United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 09-1542**
	)	**Issued: April 9, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

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 May 2, 2009 appellant filed an appeal of the Office of Workers' Compensation Programs' merit decisions dated February 20 and 24, 2009. 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 established an employment-related recurrence of disability commencing January 4, 2008; and (2) whether appellant has more than a 12 percent right arm permanent impairment.

FACTUAL HISTORY

The Office accepted the following injuries as causally related to a May 1, 1992 employment incident: right shoulder and upper arm contusions and sprains/strains, right humerus fracture and shoulder joint derangement. Appellant underwent right shoulder surgeries in 1994 and 1995. He returned to work in light-duty positions.

In a report dated April 19, 2007, Dr. Nicholas Diamond, an osteopath, provided a history and results on examination. He provided range of motion for the right shoulder and opined that appellant had a 12 percent right arm permanent impairment. In addition, Dr. Diamond found a 10 percent impairment based on sensory deficit in the C6 and C7 nerve roots, for a combined 20 percent right arm impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

The Office referred appellant to Dr. Steven Valentino, an osteopath for a second opinion examination. In a report dated August 28, 2007, Dr. Valentino provided a history and results on examination. He found that appellant had a six percent right arm impairment based on loss of right shoulder flexion and abduction.

To resolve a conflict in the medical evidence, appellant was referred to Dr. Joseph Jelen, a Board-certified orthopedic surgeon. By report dated February 5, 2008, Dr. Jelen provided a history and results on examination and provided range of motion results for the right shoulder: 30 degrees extension, 120 degrees flexion, 90 degrees abduction, 40 degrees adduction, 40 degrees internal rotation and 60 degrees external rotation. He noted that he did not find the sensory deficits reported by Dr. Diamond. Dr. Jelen opined that appellant had a 12 percent right arm impairment based on loss of range of motion.

In a report dated March 5, 2008, an attending family practitioner, Dr. Rahul Kapur, noted that appellant had a 1992 injury and stated that he was in his "USOH [usual state of health]" until February 20, 2008 when he developed right shoulder pain after repetitive lifting at work. He reported that appellant was forced to leave work from February 20 to 26, 2008. In a report dated January 30, 2008, a physician's assistant indicated that appellant was treated for right shoulder pain.

By report dated April 3, 2008, an Office medical adviser reviewed the evidence and opined that appellant had a 12 percent right arm impairment. He reported that the date of examination by Dr. Jelen was January 6, 2008 and this was the date of maximum medical improvement.

In a decision dated June 18, 2008, the Office issued a schedule award for a 12 percent right arm permanent impairment. The period of the award was 37.44 weeks from January 6 to September 24, 2008. By decision dated July 9, 2008, the Office issued a "corrected" award, indicating that the date of maximum medical improvement was February 5, 2008, the actual date of examination by Dr. Jelen. The period of the award was February 5 to October 24, 2008. The record also contains a decision dated October 14, 2008, which stated the correct period of the award should be February 5 to September 24, 2008. No further explanation was provided.

On June 18, 2008 appellant filed two Form CA-2a's (notice of recurrence of disability) for the periods commencing January 4 and March 3, 2008. He continued to receive treatment from Dr. Kapur. In a report dated November 12, 2008, Dr. Kapur again indicated that appellant had right shoulder pain on February 20, 2008 due to repetitive lifting at work. He diagnosed rotator cuff tendonopathy/tear and post-traumatic glenohumeral arthritis.

In a decision dated August 6, 2008, the Office denied the claims for recurrence of disability. It found that the medical evidence was insufficient to establish the claims. In a decision dated December 2, 2008, it stated, "your recurrence of [June 26, 2008] has been accepted by this office."[1]

Appellant requested a review of the written record with respect to the schedule award and recurrence of disability decisions. By decision dated February 20, 2009, the Office hearing representative affirmed the July 9 and October 14, 2008 schedule award decisions.

In a decision dated February 24, 2009, an Office hearing representative found that appellant had not established a recurrence of disability from January 4 through March 3, 2008.

LEGAL PRECEDENT -- ISSUE 1

The Office's regulations defines the term recurrence of disability as follows:

> "Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."[2]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[3] To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.[4]

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[1] On October 7, 2008 the Office received a CA-2a form for the period commencing June 28, 2008.

[2] 20 C.F.R. § 10.5(x).

[3] *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

[4] *Maurissa Mack*, 50 ECAB 498 (1999).

ANALYSIS -- ISSUE 1

The record indicates that appellant had returned to light duty after his May 1, 1992 employment injury. Appellant filed two CA-2a claim forms, the first indicating a claim commencing January 4, 2008 and the second commencing March 3, 2008. A June 26, 2008 Office development letter states that he was claiming compensation from January 4 to February 3, 2008 and March 3 to 18, 2008. While the hearing representative states the relevant period is January 4 through March 3, 2008, presumably in affirming the August 6, 2008 decision, he is affirming the denial of compensation claimed in both CA-2a forms filed June 18, 2008.[5]

It is, as noted above, appellant's burden to establish a recurrence of disability for the periods claimed. In this case, he received treatment on January 30, 2008, but the report is from a physician's assistant, who is not considered a physician under the Federal Employees' Compensation Act.[6] Appellant began treatment with Dr. Kapur on March 5, 2008. Dr. Kapur did not provide a rationalized medical opinion establishing a recurrence of disability on January 4 or March 3, 2008 causally related to the 1992 employment injury. He noted that appellant reported symptoms on February 20, 2008 from repetitive lifting at work, but to the extent he is alleging an aggravation based on those new employment incidents, this would be a new claim for compensation.[7]

On appeal, appellant argues that Dr. Kapur's November 12, 2008 report establishes a recurrence of disability. This report, however, simply reiterates that he had symptoms on February 20, 2008. It does not discuss disability commencing January 4 or March 3, 2008 and does not provide a rationalized medical opinion establishing a recurrence of disability causally related to the accepted employment injuries. The Board finds that appellant did not meet his burden of proof in this case.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Act[8] and its implementing regulations[9] 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

[5] Since the Office found that appellant was entitled to a schedule award commencing February 5, 2008 and since he cannot receive wage-loss compensation and a schedule award covering the same period, the claimed period at issue is January 4 to February 4, 2008. *See Eugenia L. Smith*, 41 ECAB 409 (1990).

[6] *See George H. Clark*, 56 ECAB 162 (2004); 5 U.S.C. § 8101(2).

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997).

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404 (1999).

all claimants.[10] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[11]

The Act provides that, if there is a 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 the examination.[12] The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[13]

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[14]

ANALYSIS -- ISSUE 2

A conflict under 5 U.S.C. § 8123(a) existed between an attending physician, Dr. Diamond, and Dr. Valentino, a second opinion physician. Dr. Diamond found that appellant had 20 percent right arm impairment, while Dr. Valentino opined that the impairment was 6 percent. To resolve the conflict, appellant was referred to Dr. Jelen.

The Board finds Dr. Jelen provided a rationalized medical opinion that resolved the conflict. Dr. Jelen provided a complete report with appropriate findings on examination. For impairments based on shoulder range of motion, the applicable figures are found in section 16.4i of the A.M.A., *Guides;* 30 degrees of extension is a one percent arm impairment under Figure 16-40, while 120 degrees flexion is a four percent impairment under the same figure.[15] 90 degrees abduction results in a four percent arm impairment under Figure 16-43[16] and 40 degrees internal rotation is a three percent arm impairment under Figure 16-46.[17] No additional range of motion impairments are found for the results reported by Dr. Jelen.

Dr. Jelen therefore properly determined that appellant had 12 percent right arm impairment for loss of shoulder range of motion. In addition, he explained that he did not find a

[10] *See Ronald R. Kraynak,* 53 ECAB 130 (2001); *August M. Buffa,* 12 ECAB 324 (1961).

[11] *Supra* note 9.

[12] 5 U.S.C. § 8123.

[13] 20 C.F.R. § 10.321 (1999).

[14] *Gloria J. Godfrey,* 52 ECAB 486, 489 (2001).

[15] A.M.A., *Guides* 476, Figure 16-40.

[16] *Id.* at 477, Figure 16-43.

[17] *Id.* at 479, Figure 16-46.

sensory deficit as reported by Dr. Diamond. As noted above, the report of a referee physician is entitled to special weight if rationalized and based on a proper background. The Board finds Dr. Jelen represents the weight of the evidence.

On appeal, appellant argues that Dr. Jelen's report is insufficient as he did not provide range of motion and failed to test for strength or sensory deficit. However, Dr. Jelen did provide range of motion results and did provide detailed examination results, including testing for sensory deficit. For the reasons noted above, his report represents the weight of the evidence.

The Board notes that the number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the arm, the maximum number of weeks of compensation is 312 weeks. Since appellant's impairment was 12 percent, he is entitled to 12 percent of 312 weeks or 37.44 weeks of compensation.

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.[18] There was some confusion regarding the date, as the Office medical adviser incorrectly found that the date of examination by Dr. Jelen was January 6, 2008, instead of February 5, 2008. Since the date of maximum medical improvement was February 5, 2008, appellant is entitled to 37.44 weeks of compensation from that date, as found in the July 9, 2008 decision.

The October 14, 2008 decision incorrectly states the period of the award is February 5 to September 24, 2008. The date September 24, 2008 is 37.44 weeks from January 6, 2008 not February 5, 2008. To the extent the Office is finding that, as of September 24, 2008, appellant would have received 37.44 weeks of compensation, based on the earlier error in the date of maximum medical improvement, then the Office should issue a decision that clearly explains its findings. However, the actual period of the award is 37.44 weeks from February 5, 2008 and the Office decision should properly state the period of the award. On return of the case record, the Office should clarify the issue in an appropriate decision.

CONCLUSION

The Board finds that appellant did not establish recurrences of disability commencing January 4 or March 3, 2008. The Board further finds that the evidence does not establish more than a 12 percent right arm permanent impairment. On return of the case record, the Office should clarify the period of the award.

[18] *Albert Valverde*, 36 ECAB 233, 237 (1984).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 24, 2009 and August 6, 2008 are affirmed. The decisions dated February 20, 2009 and October 14, 2008 are affirmed with respect to a 12 percent right arm impairment and set aside and remanded for clarification of the period of the award.

Issued: April 9, 2010
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