United States Department of Labor
Employees' Compensation Appeals Board

W.S., Appellant	)	
and	)	**Docket No. 16-0344**
	)	**Issued: April 4, 2016**
DEPARTMENT OF THE TREASURY, BUREAU OF THE FISCAL SERVICE, Parkersburg, WV, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 16, 2015 appellant filed a timely appeal from a November 17, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 appellant met his burden of proof to establish that he has reached maximum medical improvement (MMI) regarding his accepted conditions, warranting a schedule award pursuant to 5 U.S.C. § 8107.

On appeal, appellant contends that his doctor and OWCP's second opinion physician agreed that he had reached MMI in 2013 and requests reconsideration of his claim for a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 24, 2011 appellant, a 61-year-old mail clerk, filed an occupational disease claim (Form CA-2) alleging that he developed osteoarthritis of the basal joint of both hands due to factors of his federal employment, including heavy lifting, twisting, and repetitive motions. OWCP accepted the claim for bilateral aggravation of localized primary osteoarthritis of the hands. Appellant returned to a light-duty position as an office automation clerk and then filed a claim for a recurrence of disability (Form CA-2a). OWCP accepted that appellant sustained a recurrence of disability on June 15, 2011 and expanded acceptance of the claim to include bilateral lateral epicondylitis.[2] Appellant was placed on the periodic rolls and received appropriate compensation benefits.

OWCP referred appellant to Dr. David K. Halley, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of his employment-related conditions. In his October 25, 2013 report, Dr. Halley reviewed a statement of accepted facts, appellant's medical history, and conducted a physical examination. He found appellant's right hand was very tender at the base of his thumb and thumb opposition for both hands was three centimeters. Dr. Halley further found that appellant had weakness on pinch and grip strength and related a history of dropping things, having weakness, and not being able to do routine things that he used to do, such as drive a car, write a letter, or work with a keyboard. Regarding his right elbow, appellant had some mild discomfort on palpation of the lateral epicondylar region, but stress testing was negative for the diagnosis of lateral epicondylitis. Dr. Halley concluded that appellant continued to suffer residuals of his work-related conditions and opined that he was totally disabled for work. He noted that a functional capacity evaluation dated March 5, 2013 demonstrated that appellant could not even work in a sedentary position. In an October 25, 2013 work capacity evaluation, Dr. Halley checked a box "yes" indicating that appellant had reached MMI.

On December 22, 2014 appellant filed a claim for a schedule award (Form CA-7).

In a December 29, 2014 letter, OWCP advised appellant of the evidence needed to establish his claim, including a physician's opinion that he had reached a fixed and stable state, known as MMI, and an evaluation of any permanent impairment utilizing the sixth edition of the A.M.A., *Guides*. It afforded him 30 days to submit this evidence.

Subsequently, appellant submitted a January 8, 2015 report from Dr. Rafid Kakel, a Board-certified occupational medicine specialist, who opined that appellant was totally disabled. He also resubmitted the October 25, 2013 work capacity evaluation from Dr. Halley who checked a box "yes" indicating that appellant had reached MMI.

In a June 13, 2013 report, Dr. Stephen E. Popper, a Board-certified occupational medicine specialist, noted that appellant was being seen for a routine clinic follow-up of a workplace injury. Appellant complained of ongoing weakness in both hands and elbows.

[2] On February 28, 2013 appellant filed a claim for wage-loss compensation (Form CA-7) for the period January 30 to February 4, 2013. By decisions dated May 3, 2013 and February 24, 2014, OWCP denied the claim finding that the evidence was insufficient to establish that he was totally disabled for the period claimed.

Dr. Popper diagnosed bilateral lateral epicondylitis and bilateral localized primary osteoarthritis of the hand. He reviewed a functional capacity evaluation and found that appellant was not able to perform sedentary work. Dr. Popper opined that appellant had no other treatment options and concluded that he had reached MMI. Later in the report, he also stated that appellant was not at MMI at the current time.

In a report dated August 30, 2013, Dr. Popper reiterated his opinion that appellant had reached MMI and was totally disabled. He asserted that he had previously determined that appellant had reached MMI during an office visit on June 13, 2013. Dr. Popper found that appellant continued to suffer residuals of his accepted conditions and advised that his permanent restrictions precluded him from performing his position as an office automation clerk.

By decision dated January 29, 2015, OWCP denied appellant's schedule award claim finding that no medical evidence had been received.

On February 17, 2015 appellant requested an oral hearing before the Branch of Hearings and Review and submitted diagnostic studies dated May 9 and 10, 2012 and physical therapy notes dated August 23 and September 18, 2013. He further submitted reports dated January 8 and June 8, 2015 from Dr. Kakel who diagnosed lateral epicondylitis and localized, primary osteoarthritis of the hand.

A telephonic hearing was held before an OWCP hearing representative on September 8, 2015. Appellant testified that Dr. Popper determined that he had reached MMI on June 13, 2013.

By decision dated November 17, 2015, the OWCP hearing representative denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish that his accepted conditions had reached MMI.

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.[3] 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 sixth edition of the A.M.A., *Guides*.[4]

Permanent impairment may only be rated according to the A.M.A., *Guides* and only after MMI has been achieved. 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

[3] 5 U.S.C. § 8107.

[4] 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 and Permanent Disability Claims*, Chapter 2.808.5.a (February 2013).

months. The clinical findings must indicate that the medical condition is static and well stabilized for the person to have reached MMI.[5]

A preliminary element for considering a schedule award is establishing that the claimant has attained MMI.[6] The A.M.A., *Guides* explain that impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized. The A.M.A., *Guides* note that an individual's condition is dynamic. MMI refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once impairment has reached MMI, a permanent impairment rating may be performed.[7]

The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the injury. The question of when MMI has been reached is a factual one that 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.[8] The date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.[9]

ANALYSIS

OWCP accepted that appellant developed bilateral aggravation of localized primary osteoarthritis of the hands and bilateral lateral epicondylitis due to factors of his federal employment. On December 22, 2014 appellant filed a claim for a schedule award. In a November 17, 2015 decision, an OWCP hearing representative denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish that his accepted conditions had reached MMI. On appeal, appellant contends that his treating physician and OWCP's second opinion physician agreed that he had reached MMI in 2013.

The Board finds that this case is not in posture for decision.

Appellant bears the burden of proof to establish his entitlement to a schedule award and the element of MMI is a requirement for granting a schedule award.[10] In *D.S.*,[11] the claimant's treating physician provided the only report in the record containing an impairment rating and

[5] A.M.A., *Guides* 24 (6th ed. 2009); *see Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until MMI -- meaning that the physical condition of the injured member of the body has stabilized and will not improve further -- has been reached).

[6] *See J.D.*, Docket No. 12-481 (issued November 17, 2012).

[7] A.M.A., *Guides* 20, Table 201 (6th ed. 2009); *Orlando Vivens*, *supra* note 5.

[8] *See D.S.*, Docket No. 15-1244 (issued August 24, 2015).

[9] *Id. See also Richard Larry Enders*, 48 ECAB 184 at n.12 (1996) (where, for example, the date of MMI was the date of the audiological examination).

[10] *See supra* note 8.

[11] *Id.*

evaluation and he opined that appellant was not at MMI. In *A.T.*,[12] the treating physician indicated in earlier reports that the employee had reached MMI, but his most recent medical report did not support a finding of MMI. In both cases, the Board found that OWCP properly determined that the medical evidence of record did not establish MMI.

The instant case is distinguishable from these, however, because appellant's treating physician, Dr. Popper, opined that appellant had reached MMI on June 13, 2013. Although there was a slight discrepancy in his June 13, 2013 report regarding MMI, the Board finds that Dr. Popper clarified his opinion in his most recent report, dated August 30, 2013, which supported a finding of MMI. He reiterated his opinion that appellant had reached MMI and asserted that he had previously determined that appellant had reached MMI on June 13, 2013. Moreover, the record also contains an October 25, 2013 report from OWCP's second opinion physician, Dr. Halley, who checked a box "yes" indicating that appellant had reached MMI.

The Board finds that the reports of Drs. Popper and Halley are consistent in finding that appellant had reached MMI in 2013. These reports are not contradicted by any substantial medical or factual evidence of record.[13]

It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden of establishing entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[14]

On remand, OWCP should develop the evidence and refer appellant, together with the case record and a statement of accepted facts, to an appropriate specialist for an examination to determine the extent and degree of any employment-related permanent impairment. After such further development as it deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

[12] Docket No. 13-1908 (issued May 23, 2014).

[13] *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

[14] *See Phillip L. Barnes*, 55 ECAB 426 (2004); *Virginia Richard (Lionel F. Richard)*, 53 ECAB 430 (2002).

ORDER

IT IS HEREBY ORDERED THAT the November 17, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: April 4, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board