

FACTUAL HISTORY

This case was previously before the Board.³ Appellant, a 74-year-old retired letter carrier, slipped and fell in the performance of duty on October 1, 1991. OWCP accepted his claim for right shoulder traumatic impingement. On May 28, 2008 appellant filed a claim for a schedule award (Form CA-7) which OWCP denied by decision dated December 16, 2008. The Board twice remanded the case to OWCP for further development of the medical record.⁴ In a decision dated September 6, 2012, the Board found an unresolved conflict in medical opinion and set aside OWCP's February 17, 2012 decision. The case was remanded for referral to an impartial medical examiner.⁵ The facts of the case as set forth in the Board's September 6, 2012 decision are incorporated herein by reference.

Dr. Gerard H. Dericks, a Board-certified orthopedic surgeon selected as the impartial referee, examined appellant on October 31, 2012 and submitted a December 4, 2012 report. He found that appellant had 18 percent impairment of the right upper extremity attributable to his October 1, 1991 employment injury. The impairment was based on right shoulder range of motion deficits under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. On the question of whether appellant had reached maximum medical improvement, Dr. Dericks responded "most definitely not...." He explained that appellant would require an arthroscopic Mumford procedure (distal clavicle resection) and subacromial decompression followed by six to eight weeks of physical therapy. With the recommended procedure appellant "should" reach maximum improvement approximately three to four months after surgery. Dr. Dericks was aware that appellant previously declined shoulder surgery.

On December 17, 2012 Dr. Kenneth D. Sawyer, a district medical adviser, reviewed the record. He advised that an impairment rating was inappropriate given Dr. Derick's opinion that appellant was not at maximum medical improvement. He noted that it was unclear if appellant was currently opposed to undergoing further medical treatment, including surgery. Dr. Sawyer suggested that further inquiry be made as to whether appellant did not want surgery and that his response be referred back to Dr. Derick to assess whether maximum medical improvement had been reached absent surgery.

In a December 31, 2012 decision, OWCP denied appellant's claim for a schedule award on the basis that he had not reached maximum medical improvement.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁶ FECA,

³ Docket No. 12-873 (issued September 6, 2012) and Docket No. 09-1454 (issued January 21, 2010).

⁴ *Id.*

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⁶ For a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁷ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).⁸

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.⁹ For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."¹⁰ Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.¹¹

ANALYSIS

The Board previously found an unresolved conflict in medical opinion regarding the extent of any right upper extremity impairment. On remand, OWCP selected Dr. Dericks to resolve the conflict. Dr. Dericks rated 18 percent impairment of the right upper extremity due to shoulder range of motion deficits; but stated that appellant had not yet reached maximum medical improvement because he required surgery.

Before a schedule award may be made, it must be medically determined that no further improvement can be anticipated and the impairment must reach a fixed and permanent state, which is known as maximum medical improvement.¹² While additional medical treatment such as surgery may be recommended in order to improve the claimant's condition, the claimant is not required to undergo such treatment.¹³ Under the circumstances, OWCP must calculate the percentage of a schedule award as if no further improvement were possible if the claimant declined such intervention.¹⁴

⁷ 20 C.F.R. § 10.404.

⁸ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

⁹ 5 U.S.C. § 8123(a); see 20 C.F.R. § 10.321 (2012); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹⁰ *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

¹¹ *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3a(1).

¹³ *Id.* at Chapter 3.700.3a(1)(a).

¹⁴ *Id.* The Board notes that on October 23, 2013, the Director of OWCP filed a motion to remand the case. In light of the Board's disposition on the merits of the case, further development shall proceed as directed.

Dr. Derick was aware that appellant previously declined surgical intervention. It is not entirely clear whether appellant remains “adamantly” opposed to surgical intervention; however, there is also no evidence that he currently plans to undergo right shoulder surgery. Dr. Sawyer recommended that further inquiry be made regarding appellant’s current position on surgery and, if he remained opposed to surgery. Dr. Derick should be informed and asked to address whether maximum medical improvement had been reached under the circumstances. OWCP denied the claim based on appellant’s purported failure to be at maximum medical improvement.

As noted, appellant need not undergo surgery in order to receive a schedule award.¹⁵ Dr. Derick’s December 4, 2012 report did not adequately address the issue of maximum medical improvement. He should provide an assessment on whether appellant reached maximum improvement absent surgery. The Board notes that, while he based his 18 percent right upper extremity impairment rating on the A.M.A., *Guides* (6th ed. 2008), he did not to identify the particular Table(s) and/or Figure(s) he relied upon in rating appellant’s shoulder range of motion deficits.¹⁶ Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁷ Under the circumstances, it should seek further information and clarification from Dr. Derick.¹⁸ Accordingly, the case shall be remanded for further development. After OWCP has developed the record as deemed necessary, a *de novo* decision shall be issued.

CONCLUSION

The case is not in posture for decision.

¹⁵ *Id.*

¹⁶ See Section 15.7, Range of Motion Impairment, A.M.A., *Guides* 459, 475-78 (6th ed. 2008).

¹⁷ *Richard F. Williams*, 55 ECAB 343, 346 (2004).

¹⁸ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4g(3)(b) (July 2011).

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2012 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: October 28, 2013
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