

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

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N.T., Appellant )

and )

**U.S. POSTAL SERVICE, POST OFFICE,  
Naperville, IL, Employer**)

**Docket No. 15-1827  
Issued: February 1, 2016**

*Appearances:*

*Alan J. Shapiro, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On September 3, 2015 appellant, through counsel, filed a timely appeal from a March 10, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 has more than 11 percent permanent impairment to his right arm.

**FACTUAL HISTORY**

On September 28, 2011 appellant, then a 39-year-old laborer-custodian, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right wrist injury in the performance of duty on September 17, 2011. He noted that he injured his wrist while mowing grass at work.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

Appellant submitted a report dated October 26, 2011 from Dr. Brian Murphy, a Board-certified orthopedic surgeon, who provided a history that on September 17, 2011 appellant was operating a riding mower with a stiff steering wheel, and he developed swelling of the right wrist. Dr. Murphy reported that appellant likely had an old scaphoid fracture that had progressed to a nonunion with avascular necrosis, as demonstrated by a magnetic resonance imaging scan. He opined that the September 17, 2011 employment incident exacerbated the underlying arthritis and joint abnormalities. OWCP accepted the claim for right wrist osteoarthritis.

The record indicates that appellant underwent right wrist scaphoid excision and fusion surgery on December 20, 2011. He stopped working and began receiving wage-loss compensation. On June 1, 2012 appellant submitted a claim for compensation (Form CA-7), requesting a schedule award.

In a report dated May 25, 2012, Dr. Murphy reported that while appellant still reported some wrist pain, this had stabilized and the surgical incision had healed. He noted that appellant had undergone a functional capacity evaluation (FCE) and could return to duty as outlined in the FCE.<sup>2</sup> Dr. Murphy wrote that appellant was “at [maximum medical improvement] (MMI) at this point in time” and he would see appellant on an as-needed basis.

The record reflects that appellant was advised that he could not receive both a schedule award and wage-loss compensation concurrently and that wage-loss compensation payments would stop during any period he received a schedule award.

By decision dated July 20, 2012, OWCP found that the medical evidence of record failed to establish right arm permanent impairment.

Appellant requested a hearing before an OWCP hearing representative on August 3, 2012 and submitted a July 22, 2012 report from Dr. Murphy. Dr. Murphy reported that appellant had limitations to right wrist range of motion: 19 degrees of flexion, 27 degrees extension, 20 degrees radial deviation, and six degrees ulnar deviation. He opined that these losses equated to 18 percent right arm impairment.

An OWCP medical adviser reviewed the evidence and in a September 8, 2012 report opined that appellant had 11 percent right arm impairment. He identified Table 15-3 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (sixth edition) with a diagnosis of arthrodesis and a grade D impairment. The medical adviser opined that the date of MMI was May 25, 2012.

By decision dated September 18, 2012, OWCP issued a schedule award for 11 percent permanent impairment to the right arm. The period of the award was 34.32 weeks from May 25, 2012 to January 20, 2013.<sup>3</sup> It noted that wage-loss compensation had already been paid through

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<sup>2</sup> The record contains an FCE report dated May 16, 2012. A June 4, 2012 nurse’s report indicated that appellant had worked three days in March 2012, but was now waiting to see if his work restrictions could be accommodated by the employing establishment.

<sup>3</sup> The hearing representative issued a decision dated September 20, 2012 setting aside the July 20, 2012 OWCP decision and remanding the case for referral to an OWCP medical adviser. As noted, OWCP had already developed the medical evidence with respect to permanent impairment.

September 22, 2012, and that a claimant could not receive both wage-loss compensation and a schedule award concurrently. In addition, OWCP stated that “compensation for total disability will offset compensation payable for your schedule award through the ending date of the award [January 20, 2013].”

The record indicates that, during the period May 25, 2012 to January 20, 2013, appellant continued to receive compensation for total disability designated as wage-loss disability compensation. As of July 1, 2012, compensation was paid every 28 days pursuant to the periodic rolls.

On November 11, 2013 appellant submitted a November 1, 2013 report from Dr. Eugene Lopez, a Board-certified orthopedic surgeon. Dr. Lopez provided a history and results on examination. He opined that appellant had 11 percent permanent impairment to the right arm under the A.M.A., *Guides*. Dr. Lopez identified Table 15-3 and found that appellant had a class 1 grade D impairment under the diagnosis of arthrodesis, intercarpal fusion of the wrist.<sup>4</sup>

OWCP referred the evidence to an OWCP medical adviser for review and in a report dated November 25, 2013, the medical adviser opined that Dr. Lopez had accurately applied the A.M.A., *Guides*. He opined that the date of MMI remained May 25, 2012.

On September 30, 2013 appellant, through counsel, resubmitted a copy of the July 22, 2012 report from Dr. Murphy. Counsel referred to the “MMI from Dr. Murphy” and requested a “status update.” By decision dated December 11, 2013, OWCP determined that appellant had not been entitled to an increased impairment. It acknowledged that he had previously been awarded 11 percent right arm permanent impairment.

On December 23, 2013 appellant, through counsel, requested a hearing before an OWCP hearing representative. A hearing was held on June 10, 2014. Appellant argued that he had not properly been paid his schedule award because he had been paid wage-loss compensation, not a schedule award. He argued that OWCP “should hold the schedule award in abeyance” until a claimant is no longer receiving wage-loss compensation.

By decision dated August 26, 2014, the hearing representative set aside the December 11, 2013 decision. The hearing representative found that the decision was “confusing” and remanded the case to clarify whether wage-loss benefits should have been interrupted for the schedule award payment. The record contains a November 13, 2014 memorandum of telephone call indicating that appellant had inquired about receiving a lump-sum schedule award instead of being paid on the periodic rolls.

In a decision dated November 18, 2014, OWCP again found that appellant had failed to establish increased impairment. It found that, due to a computer error, however, his compensation had not been changed from the periodic rolls status to the payment of a schedule award. OWCP noted that, nonetheless, appellant could not receive wage-loss compensation and a schedule award concurrently.

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<sup>4</sup> A.M.A., *Guides* 397.

Appellant, through counsel, again requested a hearing before an OWCP hearing representative. A hearing was held on January 26, 2015. Counsel argued that appellant could not be at MMI while he was receiving wage loss for total disability. He argued that the finding of MMI was either “nonexistent or was incorrect.”

By decision dated March 10, 2015, the hearing representative affirmed the November 18, 2014 decision. He found that appellant was not entitled to an additional schedule award, that the date of MMI was properly calculated, and appellant properly received the appropriate number of weeks of compensation based on 11 percent right arm permanent impairment.

### **LEGAL PRECEDENT**

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>5</sup> Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>6</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.<sup>7</sup>

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.<sup>8</sup> With respect to a schedule award, it is appellant’s burden of proof to establish permanent impairment.<sup>9</sup> A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment causally related to an employment injury.<sup>10</sup> The medical evidence must include a detailed description of the permanent impairment.<sup>11</sup>

With respect to a wrist impairment, the A.M.A., *Guides* provides a regional grid at Table 15-3.<sup>12</sup> The class of impairment Class of Diagnosis (CDX) is determined based on specific diagnosis, and then the default value for the identified CDX is determined. The default value

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<sup>5</sup> 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

<sup>6</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 2.700, Exhibit 1 (January 2010); see also, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013).

<sup>7</sup> FECA Bulletin No. 09-03 (March 15, 2009).

<sup>8</sup> John W. Montoya, 54 ECAB 306 (2003).

<sup>9</sup> Edward W. Spohr, 54 ECAB 806, 810 (2003).

<sup>10</sup> See Rose V. Ford, 55 ECAB 449 (2004).

<sup>11</sup> See Vanessa Young, 55 ECAB 575 (2004).

<sup>12</sup> A.M.A., *Guides* 395, Table 15-3.

(grade C) may be adjusted by using grade modifiers for Functional History (GMFH) Table 15-7, Physical Examination (GMPE) Table 15-8, and Clinical Studies (GMCS) Table 15-9. The adjustment formula is  $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$ .<sup>13</sup>

## ANALYSIS

In the present case, appellant received a schedule award on September 18, 2012 for 11 percent right arm permanent impairment. Under Table 15-3, the diagnosis of “arthrodesis (fusion) intercarpal fusion” provides a default (grade C) arm impairment of 10 percent for a CDX 1 impairment.<sup>14</sup> The medical adviser applied the net adjustment formula noted above, and using a grade modifier 2 for physical examination, adjusted the impairment to a grade D impairment of 11 percent.

Appellant sought an increased schedule award and submitted the November 1, 2013 report from Dr. Lopez, but Dr. Lopez also applied Table 15-3 and found that appellant had an 11 percent right arm permanent impairment. Dr. Lopez used a grade modifier 2 for functional history, and grade modifier 1 for physical examination, with no modifier for clinical studies.<sup>15</sup> Using the formula noted above, the net adjustment is +1, or a grade D impairment. The grade D impairment under Table 15-3 for arthrodesis, intercarpal fusion is 11 percent. An OWCP medical adviser concurred in a November 25, 2013 report.

The Board finds that appellant has not established increased permanent impairment. The probative medical evidence indicates that his right arm permanent impairment is 11 percent, the same as the September 18, 2012 schedule award. Therefore, OWCP properly denied appellant’s claim for an increased schedule award.

As to counsel’s arguments regarding the date of MMI, it is well-established that the period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the injury.<sup>16</sup> The question of when MMI has been reached depends upon the medical findings in the record.<sup>17</sup> In this case, the attending physician, Dr. Murphy, had clearly noted in a May 25, 2012 report that appellant had reached MMI. An OWCP medical adviser concurred in the September 8, 2012 report. OWCP may use an MMI date that is prior to the date of the impairment evaluation (in this case July 22, 2012) if such a date is established by the persuasive medical evidence.<sup>18</sup> Based on the probative medical evidence of record, the September 18, 2012 schedule award properly included the date of MMI as May 25, 2012.

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<sup>13</sup> The net adjustment is up to +2 (grade E) or -2 (grade A).

<sup>14</sup> *Supra* note 4.

<sup>15</sup> If clinical studies are used to define the diagnosis-based impairment, it is not used in the adjustment formula. A.M.A., *Guides* 390.

<sup>16</sup> *L.H.*, 58 ECAB 561 (2007).

<sup>17</sup> *Id.*

<sup>18</sup> W.B. Docket No. 14-1982 (issued August 26, 2015); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b) (October 2013).

The Board notes that appellant suggested that an MMI date could not be established while a claimant was receiving wage-loss compensation for total disability. No support was provided for this argument. A permanent impairment to a scheduled member is not based on disability for work.<sup>19</sup> If the medical evidence establishes that an impairment is permanent and will not improve, then the claimant has reached MMI. A schedule award properly begins on the date of MMI, which in this case was established as May 25, 2012.

Appellant has also argued that he was not properly paid the schedule award from May 25, 2012 to January 15, 2013. In this regard the September 18, 2012 decision indicated that appellant was paid temporary total disability from May 25 to September 22, 2012. OWCP acknowledged in the November 18, 2014 decision that normally the continuing disability payments would be interrupted and the payment code changed to a schedule award.<sup>20</sup> The record indicated that OWCP did not change the code in this case, but appellant continued to receive the same amount of compensation he would have been paid, but designated as periodic rolls disability payments through January 15, 2013. Appellant continued to receive wage-loss compensation after that date.

In this regard appellant has failed to establish any adverse result from the failure to properly code the payments in the compensation system. It is well-established that a claimant may not concurrently receive compensation under a schedule award and wage loss for disability.<sup>21</sup> Schedule award compensation is payable in weeks of compensation.<sup>22</sup> For an 11 percent right arm impairment, appellant was entitled to 11 percent of the maximum 312 weeks, or 34.32 weeks of compensation.<sup>23</sup> Whether the payments were designated as wage-loss disability payments or schedule award payments, there is no evidence he was entitled to any additional compensation.<sup>24</sup> Appellant received the proper number of weeks of compensation for the schedule award based on his 11 percent permanent impairment to the right arm. He did not establish a loss of any benefits in this case.

The Board finds that appellant has not established more than 11 percent permanent impairment to this right arm and that he was properly paid compensation from May 25, 2012 to January 15, 2013.

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<sup>19</sup> See *B.K.*, 59 ECAB 228 (2007). See also *Connie J. Jamison*, Docket No. 05-1703 (issued January 12, 2006) (the schedule award provisions are different from any factors that would be used to determine disability based on wage loss).

<sup>20</sup> See *D.C.*, Docket No. 10-1046 (issued January 19, 2011) (administrative practices call for the interruption and then subsequent resumption of wage-loss compensation after the expiration of the schedule award).

<sup>21</sup> *James A. Earle*, 51 ECAB 567 (2000).

<sup>22</sup> 5 U.S.C. § 8107.

<sup>23</sup> *Id.*

<sup>24</sup> Cf. *Connie J. Jamison*, *supra* note 19, where the wage-loss compensation had been reduced to reflect wage-earning capacity and the schedule award payments would not be reduced.

Appellant may request an increased schedule award at any time based on the submission of new and relevant evidence showing progression of an employment-related condition resulting in increased impairment.

**CONCLUSION**

The Board finds that the evidence does not establish more than 11 percent right arm permanent impairment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 10, 2015 is affirmed.

Issued: February 1, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board