United States Department of Labor
Employees' Compensation Appeals Board

KENNETH D. JOHNSON, Appellant	)	
and	)	**Docket No. 04-396**
	)	**Issued: April 8, 2004**
DEPARTMENT OF JUSTICE, FEDERAL DETENTION CENTER, Oakdale, LA, Employer	)	

Appearances:
Kenneth D. Johnson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On December 1, 2003 appellant filed a timely appeal from the March 18 and April 25, 2003 merit decisions by the Office of Workers' Compensation Programs on his entitlement to schedule compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

The issues are: (1) whether appellant has more than a seven percent permanent impairment of the right upper extremity, for which he received a schedule award; and (2) whether the Office properly determined appellant's date of maximum medical improvement.

FACTUAL HISTORY

On August 6, 1999 appellant, then a 38-year-old education specialist, sustained an injury in the performance of duty while locking doors in the education department. He noticed a burning in his right wrist and by the following day it was swollen. He did not stop work. The Office accepted his claim for the condition of right wrist sprain. Appellant received

compensation for wage loss on February 13, 2002 due to swelling and soreness following an injection on February 12, 2002. He also received compensation for wage loss on July 10, 12 and 13, 2002, after undergoing a functional capacity evaluation. On July 11, 2002 appellant filed a claim for a schedule award.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Robert Po, an orthopedic surgeon, for an evaluation of permanent impairment. On January 21, 2003 Dr. Po reported that appellant had pain, localized to one particular area or nerve distribution, which decreased the use of his right wrist. Dynamometer readings were 20, 30 and 38 kilograms (kg) on the dominant right side, 30, 44 and 40 kg on the left. Pinch measurements were "1 pound less right side." Findings on range of motion revealed 35 degrees palmar flexion, 45 degrees extension, 20 degrees radial deviation and 30 degrees ulnar deviation. Dr. Po reported that the date of maximum medical improvement was July 11, 2002 "when he returned to work."

On March 18, 2003 an Office medical adviser reviewed Dr. Po's clinical findings and determined that appellant had a seven percent permanent impairment of the right upper extremity based solely on loss of range of motion. The medical adviser indicated that the date of maximum medical improvement was July 11, 2002.

On March 31, 2003 the Office issued a schedule award for a seven percent permanent impairment of the right lower (sic) extremity. Appellant was awarded 20.16 weeks of compensation.

Appellant requested reconsideration on the issue of maximum medical improvement. He argued that his date of maximum medical improvement should be February 19, 2002, the date he returned to work after receiving an injection, the last major procedure on his wrist.

In a decision dated April 25, 2003, the Office reviewed the merits of appellant's claim and modified its March 31, 2003 schedule award. The Office found that it had mistakenly issued the schedule award for the right lower extremity instead of the right upper extremity and as a result the period of the award was extended an additional 11.76 days. The Office explained that the length of the award was determined by the number of weeks for the given percentage impairment, not the date of maximum medical improvement.

On appeal, appellant does not dispute the percentage impairment found by the Office's March 31, 2003 schedule award. Appellant argues that the date of maximum medical improvement should be changed to February 19, 2002. The Office's April 25, 2003 decision, he stated, failed to address this issue.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act[1] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of

[1] 5 U.S.C. § 8107.

permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2]

ANALYSIS -- ISSUE 1

According to Figure 16-28, page 467, of the A.M.A., *Guides*, 35 degrees flexion represents a 4 percent impairment of the upper extremity and 45 degrees extension represents a 3 percent impairment. According to Figure 16-31, page 469, 20 degrees radial deviation and 30 degrees ulnar deviation represent no impairment of the upper extremity. The upper extremity impairment due to abnormal wrist motion is calculated from the pie charts by adding directly together the upper extremity impairment contributed by each motion unit.[3] Appellant, therefore, has a seven percent impairment of the right upper extremity due to loss of wrist motion, which the Office awarded.

Dr. Po's January 21, 2003 findings were not limited to range of motion, however. He reported that appellant had pain, localized to one particular area or nerve distribution, that decreased the use of his right wrist. Table 16-10, page 482, of the A.M.A., *Guides* provides a grading scheme and procedure for determining impairment of the upper extremity due to sensory deficits or pain resulting from peripheral nerve disorders. The Office medical adviser did not address this issue. Dr. Po also reported loss of grip strength and appeared to report a loss of pinch strength. Tables 16-32 through 16-34, page 509, provide values for determining upper extremity impairment due to loss of grip and pinch strength. The Office medical adviser did not address these issues as well. Because Dr. Po's clinical findings might support a greater schedule award than appellant received, the Board will remand the case for further development of the medical evidence.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Act[4] compensates covered employees for the permanent impairment of specified members, functions and organs of the body. An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of maximum medical improvement. It is understood that an individual's condition is dynamic. Maximum 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.[5]

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[2] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001). FECA Bulletin No. 01-05 (issued January 29, 2001).

[3] A.M.A., *Guides* 466 (5th ed. 2001).

[4] 5 U.S.C. § 8107(a).

[5] A.M.A., *Guides* 19; *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).

ANALYSIS -- ISSUE 2

Dr. Po reported, without explanation, that appellant reached maximum medical improvement on July 11, 2002 the date he returned to work following his functional capacity evaluation. Page 27 of that evaluation, however, states as follows:

> "With respect to rehabilitation recommendations for [appellant], he presents as a potentially excellent candidate due to his full physical effort and lack of significant symptom magnification during the evaluation. [Appellant] states that he has never received any type of therapy for his reported right wrist pain/decreased range of motion. It is recommended that [appellant] complete 12 [to] 15 visits with an occupational therapist that specializes in hands to develop a stretching/conditioning routine to improve [range of motion], strength and work tolerance."

As further recovery was anticipated with occupational therapy, with improved range of motion and strength, it would not appear that appellant reached maximum medical improvement on July 11, 2002 one day after his functional capacity evaluation. Maximum medical improvement is usually reported as the date of the medical examination that determined the extent of permanent impairment.[6] In this case, the date of Dr. Po's evaluation of appellant was January 21, 2003; however, as Dr. Po did not make clear when the clinical findings indicated that appellant's right wrist condition became static and well stabilized, such that further recovery or deterioration was not anticipated, the Board will remand the case for further development on this issue.

The Board notes that the date of maximum medical improvement is likely not as early as February 19, 2002, as appellant argues. An April 30, 2002 report from a Dr. Vanda L. Davidson states: "[Appellant] continues to have some problems with the wrist, although it is better since Dr. Savoie injected him on a visit in February [2002]." Appellant's wrist, therefore, appears to have improved from February 12 to April 30, 2002.

The Board also notes, as the Office indicated in its April 25, 2003 decision, that it is the percent of impairment that will determine how many weeks of compensation he receives, not the date of maximum medical improvement. The Act provides for 312 weeks of compensation for the complete loss of an arm and partial losses are compensated proportionally.[7] Thus, a 7 percent impairment would entitle appellant to 7 percent of 312 weeks of compensation, or 21.84 weeks of compensation. Were the date of maximum medical improvement changed to February 19, 2002, as appellant requests, he would receive no additional compensation.

CONCLUSION

The Board finds that this case is not in posture for decision. The clinical findings upon, which the Office based its March 18, 2003 schedule award indicate that appellant might have

[6] *James Lewis*, 35 ECAB 627 (1984).

[7] 5 U.S.C. § 8107(c)(1), (c)(19).

greater than a seven percent permanent impairment of the right upper extremity. The date of maximum medical improvement is not clear from the opinion of the Office referral physician. The Board will set aside the Office's March 18 and April 25, 2003 decision and remand the case for further development on these issues. After such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement to schedule compensation.

ORDER

IT IS HEREBY ORDERED THAT the April 25 and March 18, 2003 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action consistent with this opinion.

Issued: April 8, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member