12, 2010 progress note from Dr. Raoul Rodriguez, a treating Board-certified orthopedic surgeon, noting that appellant's toes were well healed. However, an x-ray interpretation revealed that, while appellant's great toe appeared to have a small avulsion fragment, the remaining fractures had healed.

By letter dated February 8, 2010, OWCP informed appellant of the requirements for a schedule award which included medical evidence showing that he had reached maximum medical improvement and sustained a permanent impairment due to his employment injury.

In June 3, 2010 progress notes, Dr. Paul B. Gladden,[3] a treating Board-certified orthopedic surgeon, and Dr. Felipe Ramirez, an examining physician, provided physical findings and history of the employment injury. They concluded that appellant might require fusion to his toes if his arthritis gets out of control.

On January 13, 2011 appellant filed a second claim for a schedule award.

By correspondence dated January 21, 2011, OWCP requested Dr. Michael DeMarco, appellant's treating physician to provide an impairment rating in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). It asked whether appellant had reached maximum medical improvement.

Subsequent to OWCP's January 21, 2011 letter, it received progress notes from Dr. Scott Tucker, an examining physician,[4] Dr. Gladden and Dr. Rodriguez. On March 3, 2011 Dr. Tucker provided physical findings, reviewed x-ray interpretations and recommended referring appellant for an assessment and possible fusion of his second and third toes. Dr. Rodriguez, in March 15, 2011 progress notes, provided physical findings, history of appellant's right foot injury and recommended realignment of appellant's second and third toe.

[3] Dr. Gladden electronically signed the report which had been dictated by Dr. Ramirez.

[4] Dr. Tucker dictated the report, which was electronically signed by Dr. Gladden.

By decision dated July 11, 2011, OWCP denied appellant's claim for a schedule award on the grounds that maximum medical improvement had not been met.

On July 22, 2011 appellant requested a review of the written record by an OWCP hearing representative.

By decision dated November 14, 2011, OWCP's hearing representative affirmed the denial of appellant's schedule award claim.

LEGAL PRECEDENT

The schedule award provision of FECA[5] and its implementing regulations[6] 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, FECA 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 regulations as the appropriate standard for evaluating schedule losses.[7] Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[8]

The A.M.A., *Guides* explain that impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized:

> "It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached [maximum medical improvement], a permanent impairment rating may be performed."[9]

A claimant seeking compensation under FECA has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.[10]

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[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.*

[8] Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[9] A.M.A., *Guides*, Table 201 at 20 (6th ed. 2009); *see Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until maximum improvement -- meaning that the physical condition of the injured member of the body has stabilized and will not improve further -- has been reached).

[10] *See W.W.*, Docket No. 09-1619 (issued June 2, 2010); *G.T.*, 59 ECAB 447 (2008); *Michael S. Mina*, 57 ECAB 379 (2006); *Nathaniel Milton*, 37 ECAB 712 (1986).

ANALYSIS

OWCP accepted appellant's claim for right ankle, foot and toes crush injury. By decision dated November 14, 2011, OWCP's hearing representative affirmed a July 11, 2011 decision. Appellant's claim for a schedule award was denied on the grounds that maximum medical improvement had not been reached.

The Board notes that none of the medical reports submitted by appellant support that he has reached maximum medical improvement. The progress notes from Drs. Gladden, Ramirez, Rodriguez and Tucker provided physical examination, treatment methods and diagnosed conditions. However, in none of the physicians' reports was appellant found to have reached maximum medical improvement nor was an evaluation made for schedule award purposes. All of these physicians reported that appellant may require additional surgery to the affected areas based on physical examination. Additionally, Dr. Tucker's assessment regarding the need for surgery was based on x-ray interpretation.

The Board finds that this evidence is insufficient to establish maximum medical improvement. Appellant bears the burden of proof to establish his entitlement to a schedule award. The medical evidence he has submitted in support of his claim is insufficient to establish the preliminary issue of maximum medical improvement. As this element is a condition precedent to consideration of a schedule award, the Board finds that appellant has not met his burden of proof. The Board will affirm OWCP's November 11, 2011 decision.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant is not entitled to a schedule award under 5 U.S.C. § 8107 as the medical evidence does not establish that he has reached maximum medical improvement, an element critical to such determination.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 11, 2011 is affirmed.

Issued: November 7, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board