

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

| | | |
|---|---|--------------------------------|
| D.S., Appellant |) | |
| |) | |
| and |) | Docket No. 15-1244 |
| |) | Issued: August 24, 2015 |
| DEPARTMENT OF THE ARMY, ARMY |) | |
| MATERIAL COMMAND, Texarkana, TX, |) | |
| Employer |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 12, 2015 appellant filed a timely appeal from a merit decision dated March 27, 2015 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 met her burden of proof to establish that she has reached maximum medical improvement (MMI).

FACTUAL HISTORY

Appellant, a 57-year-old materials expeditor, filed a Form CA-2 claim on November 21, 2013 alleging that she developed left foot and left ankle conditions causally related to

¹ 5 U.S.C. § 8101 *et seq.*

employment factors. OWCP accepted the claim for hallux rigidus of the left great toe and osteoarthritis of the left ankle and left foot.

Appellant had previously undergone left foot surgery on December 8, 2011, a cheilectomy procedure on the first metatarsophalangeal joint of the left foot to ameliorate the conditions of hallux rigidus of the left foot and arthritic first metatarsophalangeal joint of the left foot. These conditions did not respond to conservative therapy. Appellant was experiencing both bone and joint pain and her symptoms had progressed to the point where each step was painful.

In a March 31, 2014 report, Dr. Arthur Sharp, Board-certified in orthopedic surgery, found that appellant had five percent permanent impairment of the left lower extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition) (the A.M.A., *Guides*). He advised that she had left great toe metatarsalgia with a history of hallux rigidness, status post cheilectomy. Dr. Sharp asserted that appellant continued to experience pain and gait abnormality with pain on weight-bearing at the great toe and range of motion. He advised that she was considering a follow-up appointment with a foot surgeon regarding the possibility of undergoing a metatarsophalangeal joint fusion procedure for her left foot. Dr. Sharp opined that in light of this appellant was not at MMI. However, in the event she declined any further surgery, appellant would have reached MMI as of March 31, 2014. Dr. Sharp stated that, pursuant to Table 16-2 at page 507, Table 16.2 of the A.M.A., *Guides*, The Foot and Ankle Regional Grid for Lower Extremity Impairments, appellant had a class 1 impairment for arthritis of the first metatarsal phalangeal joint, a mild problem, which yielded an adjusted net impairment of five percent for the left lower extremity.

On April 28, 2014 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of her left lower extremity.

In a May 19, 2014 report, an OWCP district medical adviser (DMA) found that, if appellant declined surgery, she would be at MMI and was entitled to an award for five percent left lower extremity impairment, as rated by Dr. Sharp. He indicated, however, that if she proceeded with further surgical treatment she was not at MMI and her percentage of permanent impairment should be determined at a later date.

In a January 21, 2015 letter, OWCP advised appellant of the evidence needed to establish her claim, including her physician's opinion that she had attained MMI and an evaluation of any permanent impairment utilizing the sixth edition of the A.M.A., *Guides*. It advised her that the medical evidence of record; including its medical adviser's May 19, 2014 report, indicated that her condition had not yet reached MMI, and therefore it was unable to process her claim for schedule award at that time. OWCP informed appellant that she needed to submit supporting medical evidence from her treating physician, in the form of a detailed medical report providing rationale for this opinion, indicating that she had reached MMI, along with a request to reopen her claim for schedule award. It informed her that she had 30 days to submit this evidence.

By decision dated March 27, 2015, OWCP denied appellant's schedule award claim, finding that she did not submit sufficient medical evidence to establish that diagnosed condition had reached MMI.

LEGAL PRECEDENT

FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs, or functions of the body.² Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.³

Permanent impairment may only be rated according to the A.M.A., *Guides*, and only after MMI has been achieved. Impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur. This will depend on the nature of underlying pathology, as the optimal duration for recovery may vary considerably from days to months. The clinical findings must indicate that the medical condition is static and well stabilized for the person to have reached MMI.⁴

A preliminary element for considering a schedule award is establishing that the claimant has attained MMI.⁵ 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. The A.M.A., *Guides* note that an individual's condition is dynamic. MMI refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once impairment has reached MMI, a permanent impairment rating may be performed.⁶

The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the injury. The question of when MMI 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 upon the basis of the medical evidence in that case.⁷ The date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.⁸

² *Id.* at § 8107.

³ 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

⁴ A.M.A., *Guides* 24 (6th ed. 2009); *see Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until MMI -- meaning that the physical condition of the injured member of the body has stabilized and will not improve further -- has been reached).

⁵ *J.D.*, Docket No. 12-481 (issued November 17, 2012).

⁶ A.M.A., *Guides* 20, Table 201 (6th ed. 2009); *Orlando Vivens*, *supra* note 4.

⁷ *Marie J. Born*, 27 ECAB 623 (1976).

⁸ *E.g.*, *Richard Larry Enders*, 48 ECAB 184 at n.12 (1996) (date of the audiologic examination).

ANALYSIS

OWCP accepted appellant's claim for hallux rigidus of the left great toe and osteoarthritis of the left ankle and left foot. Appellant claimed a schedule award on April 28, 2014. OWCP advised her in a January 21, 2015 letter of the necessity of submitting a medical opinion establishing that the claimed condition had reached MMI. By decision dated March 27, 2015, OWCP denied appellant's schedule award claim because the medical evidence indicated that MMI had not been reached.

In support of her schedule award claim, appellant submitted the March 27, 2014 report from Dr. Sharp, her treating physician, who opined that she had a five percent permanent impairment of the left lower extremity pursuant to the A.M.A., *Guides*. Dr. Sharp advised that she continued to experience pain and gait abnormality with pain on weight-bearing at the great toe and range of motion. He stated that appellant was considering undergoing metatarsophalangeal joint fusion surgery to ameliorate her accepted left foot condition and that therefore she was not at MMI.

Appellant bears the burden of proof to establish her entitlement to a schedule award. Dr. Sharp, the treating physician, provided the only report in the record containing an impairment rating and evaluation. He opined that appellant was not at MMI.⁹ The DMA in his May 19, 2014 report concurred with Dr. Sharp that, if appellant proceeded with surgery, she would be at MMI following the surgery, however if she declined surgery her degree of permanent impairment would have to be evaluated.

As the element of MMI is a requirement for granting a schedule award, the Board finds that appellant has not met her burden of proof. The Board will affirm OWCP's March 27, 2015 decision.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she has reached MMI.

⁹ The Board notes that a description of appellant's impairment must be obtained from appellant's physician, which must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations. See *Peter C. Belkind*, 56 ECAB 580, 585 (2005).

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 24, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board