

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

ALEXANDER C. NAVARRO, Appellant)	
)	
and)	Docket No. 04-1101
)	Issued: August 6, 2004
U.S. POSTAL SERVICE, PROCESSING)	
& DISTRIBUTION CENTER,)	
West Sacramento, CA, Employer)	
)	

Appearances:
Alexander C. Navarro, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 17, 2004 appellant filed a timely appeal of the December 15, 2003 decision of the Office of Workers' Compensation Programs, which granted a schedule award. Appellant also appealed the Office's June 24, 2003 decision denying his claim for wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2 (c) and 501.3(d), the Board has jurisdiction over both the schedule award and the merit decision denying wage-loss compensation.

ISSUES

The issues are: (1) whether appellant established entitlement to intermittent wage-loss compensation during the period December 15, 2001 to March 3, 2003; and (2) whether appellant has more than a two percent impairment of his left and right upper extremities, for which he received schedule awards.

FACTUAL HISTORY

On February 25, 2002 appellant, a 50-year-old flat sorter machine clerk, filed an occupational disease claim for bilateral shoulder tendinitis. He attributed his condition to repetitive heavy lifting, pushing and pulling. Appellant identified November 30, 2001 as the date he first became aware of his condition. The Office initially denied the claim; however, upon reconsideration the Office accepted the claim for bilateral shoulder strain and tendinitis.

On May 1, 2003 appellant filed a claim (Form CA-7) for compensation for intermittent wage loss during the period December 15, 2001 through November 15, 2002. Appellant identified 20 days during the period for which he claimed 8 hours of wage-loss compensation, for a total of 160 hours.¹ On June 18, 2003 appellant submitted a request to the employing establishment to buy back 152 hours of annual and sick leave utilized on 20 separate dates during the period February 14, 2002 through June 7, 2003.²

Appellant also filed a separate Form CA-7 for 16 hours of lost wages on April 11 and April 12, 2003. On May 27, 2003 the Office paid appellant 8 hours of wage-loss compensation for April 12, 2003. The Office advised that unless appellant's disability extended beyond 14 days, he was not entitled to wage-loss compensation for the first 3 days of disability, which were January 10 and July 19, 2002 and April 11, 2003.

By decision dated June 24, 2003, the Office denied appellant's claim for wage-loss compensation for the period December 15, 2001 through March 3, 2003.³ The Office explained that, with the exception of January 10 and July 19, 2002, the medical evidence did not support appellant's disability on the dates claimed.

Appellant also filed a claim for a schedule award. His treating physician, Dr. Yi Yi Myint, a Board-certified psychiatrist, found that appellant was permanent and stationary as of March 5, 2003. Dr. Myint diagnosed bilateral shoulder strain and advised appellant to avoid heavy lifting, pushing, pulling and repetitive overhead activities. The Office sought an impairment rating from Dr. Myint to assist in determining appellant's entitlement to a schedule award. However, appellant advised the Office that Dr. Myint was unable to prepare an impairment rating. The Office referred appellant for evaluation by Dr. Philip Z. Wirganowicz, a Board-certified orthopedic surgeon. In a report dated June 30, 2003, Dr. Wirganowicz diagnosed bilateral shoulder rotator cuff tendinitis. He measured appellant's upper extremity range of motion and noted that he was restricted slightly in his shoulders, particularly on the left. Dr. Wirganowicz also noted that impingement signs were present bilaterally. The doctor, however, did not calculate a specific percentage impairment of appellant's upper extremities.

¹ Appellant had reportedly taken leave without pay (LWOP) on the 20 days noted during the period December 15, 2001 through November 15, 2002.

² He also claimed an additional eight hours of LWOP; four hours on January 15, 2003 and four hours on June 7, 2003.

³ The Office did not address appellant's claim for wage-loss compensation for the additional period March 4 to June 7, 2003.

The Office referred the case record to its medical adviser. In a July 24, 2003 report, the Office medical adviser, relying on Dr. Wirganowicz's physical findings, calculated a two percent permanent impairment of the right upper extremity and a four percent impairment of the left upper extremity. The overall rating was based on a combination of impairments due to loss of range of motion and impairment due to sensory deficit or pain.

On August 1, 2003 the Office granted appellant schedule awards for two percent impairment of both upper extremities. The awards covered a period of 12.48 weeks, beginning June 28, 2003 and continuing through July 12, 2003.

Appellant requested a review of the written record regarding his schedule award. By decision dated December 15, 2003, an Office hearing representative affirmed the August 1, 2003 schedule award.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under the Federal Employees' Compensation Act⁴ has the burden of establishing the essential elements of his claim, including that any specific condition or disability for which he claims wage-loss compensation is causally related to the employment injury.⁵ Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁶

ANALYSIS -- ISSUE 1

Of the 30 days appellant claimed compensation for during the period December 15, 2001 to March 3, 2003, the Office found that the medical evidence supported disability on only two days; January 10 and July 19, 2002.⁷ Appellant contends that his absences from work were authorized by the employing establishment and that the information he submitted in support of his leave requests under the Family and Medical Leave Act (FMLA) should suffice for purposes of establishing his entitlement to wage-loss compensation. The employing establishment's decision to excuse appellant's absence from work under FMLA does not establish appellant's entitlement to wage-loss compensation under the Act. Appellant bears the burden of establishing that he was disabled for work and that his claimed disability was causally related to his accepted employment injury.⁸

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁶ *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

⁷ As the Office has yet to address appellant's claim for intermittent wage-loss compensation from March 4 to June 7, 2003, appellant's entitlement to compensation during this period is not an issue properly before the Board in the current appeal. *See* 20 C.F.R. § 501.2(c).

⁸ *Jacquelyn L. Oliver*, *supra* note 5. *See also Freddie Mosley*, 54 ECAB ____ (Docket No. 02-1915, issued December 19, 2002) (entitlement to benefits under another act does not establish entitlement to benefits under the Act).

Appellant claimed wage-loss compensation for the following dates: December 15, 2001, January 10, February 14, 15 and 28, March 12, 13, 19, 20 and 27, April 5 and 27, May 7, 14 and 21-24, June 6 and 27, July 10-11 and 19, August 8, September 19 and November 5 and 15, 2002, January 15, February 1 and 22, 2003. As noted, the Office found that appellant established that he was disabled for work on January 10 and July 19, 2002.

In a report dated April 7, 2003, Dr. Myint indicated that appellant was able to perform his full duties from November 30, 2001 through February 14, 2002 and thereafter, he was able to perform light duty. Dr. Myint did not identify any specific period of total or partial disability. The doctor advised that appellant had been examined on 17 occasions between December 21, 2001 and March 5, 2003.⁹ With the exception of January 10 and August 8, 2002, no other dates of disability identified by appellant correspond with the treatment dates reported by Dr. Myint in the April 7, 2003 report.

Appellant began physical therapy treatments on December 11, 2002 and he received 15 treatments prior to his discharge on February 18, 2003. Only 2 of the 30 days appellant claimed for wage-loss compensation fall within the period of time appellant was undergoing physical therapy. Appellant claimed wage-loss compensation for eight hours on January 15, 2003 and an additional eight hours on February 1, 2003. However, the record does not establish that appellant was undergoing medical treatment on either of those specific dates.¹⁰

While the record includes evidence of numerous examinations and physical therapy treatments, with few exceptions, the dates of examination and treatment do not correspond with the days appellant claimed to have been disabled from work. Appellant has failed to submit medical evidence substantiating his disability for most of the 30 days claimed during the period December 15, 2001 to March 3, 2003. Although the Office did not credit appellant for eight hours of lost wages on August 8, 2002 the record includes medical documentation indicating that Dr. Myint examined appellant that day and excused him from work due to his accepted injury.¹¹ Accordingly, the Board finds that appellant is entitled to an additional eight hours of wage-loss compensation for August 8, 2002.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.¹² The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good

⁹ The record also includes the corresponding treatment records for the 17 examination dates noted by Dr. Myint.

¹⁰ See *Vincent E. Washington*, 40 ECAB 1242 (1989) (any time missed from work due to medical treatment for an employment-related injury would be compensable).

¹¹ Dr. Myint also excused appellant from work on May 13, 2002, however, appellant did not claim wage-loss compensation for May 13, 2002. Appellant claimed wage-loss compensation for May 14, 2002.

¹² The Act provides that, for a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks of compensation. 5 U.S.C. § 8107(c)(1).

administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulation have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the appropriate standard for evaluating schedule losses.¹³ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).¹⁴

ANALYSIS -- ISSUE 2

Both the August 1 and December 15, 2003 schedule award decisions ostensibly relied upon the Office medical adviser's July 24, 2003 opinion as the basis for awarding appellant two percent impairment for his left and right upper extremities. In both decisions, however, the Office overlooked the fact that the medical adviser, Dr. Ellen Pichey, found that appellant had four percent impairment of his left upper extremity and not merely two percent impairment. Whereas the Office awarded appellant two percent impairment for both his left and right upper extremity, Dr. Pichey indicated that appellant had two percent impairment of the right upper extremity and four percent impairment of the left upper extremity.

With respect to appellant's right upper extremity, the Office medical adviser found that appellant had one percent impairment due to loss of internal rotation. In his June 30, 2003 report, Dr. Wirganowicz reported that appellant had 0 to 70 degrees of internal rotation, bilaterally. According to Figure 16-46, A.M.A., *Guides* 479, 70 degrees of internal rotation represents 1 percent impairment. The Office medical adviser found no additional impairment due to loss of range of motion in the right upper extremity. Regarding appellant's left upper extremity, the Office medical advisor similarly found 1 percent impairment due to loss of internal rotation. Additionally, she found impairment due to loss of flexion based on Dr. Wirganowicz's measurement of 0 to 170 degrees of flexion. Appellant's 170 degrees of flexion represents 1 percent impairment according to Figure 16-40, A.M.A., *Guides* 476. Dr. Wirganowicz also reported 0 to 160 degrees of abduction, which the Office medical adviser properly calculated as one percent impairment pursuant to Figure 16-43, A.M.A., *Guides* 477. The Office medical adviser correctly added the impairments for internal rotation, flexion and abduction and found that appellant had three percent impairment of the left upper extremity due to loss of range of motion.

In addition to the range of motion impairments for both upper extremities, the Office medical adviser calculated one percent bilateral impairment due to sensory deficit or pain. Based on Dr. Wirganowicz examination findings, the Office medical adviser rated the severity of appellant's pain or sensory deficit as Grade 4, which represented a 25 percent sensory deficit under Table 16-10, A.M.A., *Guides* 482. The Office medical adviser properly found that the maximum impairment based on the suprascapular nerve was 5 percent according Table 16-15, A.M.A., *Guides* 492. Under Tables 16-10 and 16-15, a Grade 4 rating (25 percent) and a suprascapular sensory deficit (5 percent) results in 1.25 percent impairment (25 percent x 5 percent = 1.25 percent), which is properly rounded down to 1 percent.

¹³ 20 C.F.R. § 10.404 (1999).

¹⁴ FECA Bulletin No. 01-05 (January 29, 2001); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

The Office medical adviser combined appellant's upper extremity impairments due to sensory deficit and loss of range of motion utilizing the Combined Values Chart, A.M.A., *Guides* 604. She properly determined that appellant had a combined right upper extremity impairment of two percent and a left upper extremity impairment of four percent. Inasmuch as the Office medical adviser's calculation conforms to the A.M.A., *Guides* (5th ed. 2001), her finding constitutes the weight of the medical evidence.¹⁵

As the Office neglected to award appellant the full extent of his left upper extremity impairment of four percent as determined by Dr. Pichey, the December 15, 2003 decision will be modified to reflect appellant's entitlement to an additional two percent impairment of the left upper extremity. In all other respects, the December 15, 2003 decision is affirmed.

CONCLUSION

Appellant is entitled to eight hours of wage-loss compensation for August 8, 2002. The Board also finds that appellant is entitled to a schedule award for an additional two percent impairment of his left upper extremity.

¹⁵ See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

ORDER

IT IS HEREBY ORDERED THAT the June 24, 2003 decision of the Office of Workers' Compensation Programs is modified to reflect appellant's entitlement to an additional eight hours of wage-loss compensation for August 8, 2002. Accordingly, the June 24, 2003 decision is affirmed as modified. The Office's December 15, 2003 schedule award is modified to reflect appellant's entitlement to an additional two percent impairment of his left upper extremity and the decision is affirmed as modified.

Issued: August 6, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member