

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

JERALD L. ARMON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Novato, CA, Employer**

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**Docket No. 04-661
Issued: September 10, 2004**

Appearances:
Jerald L. Armon, 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 January 12, 2004 appellant filed a timely appeal from the June 20 and November 4, 2003 merit decisions of the Office of Workers' Compensation Programs, which denied an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the schedule award issue.¹

ISSUE

The issue is whether appellant has more than a 33 percent permanent impairment of her right upper extremity due to her right shoulder injury.

¹ The Board has no jurisdiction to review the Office's December 3, 2002 decision reducing appellant's compensation to zero to reflect her capacity to earn wages in the position of modified carrier technician/date conversion operator. An appeal to the Board must be mailed no later than one year from the date of the Office's final decision. 20 C.F.R. § 501.3(d) (time for filing); *see id.* § 501.10(d)(2) (computation of time).

FACTUAL HISTORY

On June 26, 1997 appellant, then a 37-year-old letter carrier, filed a claim alleging that the pain in the right side of her neck and shoulder and the tingling in her hands were a result of her federal employment. On May 30, 1998 she filed a claim alleging that she sustained a possible impingement of the right shoulder on April 18, 1998 after casing mail for approximately two hours. The Office accepted her claim for right shoulder tendinitis, right shoulder impingement and right rotator cuff tear.²

On May 10, 2000 appellant filed a claim for a schedule award. In reports dated July 10 and 30, 2000, Dr. Michael F. Charles, a Board-certified orthopedic surgeon and appellant's treating physician, examined appellant's right upper extremity and described his findings on examination, including range of motion measurements. He diagnosed a right shoulder rotator cuff tear with impingement syndrome and reported that a rotator cuff repair was indicated.

On October 3, 2000 an Office medical adviser reviewed the findings of Dr. Charles and determined that appellant had a 30 percent permanent impairment of her right upper extremity. The medical adviser reported that appellant reached maximum medical improvement on June 4, 1999.

On October 30, 2000 the Office issued a schedule award for a 30 percent permanent impairment of the right upper extremity.

On August 14, 2001 the Office authorized a right rotator cuff repair. Appellant underwent surgery for an open repair of the right rotator cuff on October 9, 2001.³ The Office accepted her claim for the additional condition of adhesive capsulitis.

In a report dated May 3, 2002, Dr. Thomas D. Schmitz, a Board-certified orthopedic surgeon and Office referral physician, related his findings on examination, including loss of shoulder motion. He stated, however, that appellant had not reached maximum medical improvement. Regarding the schedule award form that the Office asked him to complete, Dr. Schmitz commented as follows: "I will fill it out, but I do not think that will be germane at the moment." On the schedule award form itself, Dr. Schmitz noted: "Has n[o]t reached maximum medical improvement right."

² The record indicates that on September 9, 2003 the Office issued a schedule award, adjudicated under File No. 132033443, for a 51 percent permanent impairment of appellant's right upper extremity. This schedule award appears to combine permanent impairment due to an accepted carpal tunnel syndrome with permanent impairment due to appellant's right shoulder injury. File No. 131163901, which is the subject of this appeal, concerns only the permanent impairment due to appellant's right shoulder injury.

³ She also underwent repair of a partial tear of the long head of the right biceps tendon, a modified Mumford procedure on the right distal clavicle, a modified Neer procedure on the right anterior acromion and a decompression of the right subacromial space.

On June 17, 2002 Dr. Charles reported that appellant had reached maximum medical improvement. He stated that appellant's right shoulder had 30 degrees of forward flexion and 80 degrees of abduction. He stated that appellant had a positive Tinel's sign, a positive Phalen's sign and positive electrodiagnostics for carpal tunnel syndrome.

On November 17, 2002 an Office medical adviser used the May 3, 2002 findings of Dr. Schmitz and the June 17, 2002 findings of Dr. Charles to determine that appellant had a 33 percent permanent impairment of her right upper extremity. The medical adviser reported that appellant reached maximum medical improvement on June 17, 2002, the date of Dr. Charles' most recent report.

On January 8, 2003 the Office issued a schedule award for an additional three percent permanent impairment of appellant's right upper extremity due to her right shoulder condition.

Appellant requested a review of the written record by an Office hearing representative. She submitted a January 14, 2003 report from Dr. Charles, who related findings on grip strength testing. At one point in his report he noted that right shoulder abduction was 30 degrees. Elsewhere in the report he noted that right shoulder abduction was 80 degrees.

In a decision dated June 20, 2003, the Office hearing representative affirmed the January 8, 2003 schedule award.

Appellant requested reconsideration. She argued that the Office did not review the January 14, 2003 report of Dr. Charles. She also argued that her rating should include pain, grip strength and loss of motion.

In a decision dated November 4, 2003, the Office reviewed the merits of appellant's claim and denied modification of its prior decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act⁴ 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 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*).⁵

An impairment should not be considered permanent until 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

⁴ 5 U.S.C. § 8107.

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

maximum medical improvement, a permanent impairment rating may be performed.⁶ The determination of the date of maximum medical improvement is factual in nature and depends primarily on the medical evidence.⁷

ANALYSIS

On January 8, 2003 the Office issued a schedule award for an additional three percent permanent impairment of appellant's right upper extremity due to her right shoulder condition. The Office based this award on the November 17, 2002 calculations of the Office medical adviser, who noted that she based her calculations on the May 3, 2002 findings of Dr. Schmitz and the June 17, 2002 findings of Dr. Charles. Dr. Schmitz made clear, however, that appellant had not reached maximum medical improvement following her right rotator cuff repair on October 9, 2001. The Board finds, therefore, that the Office erroneously used the measurements reported by Dr. Schmitz to calculate an award for permanent impairment.

Shortly thereafter, Dr. Charles stated that appellant had reached maximum medical improvement, but his June 17, 2002 report described only two ranges of motion. This is not a sufficient basis for evaluating the degree of permanent impairment under the A.M.A., *Guides*.⁸

Because the medical evidence in this case does not permit a proper calculation of permanent impairment due to appellant's right shoulder condition, the Board will set aside the Office's June 20 and November 4, 2003 decisions and remand the case for further development. After such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement to an additional schedule award.

CONCLUSION

The Board finds that this case is not in posture for decision. The clinical findings that the Office used to determine appellant's entitlement to an additional schedule award are insufficient under the criteria set forth in the A.M.A., *Guides*. Further development of the medical evidence is warranted.

⁶ A.M.A., *Guides* at 19; *see id.* at 2 (maximum medical improvement means that the impairment is well stabilized and unlikely to change substantially in the next year with or without medical treatment).

⁷ *Franklin L. Armfield*, 28 ECAB 445 (1977); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7.a(1) (November 1998) (the date of maximum medical improvement is determined solely on the basis of the medical evidence).

⁸ *See generally* A.M.A., *Guides* at Chapter 16.4i, page 474.

ORDER

IT IS HEREBY ORDERED THAT the November 4 and June 20, 2003 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this opinion of the Board.

Issued: September 10, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member