United States Department of Labor
Employees' Compensation Appeals Board

L.H., Appellant	)	
and	)	**Docket No. 06-1691**
	)	**Issued: June 18, 2007**
U.S. POSTAL SERVICE, O'HARE AIR MAIL FACILITY, Chicago, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 18, 2006 appellant filed a timely appeal from the June 29, 2006 merit decision of the Office of Workers' Compensation Programs, which awarded compensation for permanent impairment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the schedule award.

ISSUE

The issue is whether appellant has more than a 7 percent impairment of her right upper extremity or more than a 14 percent permanent impairment of her left upper extremity.

FACTUAL HISTORY

On October 24, 1996 appellant, then a 56-year-old distribution clerk, sustained an injury in the performance of duty: "I was pulling very heavy foreign bags when I felt a strain in my shoulder so I can't lift my right arm anymore." She stopped work on February 17, 1997. The Office accepted appellant's claim for bilateral shoulder strain, bilateral rotator cuff tear, left shoulder impingement syndrome and migraine headaches.

Appellant underwent an acromioplasty and right rotator cuff repair on February 17, 1997. On September 4, 1999 she underwent a left rotator cuff repair. On December 14, 2000 appellant underwent a repeat acromioplasty and right rotator cuff repair with distal claviculectomy. On April 26, 2001 she underwent the same procedure on the left. Appellant took disability retirement in April 2001 and received compensation for wage loss on the periodic rolls. Effective September 20, 2003, she returned to work in a permanent assignment as a rehabilitation clerk with no loss of wage-earning capacity. On April 1, 2004 appellant underwent a left rotator cuff repair with acromioplasty and coracoacromial ligament release.

Appellant filed a claim for a schedule award. On November 8, 2004 Dr. Anthony A. Romeo, an orthopedic surgeon, reported that she reached maximum medical improvement (MMI) on October 12, 2004, when he last examined her. He listed ranges of shoulder motion and noted that appellant had no neurological deficits bilaterally on her October 12, 2004 visit. Dr. Romeo reported that strength was "+4/5" on the left and "5/5" on the right. He reported that after her October 12, 2004 visit, appellant sent him a fax stating that she had pain in her shoulders and very weak grip strength in both hands. Appellant was receiving special injections in her neck and had to stop taking a pain medication that was pulled off the market. She stated that she was in constant pain daily for long periods of time. Dr. Romeo recommended an impairment rating of seven percent for the left upper extremity "based on her last physical examination in the office." He gave no rating for the right.

On February 12, 2006 an Office medical adviser reviewed Dr. Romeo's findings. He determined that appellant had a two percent bilateral upper extremity impairment due to Grade 3 pain in the suprascapular nerve distribution. The Office medical adviser determined that appellant had a five percent bilateral impairment due to five planes of shoulder motion. He determined that appellant had a 7 percent impairment of the left upper extremity due to a 10 percent strength deficit against gravity only. The Office medical adviser recommended a rating of 7 percent for the right upper extremity and 14 percent for the left.

On June 29, 2006 the Office issued a schedule award for a 7 percent impairment of the right upper extremity and a 14 percent impairment of the left. The Office indicated that appellant reached MMI on October 12, 2004 and it used her pay rate effective April 1, 2004.

On appeal, appellant does not understand the reason she received a lower rating for her right upper extremity, as she has an open rotator cuff on the right with no hope of repair while the left is somewhat patched. She disagrees with the date of MMI for her right shoulder, the status of which has been the same since February 4, 2003. Appellant also questioned the pay rate of her schedule award because her July 2006 pay stub shows a higher annual rate, and she questioned why a pay rate from April 1, 2004 was used for a period of award extending to January 13, 2006.

LEGAL PRECEDENT

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.

[1] 5 U.S.C. § 8107.

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*.[2]

The A.M.A., *Guides* explains that impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized:

> "It is understood that an individual's condition is dynamic. Maximal 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 MMI, a permanent impairment rating may be performed."[3]

The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the injury. The question of when MMI has been reached is a factual one which depends upon the medical findings in the record. The determination of such date is to be made in each case upon the basis of the medical evidence in that case.[4]

Monetary compensation for total or partial disability due to an employment injury is paid as a percentage of monthly pay.[5] Section 8101(4) of the Act provides that "monthly pay" means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.[6]

ANALYSIS

Dr. Romeo, the attending orthopedic surgeon, reported that appellant reached MMI on October 12, 2004, the date he last examined her. It is the opinion of appellant's surgeon, therefore, that her bilateral shoulder condition was static and well stabilized at that time. The Board finds that this evidence clearly and convincingly establishes that appellant reached MMI by October 12, 2004, such that it was proper for the Office to begin the payment of her schedule award at that time. Appellant argues for an earlier date with respect to her right shoulder, but a more retroactive date for MMI carries certain disadvantages. If retroactive, the schedule award for her right shoulder could be paid at a lower pay rate than her left, impacting the cost-of-living

[2] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001).

[3] A.M.A., *Guides* 19.

[4] *Marie J. Born*, 27 ECAB 623, 629-30 (1976).

[5] 5 U.S.C. §§ 8105, 8106.

[6] *Id.* at § 8101(4); *John D. Williamson*, 40 ECAB 1179 (1989).

increase for 2003,[7] and any compensation she received for wage loss after February 4, 2003.[8] Also, if her right shoulder condition was in fact static and well stabilized as of February 4, 2003, the earlier date will not change her impairment rating or increase the number of weeks of compensation she receives for that impairment.[9] The determination ultimately rests with the medical evidence and appellant's orthopedic surgeon unequivocally reported October 12, 2004 as the date of MMI.

With MMI established, the Office properly used Dr. Romeo's clinical findings on October 12, 2004 to determine appellant's impairment rating. As to impairment due to loss of left shoulder motion, according to Figure 16-40, page 476 of the A.M.A., *Guides*, forward elevation (flexion) of 140 degrees is a three percent impairment of the upper extremity. Extension of 30 degrees is a one percent impairment. Figure 16-43, page 477, indicates that abduction of 150 degrees is a one percent impairment. Adduction of 30 degrees is also a one percent impairment. Under Figure 16-46, page 479, external rotation of 80 degrees shows no impairment. Internal rotation of 80 degrees also shows no impairment. Because the impairment values contributed by each unit of motion are added to determine the impairment of the upper extremity due to abnormal shoulder motion,[10] appellant has a six percent impairment of her left upper extremity due to loss of motion.[11]

On the right, Dr. Romeo reported the same ranges of motion with two exceptions: adduction was improved to 45 degrees, and external rotation was improved to 90. Neither demonstrated an impairment of the upper extremity. Appellant therefore has a five percent impairment of her right upper extremity due to loss of motion.

Dr. Romeo reported no neurological deficits in either the left or right upper extremity on October 12, 2004. The only other clinical finding he reported was "4+/5" strength on the left side and "5/5" strength on the right in all planes, indicating a slight loss of strength on the left during manual muscle testing. Dr. Romeo did not explain, however, whether he was assessing appellant's ability to move the joint against gravity only or against gravity with some resistance. He did not exercise his clinical judgment to select the appropriate percentage deficit from the range of values shown in Table 16-35, page 510. The Board finds, therefore, that Dr. Romeo did not describe the character and degree of this impairment in sufficient detail to allow a proper application of the A.M.A., *Guides*.

[7] *Franklin L. Armfield*, 29 ECAB 500 (1978) (the Office properly excluded cost-of-living increases that became effective prior to the date of MMI).

[8] *Marie J. Born*, *supra* note 4 (an employee cannot concurrently receive compensation under a schedule award and compensation for disability for work).

[9] The Act provides 312 weeks' compensation for the complete loss of an upper extremity. 5 U.S.C. § 8107(c)(1). Partial losses are compensated proportionately. *Id.* at § 8107(c)(19). Thus, a seven percent impairment of appellant's right upper extremity is seven percent of 312 weeks, or 21.84 weeks of compensation, regardless of when the schedule award begins.

[10] A.M.A., *Guides* 479.

[11] The Office medical adviser neglected to include adduction as one of the six planes of shoulder motion.

The Office medical adviser assumed that Dr. Romeo tested against gravity only and selected, without explanation, a specific percentage deficit from Table 16-35. From a range of 5 to 25 percent, the Office medical adviser reported that appellant's strength deficit was 10 percent on the left "based on the documentation provided and clinical judgment." But it is up to the examining physician to exercise clinical judgment in this matter, and Dr. Romeo failed to do so. The Office medical adviser further allowed an additional two percent impairment for pain bilaterally, based not on any clinical description of neurological deficit but on a communication from appellant that she was in constant pain daily for long periods of time. From this, the Office medical adviser localized the area of involvement, identified the nerve structures innervated the affected area, graded the severity of the sensory deficit as Grade 3 -- "Distorted superficial tactile sensibility (diminished light touch and two-point discrimination), with some abnormal sensations or slight pain, that interferes with some activities" -- and from a range of 26 to 60 percent selected a 40 percent deficit of the suprascapular nerve, again with no rationale.[12] Dr. Romeo's evaluation did not adequately address this.

The Office procedure manual provides that where the impairment has not been correctly described, a new or supplemental evaluation should be obtained.[13] The Board will therefore set aside the Office's June 29, 2006 schedule award and remand the case for further development. In addition to determining whether appellant has impairment due to a spinal, brachial plexus or peripheral nerve injury and whether she has impairment due to loss of strength on manual muscle testing, the Office should determine whether motion impairments, derived separately, should be combined with impairment for resection arthroplasty under Table 16-27, page 506 of the A.M.A., *Guides*. The criteria for arthroplasty impairment should be used only when the other criteria have not adequately encompassed the extent of appellant's impairment. The evaluator must apply proper judgment to avoid any duplication of impairment ratings.[14] Further, the Board notes that the impairment ratings in the body organ system chapters of the A.M.A., *Guides* make allowance for any accompanying pain.[15] After such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's claim for a schedule award.

CONCLUSION

The Board finds that this case is not in posture for decision. Further development of the medical evidence is warranted to determine the permanent impairment of appellant's upper extremities resulting from her October 24, 1996 employment injury.

[12] As a matter of course, the Office medical adviser should provide rationale for the percentage of impairment specified. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.d(1) (August 2002).

[13] *Id*. at Chapter 2.808.6.d(2).

[14] A.M.A., *Guides* 499.

[15] *Id*. at 20.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: June 18, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board