

and diagnosed a bulging disc at C6-7, left C7 radiculopathy, left supraspinatus tendinosis, and status post epidural, facet and trigger point injections. Dr. Allon determined that appellant had a left upper extremity impairment of 13 percent. He also found that she had reached maximum medical improvement by the date of his examination.

On October 3, 2008 the Office wrote to Dr. Yasin N. Khan, appellant's attending pain specialist: "You have submitted multiple reports which seem to indicate that your patient's conditioning may be worsening and/or has not reached a plateau ([m]aximum [m]edical [i]mprovement). Do you feel your patient has reached maximum medical improvement or have they reached a state where their condition will not worsen or improve?"

In a decision dated October 28, 2008, the Office denied appellant's claim for a schedule award. It explained that in order for consideration to be given to the payment of a schedule award, the medical evidence must demonstrate that the residuals of the injury have reached a relatively fixed and permanent state, known as maximum medical improvement. The Office found that the medical evidence in appellant's file indicated that her condition had not yet reached maximum medical improvement.

The Office subsequently received an October 24, 2008 report from Dr. Khan, who stated:

"While we are certain that she is not at maximum medical improvement, we do not feel as though her condition has worsened. [Appellant] presented to us back in June of 2007 and started a series of cervical facet injections. She was slated to undergo facet nerve rhizotomy but did not follow-up secondary to issues with her insurance. [Appellant] returned to us in July of 2008 where we again attempted to schedule similar procedures. She is currently in the process of undergoing these treatments and had last injection on October 8, 2008. [Appellant] is scheduled to return in approximately two weeks for a costochondral joint injection. We will continue to keep you updated on her progress."

Dr. Khan noted that appellant's diagnoses had not changed since her initial consultation and had failed to improve "as she has been somewhat limited in the number of treatments that she has received." He stated that the treatments were reasonable and necessary to help control her symptoms from likely chronic pain conditions.

On November 13, 2008 Dr. Khan noted that appellant denied any specific response to two cervical facet injections and wanted to hold off any trigger point injections for her left shoulder pain. He would see her back in one month for a routine follow up. Dr. Khan added:

"At this time, we do feel [appellant] is at maximum medical improvement. We do not feel that her condition is worsening but has plateaued in a sense that she has not improved since her initial visit in June of 2007. She will continue to need treatment providing symptomatic relief. The treatment at this time should not be considered curative but again palliative. We are hoping that she will continue to improve with time and the ability to minimize over use of the affected extremity given the fact that imaging to date has demonstrated minimal pathology...."

In a decision dated March 5, 2009, the Office reviewed the merits of appellant's case and denied modification of its prior decision. It found that, while Dr. Khan reported that appellant had attained maximum medical improvement, he also stated that she would continue to improve with time, which meant she had not attained maximum medical improvement.

On appeal, appellant argues that Dr. Khan clearly indicated that she had reached maximum medical improvement.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act¹ 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*.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 [maximum medical improvement], a permanent impairment rating may be performed.”³

A claimant seeking compensation under the Act has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.⁴

ANALYSIS

Dr. Allon, the orthopedic surgeon who saw appellant for an impairment rating, found that she had reached maximum medical improvement by September 4, 2007, the date of his evaluation. He did not explain how he came to this conclusion.⁵

Dr. Khan, the treating pain specialist, reported on October 24, 2008 that he was “certain” appellant was not at maximum medical improvement. He explained that appellant had failed to

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* 19 (5th ed. 2001); see *Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until maximum improvement -- meaning that the physical condition of the injured member of the body has stabilized and will not improve further -- has been reached).

⁴ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁵ Medical conclusions unsupported by rationale are of little probative value. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

improve because she had received a somewhat limited number of treatments. This contradicted Dr. Allon's finding.

Three weeks later, Dr. Khan changed his mind: "At this time, we do feel [appellant] is at maximum medical improvement." He repeated that she had not improved since her initial visit in June 2007, but this time he mentioned nothing about her limited number of treatments. Dr. Khan explained instead that her treatments were to be considered palliative, not curative. He stated: "We are hoping that she will continue to improve with time...." As the Office indicated, continuing improvement does not suggest maximum medical improvement.

So the record is one of contradictory evidence. Dr. Khan contradicted Dr. Allon by expressing his certainty that appellant was not at maximum medical improvement. A short time later, he contradicted himself by stating that appellant was at maximum medical improvement, but noted she would continue to improve.

The Board finds that this evidence is insufficient to establish maximum medical improvement. Appellant bears the burden of proof to establish her entitlement to a schedule award. The medical evidence she has submitted to support her claim is inconsistent on the preliminary issue of maximum medical improvement. As this element is a condition precedent to consideration of a schedule award, the Board finds that appellant has not met her burden of proof. The Board will affirm the Office's March 5, 2009 decision.

CONCLUSION

The Board finds that the evidence is insufficient to establish that appellant has reached maximum medical improvement, an element critical to her receipt of a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 2, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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