

**United States Department of Labor
Employees' Compensation Appeals Board**

J.S., Appellant

and

**U.S. POSTAL SERVICE, LAFAYETTE
POST OFFICE, Norfolk, VA, Employer**

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**Docket No. 13-166
Issued: April 26, 2013**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 31, 2012 appellant, through his attorney, filed a timely appeal from a September 11, 2012 schedule award decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 established that he sustained a ratable impairment of the left upper extremity.

On appeal, counsel asserts that OWCP's September 11, 2012 decision is "contrary to fact and law."

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on or before October 1, 2008 appellant, then a 54-year-old letter carrier, sustained a torn left rotator cuff due to carrying a satchel and heavy parcels in the performance of duty.²

Dr. Patrick W. O'Connell, an attending Board-certified orthopedic surgeon, diagnosed a left rotator cuff tear and left shoulder impingement on October 31, 2008.³ On November 6, 2008 he performed arthroscopic left rotator cuff debridement, repair of the left biceps tendon with fixation and subacromial decompression with acromioplasty. Dr. O'Connell performed a second arthroscopy on November 20, 2008 to remove a push-lock fixation anchor that had migrated out of the shoulder joint. On March 17, 2009 he performed a closed manipulation of the left shoulder under anesthesia to correct postsurgical arthrofibrosis. Dr. O'Connell submitted progress reports through August 2009.

On December 15, 2010 appellant claimed a schedule award. In a December 21, 2010 letter, OWCP advised him of the evidence needed to establish his claim, including his physician's opinion that he had attained maximum medical improvement and an evaluation of any permanent impairment utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Appellant was afforded 30 days to submit such evidence.

By decision dated January 21, 2011, OWCP denied appellant's schedule award claim on the grounds that he did not submit medical evidence establishing maximum medical improvement. Also, appellant did not provide an impairment rating. Counsel requested a telephonic hearing, held May 10, 2011. At the hearing, appellant stated that he remained under medical treatment for his left shoulder condition. He submitted additional medical evidence.

In a February 3, 2011 report, Dr. O'Connell noted performing a third arthroscopy and subacromial decompression on appellant's left shoulder. He also excised ossification of the coracoacromial ligament and debrided a biceps tendon tear. Dr. O'Connell noted restricted left shoulder motion and generalized rotator cuff weakness through May 2011. Appellant participated in physical therapy through July 2011.

By decision dated and finalized July 13, 2011, an OWCP hearing representative affirmed OWCP's January 21, 2011 decision, finding that the medical evidence did not establish the prerequisite criteria of maximum medical improvement. Additionally, appellant did not provide an impairment rating.

² OWCP initially denied the claim by decision dated July 7, 2009 on the grounds that causal relationship was not established. Pursuant to a request for a telephonic hearing, by decision dated and finalized September 28, 2010, it reversed its July 7, 2009 decision and accepted a torn left rotator cuff tear. OWCP also retroactively authorized the November 6, 2008 left shoulder surgery.

³ A November 29, 2007 magnetic resonance imaging scan showed a full thickness tear of the left supraspinatus tendon with two centimeters medial retraction, a large glenohumeral joint effusion, acromioclavicular arthrosis, a subacromial spur and a possible superior labral tear.

In August 18 and December 22, 2011 letters, counsel requested reconsideration. He submitted a July 5, 2011 report from Dr. Stuart J. Goodman, a neurologist, noting that appellant had a “chronic permanent condition.” Dr. Goodman found that appellant had 13 percent impairment of the left upper extremity due to weakness, restricted motion and biceps atrophy according to Table 15.5 of the A.M.A., *Guides*, the Shoulder Regional Grid.⁴

In a July 21, 2011 report, Dr. O’Connell opined that appellant required additional physical therapy and continued medication for ongoing left shoulder pain and weakness. On September 19, 2011 he noted that appellant was still trying to increase his range of left shoulder motion in physical therapy. Dr. O’Connell diagnosed a rotator cuff tear, left shoulder impingement syndrome and a supraspinatus tendon sprain and strain. He stated that he would reevaluate appellant’s condition in three months.

By decision dated September 11, 2012, OWCP denied appellant’s claim on the grounds that the medical evidence did not establish that he had attained maximum medical improvement. It found that Dr. Goodman did not find that the accepted left shoulder condition was permanent and stationary.

LEGAL PRECEDENT

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.⁵ The schedule award provisions of FECA⁶ provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. FECA, 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 OWCP. 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 A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁷ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.⁸

A preliminary element for considering a schedule award is establishing that the claimant has attained maximum medical improvement.⁹ The A.M.A., *Guides* explain that impairment

⁴ Dr. Goodman also found a one percent impairment of the left lower extremity due to an antalgic gait and chronic discomfort. However, there is no claim of record for a left lower extremity injury or condition.

⁵ *G.T.*, 59 ECAB 447 (2008).

⁶ 5 U.S.C. § 8107.

⁷ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ *J.D.*, Docket No. 12-481 (issued November 17, 2012).

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.¹⁰

ANALYSIS

OWCP accepted appellant's claim for a left rotator cuff tear and subsequent surgery. Appellant claimed a schedule award on December 15, 2010. OWCP advised him in a December 21, 2010 letter of the necessity of submitting a medical opinion establishing that the claimed condition had reached maximum medical improvement. By decisions dated January 21, July 13 and September 11, 2012, it denied appellant's schedule award claim on the grounds that maximum medical improvement had not been reached.

In support of his schedule award claim, appellant submitted reports from Dr. O'Connell, an attending Board-certified orthopedic surgeon, who performed four procedures on appellant's left shoulder, the last on February 3, 2011. Dr. O'Connell opined on July 21, 2011 that appellant required continued medication and physical therapy due to ongoing left shoulder pain and weakness. He stated on September 3, 2011 that appellant required additional physical therapy to attempt to increase his left shoulder range of motion. Dr. O'Connell planned to reevaluate appellant in three months. He prescribed additional physical therapy to improve appellant's left shoulder condition. Dr. O'Connell did not opine that appellant had already reached maximum medical improvement. He, an attending neurologist, stated on July 5, 2011 that appellant had a "chronic permanent condition," but did not state that the condition had stabilized or was not expected to improve. Dr. O'Connell did not find that appellant had attained maximum medical improvement.

Appellant bears the burden of proof to establish his entitlement to a schedule award. The Board finds that neither Dr. O'Connell nor Dr. Goodman opined that appellant had reached 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 September 11, 2012 decision.

On appeal, counsel asserts that OWCP's September 11, 2012 decision is "contrary to fact and law." As stated, appellant did not submit medical evidence establishing that he attained maximum medical improvement.

¹⁰ A.M.A., *Guides* 20, Table 201 (6th ed. 2009); *Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until maximum medical improvement has been reached, meaning that the physical condition of the injured member of the body has stabilized and will not improve further).

Appellant may request a schedule award or increased schedule award regarding the right upper extremity, 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.

ORDER

IT IS HEREBY ORDERED THAT the September 11, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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