

FACTUAL HISTORY

This is the second time this case has been before the Board. By decision dated December 10, 2007, the Board set aside the Office's January 8 and May 16, 2007 schedule award decisions and remanded the case for further development of the medical evidence, proper determination of the date of maximum medical improvement (MMI)² and development of evidence relevant to appellant's pay rate under section 8101(4) of the Federal Employees' Compensation Act.³ The facts and the circumstances of the case as set out in the Board's prior decision are incorporated herein by reference.

The Office accepted appellant's October 4, 2004 occupational disease claim for bilateral carpal tunnel syndrome and he subsequently underwent bilateral median nerve release surgeries. Based upon the second opinion report of Dr. Robert W. Lowe, a Board-certified orthopedic surgeon, the Office issued a decision dated January 8, 2007, granting appellant a schedule award for an eight percent impairment to his upper extremities (five percent -- right; three percent -- left). It determined that MMI occurred on May 26, 2006. The effective date of pay rate was October 4, 2003, with a weekly pay rate of \$887.78. On May 16, 2007 the Office denied modification of the January 8, 2007 decision.

Appellant appealed the schedule award decision to the Board. In its December 10, 2007 decision, the Board found that the case was not in posture for a decision. The Board stated that Dr. Lowe failed to explain how he arrived at his impairment rating based upon a correct application of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁴ noting that, although he referred to page 495, Dr. Lowe did not specifically indicate that, or discuss why, appellant fell into category 2, rather than category 1, of the standards for determining impairment for carpal tunnel syndrome and did not explain how his clinical findings applied to his impairment rating.

On remand, the Office asked the employing establishment to provide evidence of appellant's actual earnings for the 12-month period prior to the date his disability began, excluding overtime, as well as information regarding premium pay, such as night differential and Sunday premium pay.

The Office referred appellant, together with a revised statement of accepted facts and the entire medical record, to Dr. Lowe for clarification of his opinion as to the degree of appellant's permanent impairment and the date of MMI. In a report dated February 15, 2008, Dr. Lowe reiterated his opinion that appellant had reached MMI as of May 26, 2006 and clarified his

² The Board found that the Office improperly selected May 26, 2006 as the date of MMI, in that the date selected was retroactive to the date of the examination on which the Office relied in fashioning the schedule award.

³ Docket No. 07-1867 (issued December 10, 2007).

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

conclusion regarding the degree of impairment to appellant's upper extremities, right versus left.⁵ He reported basically normal examination findings, noting that appellant had intact sensation in both hands. Two-point discrimination was present in all fingers at five millimeter or less. Tinel's and Phalan's signs were negative bilaterally. Both radial and ulnar arteries were open and patent bilaterally. The vascular filling of the hand and mobility of the thumb were normal bilaterally. There was no problem with either operative site for carpal tunnel release; *i.e.*, there was no neuron at the wound. The wounds were well healed. The motion of the metatarsophalangeal (MP) and proximal interphalangeal (IP) joints of the right hand were normal, although the right thumb showed some stiffness (MP and IP joints flexing 40 degrees). The distal interphalangeal (DIP) joints of the right hand are stiff due to age, flexing 25 degrees at index, 25 degrees long finger, but ring finger right and fifth finger DIP joints approaching more normal range; 40 degrees ring and 60 degrees DIP joint. On the left hand, MP joint flexed 36 degrees, thumb flexed 36 degrees, IP joint of the thumb flexed 40 degrees. Left hand DIP joints were stiff (second flexing 20 degrees, third 20 degrees, fourth 32 degrees and fifth 32 degrees).

Dr. Lowe reviewed the results of an August 25, 2005 nerve conduction study, which showed severe compression of the left median nerve and moderate compression of the right median nerve. Referring to page 495 of the fifth edition of the A.M.A., *Guides*, Dr. Lowe opined that appellant had a five percent impairment of his left upper extremity and a three percent impairment of his right upper extremity. He explained that he was applying category 2 on page 495 of the A.M.A., *Guides* because, on examination, appellant did not exhibit any nerve or sensory deficits, as required under category 1. Noting that appellant had excellent clinical results, he stated that his rating was based solely on electrical studies.

In a March 5, 2008 report, the district medical adviser agreed with Dr. Lowe's impairment rating. Noting that Dr. Lowe found no clinical evidence of median nerve deficits, but that nerve conduction studies were abnormal bilaterally, he concluded that appellant was entitled to a maximum of a five percent impairment rating for each upper extremity, under scenario 2 on page 495 of the A.M.A., *Guides*. He concluded that a five percent left upper extremity rating and a three percent right upper extremity rating properly reflected the differences between the two extremities in terms of the relative impact of the residual carpal tunnel syndrome in each hand. The medical adviser opined that appellant had reached MMI on May 26, 2006.

The record contains a leave analysis for the period September 22, 2003 through July 24, 2004. A March 26, 2008 memorandum to the file indicates that on October 4, 2003 appellant had a total pay rate of \$1,082.67, based on his entitlement to premium pay (base pay rate -- \$887.78; night differential -- \$161.99; holiday -- \$4.09; other -- \$28.81). A March 27, 2008 fiscal report reflects that appellant was paid the amount of \$3,906.24, representing a pay rate adjustment for a schedule award for the period May 26 to November 16, 2006.

⁵ Dr. Lowe stated that his September 22, 2006 report contained a typographical error reflecting that appellant's right hand was more severely impaired than the left. He stated that, in fact, appellant's left hand was more severely impaired than the right, as reflected by his impairment rating of five percent for the left hand and three percent for the right.

By decision dated March 28, 2008, the Office granted appellant a schedule award for a five percent impairment of the left upper extremity and a three percent impairment of the right upper extremity. It did not address the issue of the date of MMI. The Office found that appellant was entitled to additional compensation based on an adjusted pay rate, which included premium pay for the 12-month period prior to the date disability began on October 4, 2003. It stated that the date disability began was “procedurally correct and [was] the proper date to use to establish the effective pay rate for compensation purposes.”

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act⁶ and its implementing regulations⁷ 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 regulations as the appropriate standard for evaluating schedule losses.⁸

The fifth edition of the A.M.A., *Guides*, regarding impairment due to carpal tunnel syndrome, provides:

“If, after an optimal recovery time following surgical decompression, an individual continues to complain of pain, paresthesias and/or difficulties in performing certain activities, three possible scenarios can be present --

- (1). Positive clinical findings of median nerve dysfunction and electrical conduction delay(s): the impairment due to residual [carpal tunnel syndrome] is rated according to the sensory and/or motor deficits as described [in Tables 16-10a and 16-11a].
- (2). Normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal [electromyogram] testing of the thenar muscles: a residual [carpal tunnel syndrome] is still present and an impairment rating not to exceed five percent of the upper extremity may be justified.
- (3). Normal sensibility (two-point discrimination and Semmes-Weinstein monofilament testing), opposition strength and nerve conduction studies: there is no objective basis for an impairment rating.”⁹

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.*

⁹ A.M.A., *Guides* 495.

The Board has found that the fifth edition of the A.M.A., *Guides* provides that impairment for carpal tunnel syndrome is to be rated on motor and sensory deficits only.¹⁰

ANALYSIS -- ISSUE 1

The medical evidence of record establishes that appellant has no more than a five percent impairment of his left upper extremity and a three percent impairment of his right upper extremity.

Dr. Lowe's examination of appellant did not reveal any motor or sensory deficits. He reported basically normal findings, noting that appellant had intact sensation in both hands and essentially normal range of motion. However, an August 25, 2005 nerve conduction study showed severe compression of the left median nerve and moderate compression of the right median nerve. Referring to page 495 of the fifth edition of the A.M.A., *Guides*, Dr. Lowe explained that he was applying category 2 on page 495 because, on examination, appellant did not exhibit any nerve or sensory deficits, as required under category 1. He found no basis under the A.M.A., *Guides* on which to attribute any greater impairment.

The Office medical adviser reviewed Dr. Lowe's evaluation and concluded that he properly applied the A.M.A., *Guides* in determining the degree of appellant's permanent impairment. Noting that Dr. Lowe found no clinical evidence of median nerve deficits, but that nerve conduction studies were abnormal bilaterally, he concluded that appellant was entitled to a maximum of a five percent impairment rating for each upper extremity, under scenario 2 on page 495 of the A.M.A., *Guides*. He concluded that a five percent left upper extremity rating and a three percent right upper extremity rating properly reflected the differences between the two extremities in terms of the relative impact of the residual carpal tunnel syndrome in each hand.

The Board finds that Dr. Lowe's February 15, 2008 report is thorough and well rationalized. This report, reviewed and corroborated by the district medical adviser, establishes that appellant has no more than a five percent permanent impairment of his left upper extremity and a three percent impairment of the right upper extremity. Therefore, the Board will affirm the Office's finding on the degree of appellant's permanent impairment.

The Board finds, however, that the case is not in posture for a decision as to the date of MMI. In its December 10, 2007 decision, the Board found that the Office had improperly selected May 26, 2006 as the date of MMI, in that the date of the examination on which the Office relied in fashioning the schedule award was September 22, 2006. The case was remanded to the Office for further development of the medical evidence and a determination of a date of MMI. However, in its March 28, 2008 decision, it did not address the issue of the date of MMI and did not modify the term of the original schedule award. As the Board noted in its December 11, 2007 decision, a retroactive date for MMI carries with it certain disadvantages and may result in payment of less compensation. Therefore, the Board has been reluctant to find a date of MMI which is retroactive to the award and requires persuasive proof of MMI in the

¹⁰ *Kimberly M. Held*, 56 ECAB 670 (2005).

selection of a retroactive date.¹¹ The determination ultimately rests with the medical evidence¹² and is usually considered to be the date of the evaluation by the physician which is accepted as definitive by the Office.¹³ In the instant case, the date of the examination upon which the March 28, 2008 schedule award decision was made was February 15, 2008. The Office's original January 8, 2007 schedule award was based on Dr. Lowe's September 22, 2006 examination. The case will be remanded for a proper determination of the date of MMI and a recalculation of appellant's benefits under the schedule award.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act provides that compensation for a schedule award shall be based on the employee's monthly pay.¹⁴ For all claims under the Act, compensation is to be based on the pay rate as determined under section 8101(4) which defines monthly pay as:

“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...”¹⁵

In applying section 8101(4), the statute requires the Office to determine monthly pay by determining the date of the greater pay rate, based on the date of injury, date of disability or the date of recurrent disability. The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).¹⁶

Section 8114(d) of the Act provides that average annual earnings are determined: (1) if the employee worked in the employment in which the employee was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay -- (A) was fixed, the average annual earnings are the rate of pay; or (B) was not fixed, the average annual earnings are the product obtained by multiplying the daily wage for the particular employment or the average thereof, if the daily wage has fluctuated, by 300 if the employee was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week and 260 if employed on the basis of a 5-day week.¹⁷

¹¹ *J.C.*, 58 ECAB ___ (Docket No. 06-1018, issued January 10, 2007).

¹² *L.H.*, 58 ECAB ___ (Docket No. 06-1691, issued June 18, 2007).

¹³ *Mark Holloway*, 55 ECAB 321, 325 (2004).

¹⁴ *See supra* note 6.

¹⁵ 5 U.S.C. § 8101(4).

¹⁶ *See Robert A. Flint*, 57 ECAB 369 (2006).

¹⁷ 5 U.S.C. § 8114(d).

ANALYSIS -- ISSUE 2

In its December 11, 2007 decision, the Board found that the Office improperly determined appellant's pay rate based upon his monthly pay on the date of disability, without evaluation of whether date-of-injury monthly pay would be greater and remanded the case for a proper comparison. The Board finds that the Office did not properly determine appellant's pay rate for computation of his schedule award.

On remand, the Office asked the employing establishment to provide evidence of appellant's actual earnings for the 12-month period prior to the date his disability began, excluding overtime, as well as information regarding premium pay, such as night differential and Sunday premium pay. However, there is no evidence of appellant's actual earnings for the 12-month period prior to his date of injury, which, in this case, would be the date of the medical evaluation, which substantiates the degree of permanent impairment, namely February 15, 2008.¹⁸ In its March 28, 2008 decision, the Office found that appellant was entitled to additional compensation based on an adjusted pay rate, which included premium pay for the 12-month period prior to the date disability began on October 4, 2003, summarily stating that the date disability began was "procedurally correct and [was] the proper date to use to establish the effective pay rate for compensation purposes." However, the Office gave no explanation as to how it determined that the date disability began was procedurally correct. Moreover, there is no evidence of record from which the Board can determine whether appellant's pay rate on the date disability began was greater than his pay rate on the date of injury.

The Office properly included appellant's premium pay in calculating his pay rate. However, as the record does not contain pay rate information as to the date of injury, the Board is unable to determine whether appellant received the appropriate pay rate for schedule award purposes. On remand, the Office should request the appropriate pay rate information from the employing establishment. Thereafter, it should determine the proper pay rate for schedule award purposes, by comparing the pay rates on the date of injury and the date of disability and select the greater of the two.

CONCLUSION

The Board finds that appellant has no more than a five percent permanent impairment of his left upper extremity and a three percent impairment of his right upper extremity. The Board also finds that the case is not in posture for a decision as to the date of MMI or for a determination as to appellant's pay rate for schedule award purposes.

¹⁸ In its prior decision, the Board noted that in schedule award claims where an injury is sustained over a period of time, as in this case, to determine the date of injury, the Office must ascertain the date of last exposure to employment factors, as well as the date of the medical evaluation, which substantiates the degree of permanent impairment. *Id.*; *Leonard E. Redway*, 28 ECAB 242 (1977). Where exposure to work factors continues, as in this case, the date of injury is the date of the relevant medical examination, *i.e.*, the date of the medical examination upon which the extent of permanent impairment has been determined. *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2008 decision of the Office of Workers' Compensation Programs is affirmed as to the percentage of impairment of appellant's right upper extremities. However, the case is set aside and remanded for a proper determination of the date of MMI and a recalculation of appellant's benefits under the schedule award. It is further ordered that the case is set aside as to the rate of pay upon which the schedule award should be based and is remanded for action consistent with the terms of this decision.

Issued: February 6, 2009
Washington, DC

David S. Gerson, Judge
Employee' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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