

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

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**J.J., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Philadelphia, PA, Employer**

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**Docket No. 08-2130  
Issued: April 10, 2009**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 29, 2008 appellant, through his representative, filed a timely appeal from the October 9, 2007 merit decision of the Office of Workers' Compensation Programs, which awarded scheduled compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the May 6, 2008 merit decision of the Office hearing representative, which affirmed the schedule award.

**ISSUE**

The issue is whether appellant is entitled to a schedule award. On appeal, appellant's representative argues that the Office should have held the claim for a schedule award in abeyance while appellant was in receipt of benefits for temporary total disability. He also argues that appellant did not reach maximum medical improvement (MMI).

## **FACTUAL HISTORY**

On April 7, 2003 appellant, then a 48-year-old manual clerk, filed a claim alleging that his bilateral carpal tunnel syndrome was a result of casing and hand-stamping letters in the course of his federal employment. The Office accepted his claim for bilateral carpal tunnel syndrome and authorized surgery. Appellant underwent a left carpal tunnel release on August 8, 2003 and a right carpal tunnel release on October 10, 2003. On January 28, 2004 Dr. James S. Raphael, the orthopedic hand surgeon, reported that appellant had reached MMI.

On December 17, 2004 appellant filed a formal claim for a schedule award. In an attached letter, his representative stated the following: "I ask kindly that the schedule award claim be suspended in light of the fact that the claimant is in receipt of temporary total disability benefits."

On January 26, 2006 Dr. Steven M. Lipschutz, a family practitioner, reported that appellant had reached MMI. On January 31, 2007 Dr. Mark A.P. Filippone, a physiatrist, reported that appellant had not reached MMI. On May 16, 2007 he reported that appellant's medical history was unchanged and there had been no interval history of trauma or injury. Dr. Filippone added that the central and peripheral neurologic examinations were also unchanged.

On May 23, 2007 Dr. Robert Franklin Draper, an orthopedic surgeon and Office referral physician, evaluated appellant and offered an assessment of his permanent functional loss of use of the upper extremities. He reported that appellant reached MMI on January 1, 2007.

On September 21, 2007 an Office medical adviser reviewed the evaluations performed by Dr. Draper and Dr. Filippone and determined that appellant had a 10 percent impairment of each upper extremity as a result of residual carpal tunnel syndrome. He recommended May 16, 2007 as the date of MMI, as that was the date Dr. Filippone reported electrodiagnostic studies.

In a decision dated October 9, 2007, the Office issue a schedule award for a 10 percent impairment of each upper extremity. It determined that the period of the award should begin on May 16, 2007, the date of MMI.

On October 31, 2007 Dr. Filippone wrote to appellant's representative: "This is in response to your correspondence of November 25, 2007. [Appellant] remains under my medical care. He has not reached MMI and still remains totally disabled." On December 9, 2007 Dr. Filippone reported that appellant was status post bilateral carpal tunnel releases in 2003. He reported that the history remained unchanged. Dr. Filippone added that central and peripheral neurological examinations were "abnormally unchanged."

On May 6, 2008 an Office hearing representative affirmed appellant's October 9, 2007 schedule award. She could find no provision to support a delay in paying the schedule award and noted that the evidence indicated that appellant had reached MMI.

## LEGAL PRECEDENT

The Office may not purport to adjudicate a claim before any claim has been filed.<sup>1</sup> But in every instance where a claim for compensation is filed, good administrative practice requires that a final determination be made and a compensation order be issued. In such a case, a claimant is entitled to have an adjudication.<sup>2</sup>

Section 8107 of the Federal Employees' Compensation Act<sup>3</sup> 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*).<sup>4</sup>

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. [MMI] 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.”<sup>5</sup>

Postoperatively, the A.M.A., *Guides* states a sufficient amount of time for optimal physiologic recovery and rehabilitation should elapse before an individual qualifies for permanent impairment rating, should there be residual symptoms or clinical findings. Factors affecting nerve recovery in compression lesions include nerve fiber pathology, level of injury, duration of injury and status of the end organs. Age is not a prognostic factor. Sensory function usually returns before motor function. High axonotmetic lesion may take 1 to 2 years for maximal recovery, whereas even lesions at the wrist may take 6 to 9 months for maximal recovery of nerve function.<sup>6</sup>

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<sup>1</sup> E.g., *Charlie Denman*, 1 ECAB 105 (1948); accord *Peter Joseph Crowley*, 2 ECAB 128 (1948) (a purported adjudication of a claim is inappropriate where no formal claim has been filed).

<sup>2</sup> *Sanford B. Teu, II*, 9 ECAB 923 (1958) (noted in passing, as there appeared to be no decision from which an appeal would lie).

<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404 (1999).

<sup>5</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>6</sup> *Id.* at 493.

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>7</sup>

### ANALYSIS

Appellant's representative does not argue the percentage impairment awarded. He argues that the Office should have held appellant's December 17, 2004 claim in abeyance. On appeal, he asks that the schedule award "be revisited at a later date." Appellant's representative cites no authority for an indefinite suspension of a formal claim for compensation. He offers no guidance as to when the Office should "revisit" the matter. A formal claim having been filed, the Board finds that it was proper for the Office to adjudicate it.<sup>8</sup> Workers' compensation benefits are to be adjudicated with reasonable dispatch so as to provide for an injured worker's current needs. Therefore, the Board will not disturb the Office's decisions on this point.

The Board finds, however, that there is a conflict in medical opinion warranting referral to an impartial medical specialist. On January 31, 2007 and again on October 31, 2007 Dr. Filippone, the attending physiatrist, reported that appellant had not yet reached MMI. He did not explain. Dr. Filippone appeared to maintain that appellant's history and neurological examination remained unchanged years after surgery, certainly longer than the six to nine months suggested by the A.M.A., *Guides*.<sup>9</sup>

Dr. Draper, the Office orthopedic surgeon, reported that appellant reached MMI on January 1, 2007. He, too, did not explain. An Office medical adviser recommended May 16, 2007 as the date of MMI, as that was the date Dr. Filippone noted appellant's electrodiagnostic studies.

The Board will set aside the Office's October 9, 2007 and May 6, 2008 decisions and will remand the case for referral to an impartial medical specialist. The specialist must offer sound medical reasoning with references to the supporting clinical findings.

If the impartial medical specialist finds that appellant reached MMI by a specific date, the Office shall issue a schedule award to begin on that date. If the specialist finds that appellant has not yet reached MMI, the Office shall deny compensation on that ground. After such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's outstanding claim for a schedule award.

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<sup>7</sup> 5 U.S.C. § 8123(a).

<sup>8</sup> See text accompanying notes 1 and 2 above.

<sup>9</sup> Dr. Raphael, appellant's surgeon, found that appellant reached MMI by January 28, 2004. Dr. Lipschutz, appellant's family physician, reported on January 26, 2006 that appellant had reached MMI. But their disagreement with Dr. Filippone is not enough to invoke section 8123(a) of the Act.

**CONCLUSION**

The Board finds that this case is not in posture for decision. A conflict in medical opinion warrants referral to an impartial medical specialist.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 6, 2008 and October 9, 2007 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this opinion.

Issued: April 10, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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