

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

K.M., Appellant)	
)	
and)	Docket No. 12-1137
)	Issued: October 19, 2012
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Birmingham, AL,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 30, 2012 appellant, through his representative, filed a timely appeal from the March 23, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of his schedule award. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly identified the date of maximum medical improvement.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 2, 2007 appellant, a 30-year-old transportation security screener, filed an occupational injury claim alleging that he sustained a low back and right shoulder strain in the performance of duty while loading and unloading a detection unit. OWCP accepted his claim for right rotator cuff sprain, traumatic arthropathy of the right shoulder region and degeneration of L4-5 and L5-S1 discs. On September 4, 2007 appellant underwent an arthroscopic subacromial decompression. He returned to full-time light duty on October 25, 2007.

Dr. Richard Steinfeld, a Board-certified orthopedic surgeon and OWCP referral physician, examined appellant on September 19, 2011. He noted that, following surgery and physical therapy, appellant had no significant changes over time. Using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Dr. Steinfeld calculated a 16 percent right upper extremity impairment due to loss of motion.

OWCP asked Dr. Steinfeld to recalculate the impairment using the applicable sixth edition of the A.M.A., *Guides*. On November 9, 2011 Dr. Steinfeld explained that the impairment was 14 percent using Table 15-34, page 475 of the sixth edition.

OWCP's medical adviser confirmed Dr. Steinfeld's calculation and noted the date of maximum medical improvement to be November 9, 2011.

On December 8, 2011 OWCP issued a schedule award for a 14 percent impairment of appellant's right upper extremity, entitling him to 43.68 weeks of compensation. The period of the award began November 9, 2011.

Appellant, through his representative, requested reconsideration. The representative argued that the date of maximum medical improvement should be November 30, 2009.

In a March 23, 2012 decision, OWCP reviewed the merits of appellant's case and denied modification of his schedule award. It explained that November 9, 2011 was the date of the medical report that provided the calculation of his impairment under the sixth edition. OWCP reviewed a November 30, 2009 medical report from Dr. Dewey H. Jones, III, the attending Board-certified orthopedic surgeon, but found that the report contained no discussion of maximum medical improvement.

LEGAL PRECEDENT

FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.² Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.³

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.0808.6.a (January 2010).

Only permanent impairment may be rated according to the A.M.A., *Guides*, and only after the status of maximum medical improvement is determined. Impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur. This will depend on the nature of underlying pathology, as the optimal duration for recovery may vary considerably from days to months. The clinical findings must indicate that September 19, 2011 for the person to have reached maximum medical improvement.⁴

The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the injury. The question of when maximum medical improvement has been reached is a factual one which depends upon the medical findings in the record. The determination of such date is to be made in each case upon the basis of the medical evidence in that case.⁵ The date of maximum medical improvement is usually considered to be the date of the medical examination that determined the extent of the impairment.⁶

ANALYSIS

Appellant does not dispute the impairment rating he received. He contests the date the schedule award began. The Board will therefore review whether OWCP properly determined the date of maximum medical improvement.

On November 30, 2009 Dr. Jones, the attending orthopedic surgeon, addressed whether appellant's work activities caused or aggravated any or all of the medical findings regarding his low back. He did not discuss maximum medical improvement. Dr. Jones gave no indication that a reasonable time had passed for healing or recovery such that appellant's low back condition had now stabilized and was not expected to improve further. The Board therefore finds that this medical report is immaterial to the issue of maximum medical improvement. OWCP properly rejected the representative's argument that the date of maximum medical improvement should be November 30, 2009.

OWCP instead used November 9, 2011 as the date of maximum medical improvement. That was the date Dr. Steinfeld, the referral orthopedist, recalculated appellant's impairment using the sixth edition of the A.M.A., *Guides*. It does not appear that he reexamined appellant on that date. It appears that Dr. Steinfeld simply applied the sixth edition to the findings he made on September 19, 2011. That was the date he examined appellant for the purpose of evaluating permanent impairment.

As the Board noted earlier, the date of maximum medical improvement is usually considered to be the date of the medical examination that determined the extent of the impairment. That date was September 19, 2011. Further, it was on September 19, 2011 that Dr. Steinfeld reported appellant had no significant changes over time following surgery and

⁴ A.M.A., *Guides* (6th ed. 2009); see *Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until maximum medical improvement -- meaning that the physical condition of the injured member of the body has stabilized and will not improve further -- has been reached).

⁵ *Marie J. Born*, 27 ECAB 623 (1976).

⁶ *E.g.*, *Richard Larry Enders*, 48 ECAB 184 at n.12 (1996) (date of the audiologic examination).

physical therapy, an indication that the condition had stabilized. For this reason, the Board will modify OWCP's March 23, 2012 decision to find that appellant reached maximum medical improvement by September 19, 2011 and that the period of his schedule award should begin that date.⁷

CONCLUSION

The Board finds that OWCP improperly identified the date of maximum medical improvement. The date of maximum medical improvement is the date Dr. Steinfeld examined appellant for the purpose of evaluating permanent impairment, not the date he recalculated the rating under the sixth edition.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2012 decision of the Office of Workers' Compensation Programs is modified to find maximum medical improvement on September 19, 2011 and is affirmed as modified.

Issued: October 19, 2012
Washington, DC

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

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

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

⁷ Regardless of whether the award begins to run on September 19 or November 9, 2011, appellant is entitled to no more than 43.68 weeks of compensation for the permanent impairment of his right upper extremity.