

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY J. GOLAN and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Winter Haven, FL

*Docket No. 00-891; Submitted on the Record;
Issued March 1, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has more than an eight percent permanent impairment of the left upper extremity, for which he received a schedule award; (2) whether the date of maximum medical improvement was September 15, 1998; and (3) whether appellant is entitled to a schedule award for any permanent impairment of his back.

The Office of Workers' Compensation Programs accepted that as a result of a fall on April 8, 1992 appellant sustained a lumbar strain and an aggravation of lumbar spondylosis while in the performance of his duties (case number 060539822). The Office also accepted that as a result of a motor vehicle accident on March 4, 1994 appellant sustained cervical and lumbar strains with an aggravation of cervical and lumbar spondylosis and a left shoulder rotator cuff tear (case number 060594233). The Office combined these cases into one file under the latter case number.

As the Office explained in its December 7, 1998 letter, a claimant may not concurrently receive compensation for temporary total disability for two separate injuries as this would constitute a prohibited payment of dual benefits. The Office, therefore, paid compensation for wage loss due to the earlier injury of April 8, 1992 while determining appellant's entitlement to a schedule award in relation to the injury of March 4, 1994.

Appellant filed claims for a schedule award under both of the combined case files. On August 13, 1997 the Office referred him to Dr. Paul Webster for an evaluation of permanent impairment due to the accepted lower and upper back or neck conditions. Dr. Webster provided reports dated September 8 and 15, 1997, supporting impairments to the cervical, thoracic, lumbar and lumbosacral regions of the spine, back or neck.

On August 14, 1998 the Office sought a second opinion from Dr. Donald Pearson, an orthopedic surgeon. In a report dated September 15, 1998, Dr. Pearson related appellant's medical history and complaints and detailed his findings on physical examination. Dr. Pearson

reviewed certain medical records, described the results of x-rays and noted chronic low back pain, history of left rotator cuff tear and repair, manipulation, arthroscopy and debridement. He reported that appellant had reached maximum medical improvement “as of some time prior to this examination.” Dr. Pearson rated the impairment of appellant’s left upper extremity at eight percent and reported the following clinical findings: retained internal rotation to 90 degrees; retained external rotation to 90 degrees; retained forward elevation to 130 degrees; retained backward elevation to 50 degrees; retained abduction to 130 degrees; and retained adduction to 50 degrees. Dr. Pearson found no additional impairment due to weakness, atrophy, pain or loss of sensation. He also rated impairment of appellant’s lumbosacral spine at five percent of the whole body.

On December 8, 1998 the Office issued a schedule award for an eight percent permanent impairment of the left upper extremity. The award ran from September 15, 1998 to March 8, 1999.

Appellant requested an oral hearing before an Office hearing representative. At the hearing on July 22, 1999, appellant testified that he was not contesting the percentage of the award but the date of maximum medical improvement, which he believed should be September 8, 1997, the date of Dr. Webster’s first report. Appellant also disagreed with the Office’s refusal to issue a schedule award for his low back.

In a decision dated September 3, 1999, the hearing representative affirmed the Office’s December 8, 1998 schedule award.

The Board finds that appellant has no more than an eight percent permanent impairment of the left upper extremity, for which he received a schedule award.

Section 8107 of the Federal Employees’ Compensation Act¹ authorizes the payment of schedule awards for the loss or permanent impairment of specified members, functions or organs of the body, but neither the Act nor the implementing regulations specify how the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the standard for determining the percentage of impairment and the Board has concurred in such adoption.²

According to Table 44, page 45, of the A.M.A., *Guides* (4th ed. 1995), retained internal rotation to 90 degrees represents no impairment of the upper extremity. Retained external rotation to 90 degrees also represents no impairment. Table 38, page 43, indicates that retained forward elevation (flexion) to 130 degrees represents a 3 percent impairment of the upper extremity. Retained backward elevation (extension) to 50 degrees represents no impairment. Table 41, page 44, indicates that retained abduction to 130 degrees represents a 2 percent impairment of the upper extremity. Retained adduction to 50 degrees represents no impairment.

¹ 5 U.S.C. § 8107.

² See, e.g., *Leisa D. Vassar*, 40 ECAB 1287 (1989).

Because the relative value of each shoulder functional unit has been taken into consideration in the impairment charts, the impairment values for loss of each shoulder motion are added to determine the impairment of the upper extremity.³ The clinical findings reported by Dr. Pearson, therefore, support that appellant has a five percent permanent impairment of the left upper extremity. The Office, nonetheless, issued a schedule award for an eight percent permanent impairment. The Board finds that appellant has no more than the eight percent permanent impairment of the left upper extremity for which he received a schedule award.

The Board also finds that the Office properly determined that the date of maximum medical improvement was September 15, 1998.

As noted earlier, the schedule award provisions of the Act compensate covered employees for the permanent impairment of specified members, functions or organs of the body. Before a judgment regarding impairment is made, it must be shown that the problem has been present for a period of time, is stable and is unlikely to change in future months in spite of treatment.⁴ Only then, when the evidence establishes that the employee has reached maximum medical improvement from the residuals of the accepted employment injury, can the extent of any impairment be considered “permanent,” and only then can the employee’s condition be evaluated for schedule award purposes.⁵

The determination of maximum medical improvement is factual in nature and depends primarily on the medical evidence.⁶ The date is usually the date of the medical examination that determined the extent of the permanent impairment.⁷

Appellant testified at the July 22, 1999 hearing that the date of maximum medical improvement should be September 8, 1997, the date of Dr. Webster’s first report. Dr. Webster, however, did not evaluate the impairment of appellant’s left upper extremity. His September 8, 1997 report dealt only with appellant’s neck and upper back injuries and made no mention of the accepted left rotator cuff tear. Dr. Webster’s statement that appellant was at maximum medical improvement cannot be interpreted to apply to the left shoulder or left upper extremity.

Dr. Pearson, on the other hand, related the history of appellant’s March 4, 1994 employment injury, noted the surgeries on appellant’s left shoulder and reviewed the history of his rotator cuff tear and repair. He specifically evaluated appellant’s left shoulder and reported the clinical findings necessary to determine the extent of the permanent impairment. Because Dr. Pearson’s medical examination determined the extent of the permanent impairment of

³ A.M.A., *Guides* 45.

⁴ *Id.* at 3.

⁵ See *Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until maximum improvement of the claimant’s condition has been reached; maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further).

⁶ *Jerre R. Rinehart*, 45 ECAB 518 (1994).

⁷ See *James Lewis*, 35 ECAB 627 (1984).

appellant's left upper extremity, the Board finds that the date of Dr. Pearson's report, September 15, 1998, is properly the date of maximum medical improvement. Although Dr. Pearson reported that appellant had reached maximum medical improvement "as of some time prior to this examination," he gave no specific prior date that could be used.

The Act compensates permanent loss or impairment by the payment of a specific number of weeks of compensation. The Act's compensation schedule specifies a maximum of 312 weeks of compensation payable for the total loss of arm,⁸ and the schedule compensates partial loss of use at a proportionate rate.⁹ Thus, compensation for an 8 percent loss of use of the left upper extremity is 8 percent of 312 weeks, or 24.96 weeks of compensation, which the Office awarded.¹⁰ The Board notes that appellant is entitled to no more than 24.96 weeks of compensation regardless of the date of maximum medical improvement or when the period of the schedule award began.

The Board also finds that appellant is not entitled to a schedule award for any permanent impairment of his back.

Again, the schedule award provisions of the Act provide for payment of compensation for the permanent loss or loss of use of specified members, functions or organs of the body. No schedule award is payable for a member, function or organ of the body not specified in the Act or its implementing regulations.¹¹ Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,¹² no claimant is entitled to such an award.¹³

⁸ 5 U.S.C. § 8107(c)(1).

⁹ *Id.* § 8107(c)(19).

¹⁰ For an employee with one or more dependents, scheduled compensation is paid at a rate of 75 percent of the employee's monthly pay. 5 U.S.C. §§ 8107(a), 8110(b).

¹¹ *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment).

¹² The Act itself expressly excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

¹³ *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

The September 3, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 1, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member