United States Department of Labor
Employees' Compensation Appeals Board

WILLIE BYRD, JR., Appellant	)	
and	)	**Docket No. 04-2202**
	)	**Issued: February 18, 2005**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Birmingham, AL, Employer	)	

Appearances:
Willie Byrd, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 7, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated June 28, 2004, granting a schedule award for a four percent impairment of his lower extremities. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUES

The issues are: (1) whether appellant has more than a four percent impairment of the lower extremities for which he received a schedule award; and (2) whether the Office properly selected May 15, 2000 as the date of maximum medical improvement for the schedule award.

FACTUAL HISTORY

This case was previously before the Board.[1] By decision dated February 26, 2004, the Board set aside the Office's March 12, 2003 decision denying appellant's claim for a schedule award and remanded the case for clarification of the opinion of the impartial medical specialist.

[1] Docket No. 03-2211 (issued February 26, 2004).

The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

On April 21, 2004 the Office wrote to Dr. George S. Buckner, the impartial medical specialist and Board-certified orthopedic surgeon who provided the impairment rating which was the basis of the Office's March 12, 2003 schedule award. The Office asked Dr. Buckner to provide clarification of his opinion as to whether appellant has any impairment of the lower extremities due to loss of range of motion.

In a report dated April 29, 2004, Dr. Buckner stated:

> "I consider 20 degrees of inversion of the ankle to be normal; however, I note in the American Medical Association, [*Guides to the Evaluation of Permanent Impairment*][2] it is the upper limit of their mild impairment range therefore presumably 21 degrees of inversion would be normal. I consider this close enough to be normal to be a nonratable loss of motion; however, I would have no argument with the 2 percent lower extremity three percent foot impairment rating since 20 degrees does actually fall at the very end of that range of motion."

In a May 25, 2004 memorandum, an Office medical adviser indicated that Dr. Buckner properly applied Table 17-12 at page 537 of the fifth edition of the A.M.A., *Guides* in finding that a 20 degree inversion of the hind foot (ankle) equaled a 2 percent impairment of each lower extremity.

By decision dated June 28, 2004, the Office granted appellant a schedule award for 11.52 weeks of compensation based on a 4 percent impairment of the lower extremities. The date of maximum medical improvement in the schedule award was May 15, 2000.[3]

LEGAL PRECEDENT -- ISSUE 1

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence[4] and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.[5] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper and factual medical background, must be given special weight.[6]

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*).

[3] The Office did not explain why it selected May 15, 2000 as the date of maximum medical improvement for appellant.

[4] 5 U.S.C. §§ 8101-8193, § 8123(a).

[5] *Roger W. Griffith*, 51 ECAB 491, 505 (2000).

[6] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

The schedule award provision of the Federal Employees' Compensation Act[7] and its implementing regulation[8] sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[9] Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[10]

ANALYSIS -- ISSUE 1

As noted above, the Board remanded this case for the Office to obtain clarification from Dr. Buckner regarding his finding that appellant had no impairment of his lower extremities based on loss of range of motion. In his April 29, 2004 supplemental report, Dr. Buckner correctly found that appellant had a two percent impairment of each lower extremity based on 20 degrees of inversion of the hind foot (ankle) according to Table 17-12 at page 537 of the fifth edition of the A.M.A., *Guides.* The Board finds that the Office, in its June 28, 2004 decision, properly granted appellant a schedule award for a four percent impairment of the lower extremities.

LEGAL PRECEDENT – ISSUE 2

A disabled employee has the right to compensation for periods of temporary total or partial disability until the point of maximum medical improvement is reached. Upon reaching maximum medical improvement, the evidence ordinarily permits a determination to be made as to the precise degree of permanent loss of use of the schedule member of the body.[11] It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury.[12] The issue of maximum medical improvement was extensively treated by the Board in its two decisions in *Marie J. Born.*[13]

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[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id*.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims,* Chapter 2.808.6(a) (August 2002).

[11] *Michael Vining (Kevin M. Vining),* 52 ECAB 354, 356 (2001).

[12] *Yolanda Librera, (Michael Librera),* 37 ECAB 388, 392 (1986).

[13] 27 ECAB 623 (1976); *petition for recon. denied,* 28 ECAB 89 (1976).

In *Born*, the Board reviewed the well-settled rule that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement and explained that maximum medical improvement "means that the physical condition of the injured member of the body has stabilized and will not improve further." The Board also noted a reluctance to find a date of maximum medical improvement which is retroactive to the award, as retroactive awards often result in payment of less compensation. The Board, therefore, requires persuasive proof of maximum medical improvement for selection of a retroactive date of maximum medical improvement.

ANALYSIS -- ISSUE 2

In this case, the Office did not explain why it selected May 15, 2000 as the date of maximum medical improvement in the June 28, 2004 schedule award. The Board notes that the date the Office selected for the date of maximum medical improvement is four years prior to the June 28, 2004 schedule award. As noted above, the Office is required to provide persuasive proof of maximum medical improvement for selection of a retroactive date of maximum medical improvement. Such proof is lacking in this case. Therefore, the case must be remanded for further development by the Office on the issue of the date of maximum medical improvement. After such further development as it deems necessary, the Office should modify the June 28, 2004 schedule award to include an explanation of its choice of date for maximum medical improvement and, if appropriate, change the date of maximum medical improvement in the schedule award. If the Office changes the date of maximum medical improvement, it should determine whether there is a change in the pay rate applicable to the schedule award such that appellant is entitled to additional compensation.

CONCLUSION

The Board finds that appellant has no more than a four percent impairment of the lower extremities for which he received a schedule award. The Board further finds that additional development is required on the issue of maximum medical improvement.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 28, 2004 is affirmed as to the issue of the percent of impairment. The decision is set aside as to the issue of maximum medical improvement and the case is remanded for further development of this issue.

Issued: February 18, 2005
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member