United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 07-800**
	)	**Issued: August 13, 2007**
U.S. POSTAL SERVICE, NORTHLAND PERFORMANCE CLUSTER, Minneapolis, MN, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 31, 2007 appellant filed a timely appeal from a February 23, 2006 merit decision of the Office of Workers' Compensation Programs concerning her schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a three percent permanent impairment to her right upper extremity, for which she received a schedule award.

FACTUAL HISTORY

On October 31, 1999 appellant, then a 34-year-old distribution clerk, injured her right shoulder while lifting mail. She filed a traumatic injury claim on March 3, 2000. The Office accepted the claim for a right shoulder strain, cervical strain and right shoulder impingement.

Appellant stopped work September 24, 2001 and underwent arthroscopic decompression of the right shoulder. She returned to full-time light-duty work.

On March 22, 2004 appellant filed a claim for a schedule award. In a March 29, 2004 letter, the Office advised her to obtain an impairment rating in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*).

In an April 30, 2004 report, Dr. Benjamin Gulli, a Board-certified orthopedic surgeon, provided an impression of bilateral shoulder pain and opined that appellant reached maximum medical improvement (MMI) on January 22, 2004.[1] His examination revealed full range of motion of the right shoulder in all areas except internal rotation, which was noted as 70 degrees. Dr. Gulli also advised that appellant had constant, moderate pain, which was worse with activity. Based on his examination, he opined that appellant had a 20 percent disability of the right shoulder due to pain. Dr. Gulli stated that this rating equaled 12 percent whole body impairment under the A.M.A., *Guides*.

In a May 23, 2005 report, an Office medical adviser reviewed the medical evidence, including notations from physical therapists and opined that appellant had a three percent permanent impairment to the right upper extremity. He advised that MMI occurred June 7, 2002, as that was when Dr. Gulli recommended permanent restrictions for appellant's right shoulder and released her from his care. As appellant experienced right shoulder pain which was exacerbated with repetitive activities, the Office medical adviser awarded a two percent right upper extremity impairment due to pain. He classified this as a Grade 4 pain in the distribution of the suprascapular nerve under Table 16-15, page 492 and Table 16-10, page 482 of the A.M.A., *Guides*. The Office medical adviser noted the findings from an April 30, 2002 physical therapy report and applied the A.M.A., *Guides*. Under Figure 16-43, page 477 of the A.M.A., *Guides* a 170 degrees abduction equaled a zero percent impairment. Under Figure 16-46, page 479 of the A.M.A., *Guides*, he found that 78 degrees external rotation and 90 degrees internal rotation resulted in zero percent impairment. Under Figure 16-40, page 476 of the A.M.A., *Guides*, the Office medical adviser found that a flexion of 168 degrees equaled one percent impairment. He then used the Combined Values Chart on page 604 of the A.M.A., *Guides* to find a total of three percent total right upper extremity impairment.

By decision dated November 15, 2005, the Office granted appellant a schedule award for a three percent permanent impairment of the right upper extremity. The period of the award ran for 9.36 weeks from June 7 to August 11, 2002.

Appellant disagreed with the decision and requested an examination of the written record. No additional evidence was received.

By decision dated February 23, 2006, an Office hearing representative affirmed the Office's prior decision.

[1] In his January 22, 2004 report, Dr. Gulli had advised that there was no need for appellant to return and her work restrictions should be permanent.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] set 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.[4]

Chapter 16 of the fifth edition of the A.M.A., *Guides* provides the framework for assessing upper extremity impairments.[5] Section 16.4 provides that in evaluating abnormal motion both active and passive motion measurements are necessary to evaluate the joint motion under the appropriate charts and these should be added to obtain the total motion impairment.[6] A schedule award is not payable for impairment to the whole person.[7]

Office procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from a physician is obtained.[8]

It is well established that the period of a schedule award commences on the date that the employee reaches MMI from the residuals of the accepted employment injury. The determination of whether MMI has been reached is based on the probative medical evidence of record, and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office.[9] The Board has noted a reluctance to find a date of MMI which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits.[10] The Board, therefore, requires persuasive proof of MMI for selection of a retroactive date of MMI.[11]

---

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Id.*; *see, e.g., Rose V. Ford*, 55 ECAB 449 (2004).

[5] A.M.A., *Guides*, 433-521.

[6] *Id.* at 451-452.

[7] *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

[8] *See Thomas J. Fragale*, 55 ECAB 619 (2004). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

[9] *Mark A. Holloway*, 55 ECAB 321 (2004).

[10] *James E. Earle*, 51 ECAB 567 (2000).

[11] *Id.*

ANALYSIS

The Office accepted the conditions of right shoulder strain, cervical strain and right shoulder impingement. On March 22, 2004 appellant filed a claim for a schedule award. At the request of the Office, her attending physician, Dr. Gulli, evaluated her to determine the extent of her permanent impairment of the right upper extremity on April 30, 2004. Dr. Gulli related that appellant had range of motion findings which included a 70 degree internal rotation. He also stated that she had constant, moderate pain which worsened with activity. However, Dr. Gulli did not apply the tables of the A.M.A., *Guides* to either his range of motion findings or to his pain findings to support his impairment rating. The Board notes that, under Figure 16-46, page 479 of the A.M.A., *Guides,* a 70 degree internal rotation equals a one percent upper extremity impairment. Although, while Dr. Gulli opined that appellant had a 20 percent impairment due to pain, he failed to identify the nerve structure that innervates the area of involvement and grade the severity of pain under Table 16-10, page 482 and Table 16-15, page 492 of the A.M.A., *Guides*. As such, the impairment rating made by Dr. Gulli is of diminished probative value.

The Office medical adviser reviewed the medical record and concluded that appellant had a three percent upper extremity impairment. He incorporated the April 30, 2002 findings of a physical therapist in finding that appellant had one percent impairment due to loss of flexion according to Figure 16-40, page 476 of the A.M.A., *Guides*. The Office medical adviser also concluded that appellant had 2 percent upper extremity impairment due to pain according to Tables 16-10 and 16-15 at pages 482 and 492, respectively. Table 16-15 is used to determine sensory or motor impairments of the major upper extremity peripheral nerves. The table allows a maximum of five percent for sensory loss for the suprascapular nerve. In turn, this percentage is multiplied by the severity of the sensory deficit, as classified under Table 16-10, page 482.[12] While the Office medical adviser reported a Grade 4 deficit under Table 16-10, he did not explain the range he was using. A Grade 4 sensory deficit can range from 1 to 25 percent of the affected nerve and the A.M.A., *Guides* provides that the examiner must use his clinical judgment to estimate the appropriate percentage within this range.[13] The Office medical adviser did not adequately explain how he derived the impairment rating for sensory loss within the range of values shown in Table 16-10. As such, the impairment rating made by the Office medical adviser is of diminished probative value.

The Office advised that the period of the schedule award commenced June 7, 2002. It is well established that the period of a schedule award commences on the date that the employee reaches MMI from the residuals of the accepted employment injury. Dr. Gulli found that the date of MMI was January 22, 2004. The Office medical adviser found that appellant reached MMI on June 7, 2002. While the Office medical adviser properly noted that Dr. Gulli had recommended permanent restrictions for appellant's right shoulder as of June 7, 2002 the record supports that Dr. Gulli first opined that appellant had reached MMI on January 22, 2004. The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which

[12] *Mark A. Holloway*, *supra* note 9.

[13] *James E. Earle*, *supra* note 10.

is accepted as definitive by the Office.[14] The Office medical adviser did not provide adequate rationale for his finding and thus did not present the persuasive proof necessary to support a retroactive date of MMI.

The Board will set aside the Office's February 23, 2006 schedule award decision and remand the case for further development. After such further development of the medical evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement to a schedule award. Additionally, the Office should determine whether any change in the date of commencement of the schedule award impacts the pay rate applicable to the schedule award.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with the above opinion.

Issued: August 13, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[14] *Mark A. Holloway*, *supra* note 9.