United States Department of Labor
Employees' Compensation Appeals Board

D.G., Appellant	)	
and	)	**Docket No. 08-2076**
	)	**Issued: July 21, 2009**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Sandstone, MD, 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 21, 2008 appellant filed a timely appeal from a March 31, 2008 merit decision of the Office of Workers' Compensation Programs regarding a schedule award and a June 19, 2008 nonmerit decision denying an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than three percent permanent impairment to his left upper extremity causally related to his January 6, 1980 employment injury; and (2) whether the Office properly denied his request for an oral hearing as untimely. On appeal, appellant contends that he is entitled to a schedule award for 16 percent permanent impairment.

FACTUAL HISTORY

On January 7, 1980 appellant, then a 55-year-old prison guard, filed a traumatic injury claim (Form CA-1) alleging that, on January 6, 1980, while walking to the parking lot, he slipped

and fell on an icy sidewalk, injuring his left shoulder. The Office accepted the claim for a left shoulder contusion.

On January 11, 2008 appellant filed a claim for a schedule award (Form CA-7).

In an October 7, 1981 medical report, Dr. Arnold L. Hamel, a Board-certified orthopedic surgeon, stated that appellant presented for a follow-up for his left shoulder injury. Physical examination of the left shoulder revealed mild tenderness over the cuff region, but no demonstrable grating, crepitus or snapping. Dr. Hamel noted that it was too early to determine if there was any permanent disability associated with the injury.

In a medical report dated May 11, 2000, Dr. Curtis L. Leonard, a Board-certified orthopedic surgeon, reported appellant's complaint of increasing left shoulder pain for the last couple of years related to a fall 20 years ago. Physical examination revealed tenderness over the insertion of the rotator cuff on the greater tuberosity but no instability in the inferior, posterior and anterior directions. Appellant demonstrated a full range of motion, but with a catch in the abduction arc from 80 to 120 degrees, 5/5 grip strength and results of 1+/4, 0/4 and 1+/4 in the biceps, brachioradialis and triceps, respectively. Dr. Leonard also noted symmetry from left to right. Diagnostic tests revealed narrowing at the acromioclavicular (AC) joint with a small amount of spurring and a well-maintained acromiohumeral index and glenohumeral joint space. Dr. Leonard diagnosed left shoulder impingement and ordered diagnostic testing to rule out a rotator cuff tear.

Appellant was examined by Dr. Leonard again on May 26, 2000. Physical examination of the left shoulder showed tenderness at the rotator cuff insertion on the greater tuberosity and a little bit of tenderness at the AC joint. Magnetic resonance imaging (MRI) scan results revealed a rotator cuff tear on the supraspinatus with just a little bit of retraction and fairly significant degenerative disease at the AC joint with a subacromial spur impingement on the underlying supraspinatus muscle. Dr. Leonard diagnosed left shoulder, 9 x 15 millimeter, rotator cuff tear and AC degenerative joint disease. He opined that, because there was only a little retraction, he did not think the rotator cuff tear was that old.

In a December 19, 2007 medical report, Dr. Philip H. Haley, a Board-certified orthopedic surgeon, stated that he treated appellant in 2004 and again in 2007 for a left shoulder injury caused by a work-related fall on an icy sidewalk in 1980. Physical examination revealed restricted motion, pain and weakness with resisted rotator cuff function. An MRI scan showed a very large, full thickness rotator cuff tear with retracted tendon ends and fatty atrophy in the rotator cuff musculature. Dr. Haley diagnosed an irreparable rotator cuff tear. He opined that appellant sustained a 16 percent impairment of the left shoulder. Dr. Haley assigned seven percent impairment due to lost flexion and extension, six percent permanent impairment due to lost abduction/adduction and three percent due to restricted internal rotation and external rotation. He noted that his finding was based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and a physical examination involving the assessment of active and passive range of motion measurements of the shoulder.

On January 17, 2008 the Office referred the record to a Office medical adviser for an evaluation of appellant's permanent impairment.

In a medical report dated January 21, 2008, the Office medical adviser, Dr. David H. Garelick, a Board-certified orthopedic surgeon, opined that appellant sustained three percent permanent impairment to his upper extremity and that his date of maximum medical improvement was October 7, 1981. Dr. Garelick cited Dr. Hamel's October 7, 1981 medical report. He evaluated a three percent left upper extremity impairment due to Grade 3 pain in the distribution of the suprascapular nerve, in accordance with Table 16-15, on page 492, combined with Table 16-10, on page 482, of the A.M.A., *Guides*. Dr. Garelick noted that Dr. Hamel did not mention any limitation of shoulder motion or diminished strength in the rotator cuff musculature. He also stated that Dr. Haley's report should be disregarded because the report was based on a retracted permanent rotator cuff. In light of Dr. Leonard's 2000 medical report finding that the rotator cuff tear was probably new due to the limited amount of retraction, Dr. Haley's findings were likely based on the 2000 condition and not related to the January 6, 1980 injury. Further, Dr. Haley cited restricted shoulder motion, pain and weakness in the rotator cuff musculature, however, he did not quantify the range of motion or weakness.

By decision dated March 31, 2008, the Office granted appellant a schedule award for three percent permanent impairment of his left upper extremity based on the findings of Dr. Garelick.

On May 13, 2008 appellant filed a request for an oral hearing before an Office hearing representative.

By decision dated June 19, 2008, the Office denied the request for an oral hearing as untimely because it was filed more than 30 days after the March 31, 2008 decision. It also found that the issue in the case could be equally well addressed by requesting reconsideration and submitting additional evidence.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulations[2] 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, the Office has adopted the A.M.A., *Guides*, (5th ed. 2001) as the standard to be used for evaluating scheduled losses.[3]

ANALYSIS

The Office accepted that appellant sustained a contusion to his left shoulder due to his January 6, 1980 employment injury. On appeal, appellant contends that he is entitled to a

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404.

[3] *Id.*

schedule award for 16 percent permanent impairment. The Board finds that this case is not in posture for decision.

In a December 19, 2007 medical report, Dr. Haley opined that appellant sustained 16 percent permanent impairment of the left upper extremity due to an irreparable rotator cuff tear. The Board finds that Dr. Haley's report is insufficient to establish entitlement to a schedule award, as he did not base his opinion on a condition causally related to appellant's work injury and failed to provide sufficient detail to support his findings, such as his application of the A.M.A., *Guides.*

Moreover, it is well established that a schedule award can only be paid for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[4] Dr. Haley based his findings of permanent impairment on the diagnosis of an irreparable rotator cuff tear. Rotator cuff tear is not an accepted condition, as the Office only accepted a left shoulder contusion. Dr. Haley only briefly addressed the cause of the rotator cuff tear, stating that appellant had injured his left shoulder when he slipped on an icy sidewalk in 1980. Appellant failed to provide a rationalized explanation as to how this event caused a rotator cuff tear over 20 years after the injury.[5] Moreover, the medical evidence suggests that the rotator cuff tear was not related to the January 6, 1980 employment injury. In a May 26, 2000 medical report, Dr. Leonard diagnosed a rotator cuff tear and opined that, because there was only a little retraction, the tear was probably not that old. Dr. Garelick, the Office medical adviser, opined that, if the rotator tear was new in 2000, it was unlikely related to the work injury over 20 years ago. There is no medical evidence establishing that the employment injury caused or aggravated appellant's rotator cuff tear. Thus, Dr. Haley's findings of permanent impairment based on a rotator cuff tear cannot be considered in determining entitlement to a schedule award.[6]

When the examining physician does not provide an estimate of impairment conforming to the A.M.A., *Guides*, the Office may rely on the impairment rating provided by a medical adviser.[7] The Office medical adviser, Dr. Garelick, opined that appellant sustained three percent permanent impairment based on Dr. Hamel's October 7, 1981 medical report. However, the Board finds that Dr. Garelick's medical opinion is also deficient and insufficient to constitute a basis for determining appellant's permanent impairment.

[4] *Veronica Williams*, 56 ECAB 367 (2005).

[5] The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between his current condition and the employment injury. *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

[6] *See Tomas Martinez*, 54 ECAB 623 (2003) (where the Board found that appellant was not entitled to a schedule award as there was no rationalized medical evidence establishing that his condition and subsequent impairment was related to his employment injury).

[7] *Tommy R. Martin*, 56 ECAB 273 (2005).

Dr. Garelick stated that appellant had Grade 3 pain in the distribution of the suprascapular nerve. Citing to Table 16-15, on page 492[8] and Table 16-10, on page 482,[9] Dr. Garelick calculated three percent permanent impairment of the left upper extremity. It appears that, in making this calculation, Dr. Garelick determined that appellant sustained 60 percent sensory deficit for Grade 3 pain in accordance with Table 16-10.[10] He apparently multiplied the 60 percent sensory deficit by the maximum 5 percent impairment for the suprascapular nerve to find 3 percent upper extremity impairment.[11] However, Dr. Garelick did not provide any medical rationale explaining how he determined that appellant had a Grade 3 pain impairment based on the descriptions of sensory deficit in Table 16-10. He also failed to explain how he determined that 60 percent sensory deficit from Grade 3, as Grade 3 provides for a range of 26 to 60 percent sensory deficit. Because Dr. Garelick failed to provide a rationalized opinion explaining how he applied the medical evidence of record to the A.M.A., *Guides*, his impairment rating is not sufficient to determine appellant's left upper extremity impairment due to his employment injury.[12]

The Board also notes that Dr. Garelick set appellant's date of maximum medical improvement as October 7, 1981. A retroactive date for maximum medical improvement carries with it certain disadvantages and may result in payment of less compensation.[13] The Board has been reluctant to find a date of maximum medical improvement that is retroactive to the award and requires persuasive proof of maximum medical improvement in the selection of a retroactive date.[14] Dr. Garelick did not provide any rationale explaining why he chose October 7, 1981 as the date for maximum medical improvement. Further, Dr. Hamel stated in his October 7, 1981 medical report that it was too early to determine if there was any permanent disability associated with the January 6, 1980 work injury, suggesting that appellant did not reach maximum medical improvement by this date.[15] The record does not support a date of maximum medical improvement on October 7, 1981. On remand, the Office should also develop the evidence regarding appellant's date of maximum medical improvement.

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[8] A.M.A., *Guides* at 492, Table 16-15.

[9] *Id*. at 482, Table 16-10.

[10] *Id.*

[11] *Id*. at 482, 492.

[12] *See C.S.*, Docket No. 08-1466 (issued December 1, 2008) (where the Board remanded the case due to the Office medical adviser's failure to explain how he calculated the permanent impairment to the appellant's upper extremities. The Office medical adviser used Tables 16-10 and 16-15 of the A.M.A., *Guides*, at pages 482 and 492, respectively. However, he did not explain how he determined impairment grades or sensory deficits to support his findings of permanent impairment).

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

[14] *Id. See also Mark Holloway*, 55 ECAB 321 (2004).

[15] Maximum medical improvement arises at the point at which an injury has stabilized and will not improve further. This determination is factual in nature and depends primarily on the medical evidence. *Peter Belkind*, 56 ECAB 580 (2005).

Therefore, the Board finds that, on remand, the Office should further develop the medical evidence regarding the nature and extent of appellant's left upper extremity and his date of maximum medical improvement.

CONCLUSION

The Board finds that the case is not in posture for decision on the issue of appellant's entitlement to a schedule award for his left upper extremity.[16]

ORDER

IT IS HEREBY ORDERED THAT the June 19 and March 31, 2008 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 21, 2009
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

[16] In view of the Board's disposition of the first issue, the second issue, regarding whether the Office properly denied his request for an oral hearing as untimely, is moot.