

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

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C.R., Appellant )

and )

U.S. POSTAL SERVICE, LANIER CARRIER )  
ANNEX, Cumming, GA, Employer )

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**Docket No. 17-1872  
Issued: March 8, 2018**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 5, 2017 appellant filed a timely appeal from an April 13, 2017 merit decision and an August 8, 2017 nonmerit 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 to consider the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly determined the date of maximum medical improvement (MMI) for payment of appellant's schedule award; and (2) whether OWCP properly denied appellant's request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

On appeal appellant contends that OWCP incorrectly determined the date of her MMI.

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

## **FACTUAL HISTORY**

On August 22, 2012 appellant, then a 53-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral basal joint arthritis from her repetitive work duties. She indicated on the form that she did not stop work. OWCP initially accepted appellant's claim for bilateral thumb osteoarthritis and subsequently expanded acceptance of the claim to include right thumb contracture and injury to other unspecified right upper extremity nerves.

OWCP authorized a series of surgical procedures. On November 27, 2012 appellant underwent a right hand suspensionplasty; on July 15, 2013 a left hand suspensionplasty and right thumb tenolysis of the extensor tendon; and on January 20, 2014 tenolysis of the right extensor pollicis brevis and abductor pollicis brevis, and neurolysis of the radial and median nerves. She also underwent a left thumb carpal metacarpal arthroplasty on April 13, 2015.

Appellant received intermittent wage-loss compensation benefits on the supplemental rolls from November 27, 2012 until July 27, 2013, on the periodic rolls from July 28, 2013 until June 1, 2014, and then intermittent wage-loss compensation benefits on the supplemental rolls until August 5, 2015.

On October 23, 2015 appellant filed a claim for a schedule award (Form CA-7).

In an October 1, 2015 report, Dr. Edward Holliger, a treating Board-certified orthopedic and hand surgeon, diagnosed right thumb osteoarthritis and provided examination findings. He concluded that under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>2</sup> appellant had 20 percent left upper extremity permanent impairment and 11 percent right upper extremity permanent impairment. However, Dr. Holliger did not explain how he had rated appellant's permanent impairment. He listed October 1, 2015 as the date of MMI.

On February 24, 2016 a district medical adviser (DMA) reviewed Dr. Holliger's October 1, 2015 impairment rating. The DMA opined that the opinion could not be used for a schedule award determination as it was based on the fifth edition of the A.M.A., *Guides*, and did not properly explain how the permanent impairment was rated. He recommended appellant be referred for a second opinion evaluation to determine appellant's permanent impairment using the sixth edition of the A.M.A., *Guides*.

On March 16, 2016 OWCP referred appellant to Dr. Eric S. Furie, a Board-certified orthopedic surgeon for an impairment rating under the sixth edition of the A.M.A., *Guides*.<sup>3</sup> In an April 5, 2016 report, Dr. Furie, based upon a review of the medical records and a physical examination, concurred with Dr. Holliger's impairment rating of 11 percent right upper extremity permanent impairment and 20 percent left upper extremity permanent impairment. In reaching the impairment determination, he referenced Table 15-2, pages 392 and 393 and

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<sup>2</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

Table 15-31, page 470. Dr. Furie assigned January 20, 2015 as the date of MMI as it was one year following her last surgery of January 20, 2014.

On May 19, 2016 the DMA reviewed Dr. Furie's report and opined that the second opinion physician provided insufficient detail supporting entitlement to a schedule award. He noted that Dr. Furie provided no narrative, worksheet, or calculations explaining how he arrived at his impairment determination. Due to the lack of sufficient detail, the DMA recommended referral to another second opinion physician for an impairment rating.

On August 10, 2016 OWCP referred appellant to Dr. Raju M. Vanapalli, a Board-certified orthopedic surgeon, to provide an impairment rating using the sixth edition of the A.M.A., *Guides*.

In a report dated December 15, 2016, Dr. Vanapalli, based upon a review of the medical records, statement of accepted facts, and a physical examination, diagnosed osteoarthritis of the trapeziometacarpal joints status post suspension arthroplasty of the bilateral trapeziometacarpal joint. He noted that OWCP had accepted the claim for right thumb fracture and bilateral thumb osteoarthritis. Dr. Vanapalli completed impairment evaluation forms. Using Table 15-2 on page 393 of the sixth edition of the A.M.A., *Guides*, he identified the diagnosis as class 2 based on the diagnosis of thumb CMC dislocation. Dr. Vanapalli applied a grade modifier of 3 for functional history and physical examination and a grade modifier of 2 for clinical studies, resulting in a net adjustment of 2. Next, he used Table 15-11 on page 420, to find nine percent left upper extremity permanent impairment and six percent right upper extremity permanent impairment. Dr. Vanapalli advised that appellant had reached MMI in April 2016, which was one year following her last surgery on April 13, 2015.

On January 4, 2017 a different DMA reviewed Dr. Vanapalli's report and opined that the doctor incorrectly rated the key diagnostic factor and that the impairment rating should be recalculated. The DMA using Table 15-2 on page 394 identified the diagnosis as class 3 with a default value C based on the diagnosis of thumb CMC arthroplasty with residual symptoms and consistent objective findings. He applied a grade modifier of 3 for functional history and physical examination. The DMA noted that clinical studies were not applicable. Applying the net adjustment formula, he found a net adjustment of 0 or 30 percent thumb impairment. Using Table 15-12 on page 321, the DMA found that 30 percent thumb impairment resulted in 11 percent permanent impairment of each upper extremity. He determined the date of MMI to be December 15, 2016, the date of Dr. Vanapalli's report.

On March 24, 2017 OWCP requested clarification regarding the date of MMI. It noted that Dr. Vanapalli examined appellant on October 3, 2016, but did not prepare his report until December 15, 2016.

In the March 29, 2017 report, the DMA clarified his opinion regarding appellant's date of MMI. He determined the date of MMI was October 3, 2016, the date Dr. Vanapalli examined appellant.

By decision dated April 13, 2017, OWCP granted appellant a schedule award for 11 percent permanent impairment of the right upper extremity and 11 percent permanent

impairment of the left upper extremity. The period of the award was for October 3, 2016 to January 26, 2018, for a total of 68.64 weeks of compensation.

In a form dated July 4, 2017 and postmarked July 6, 2017, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated August 8, 2017 OWCP's hearing representative denied appellant's request for review of the written record. It found that as appellant's request for review of the written record was postmarked July 6, 2017, it was not made within 30 days of the April 13, 2017 decision. Appellant was not entitled to a review of the written record as a matter of right; however, OWCP exercised its discretion and determined that the issue involved could be addressed by a request for reconsideration.

### **LEGAL PRECEDENT -- ISSUE 1**

Permanent impairment is to be rated according to the A.M.A., *Guides*, and only after the status of MMI is determined. Before a schedule award can be awarded, 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 MMI.<sup>4</sup> MMI means that the physical condition of the injured member of the body has stabilized and will not improve further.<sup>5</sup>

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. The clinical findings must indicate that the medical condition is static and well stabilized for the person to have reached MMI.<sup>6</sup>

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.<sup>7</sup> The date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.<sup>8</sup>

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3a(1) (January 2010); *see also P.L.*, Docket No. 13-1340 (issued October 28, 2013).

<sup>5</sup> *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

<sup>6</sup> A.M.A., *Guides* 24 (6<sup>th</sup> 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); *see R.I.*, Docket No. 09-1559 (issued August 23, 2010).

<sup>7</sup> *Peter C. Belkind*, 56 ECAB 580 (2005); *Marie J. Born*, 27 ECAB 623 (1976).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3 (January 2010).

The Board has also noted a reluctance to find a date of MMI which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, requires persuasive proof of MMI if OWCP selects a retroactive date.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

On appeal appellant does not contest the percentage of permanent impairment of her schedule award. Rather, she contests the date the schedule award began, contending that the period of her award should have begun as of October 1, 2015, the date of Dr. Holliger's initial impairment report. The Board will therefore review whether OWCP properly determined the date of MMI.

As the Board noted, the date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.<sup>10</sup> That DMA determined that the date of MMI for appellant's schedule award was October 3, 2016, the date Dr. Vanapalli examined and rated appellant's permanent impairment.

Appellant argued that the date of MMI should be October 1, 2015, the date that Dr. Holliger provided an impairment rating. Utilizing the fifth edition of the A.M.A., *Guides*, Dr. Holliger concluded that appellant had 20 percent permanent impairment of the left upper extremity, and 11 percent permanent impairment of the right upper extremity. He, however, did not provide any explanation as to how he arrived at the impairment rating. Dr. Holliger's report was therefore insufficient to establish permanent impairment.

OWCP referred appellant for a second opinion evaluation to determine her impairment using the sixth edition of the A.M.A., *Guides* along with reference the tables used and how the calculations were made. Dr. Vanapalli provided sufficient explanation regarding appellant's physical examination findings and diagnoses to allow OWCP's DMA to calculate that appellant had 11 percent permanent impairment of each upper extremity.

MMI means that the physical condition of the injured member of the body has stabilized and will not improve further. This date, which is determined through evaluation of the medical evidence, is usually considered to be the date of the evaluation accepted as definitive by OWCP.<sup>11</sup> October 3, 2016 was the date that Dr. Vanapalli conducted a comprehensive evaluation of appellant's upper extremity conditions. There is no medical evidence which supports that appellant's accepted conditions had stabilized prior to Dr. Vanapalli's impairment rating evaluation. The Board has noted a reluctance to find a date of MMI which is retroactive to

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<sup>9</sup> C.W., Docket No. 13-1501 (issued November 15, 2013).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b) (February 2013).

<sup>11</sup> *Supra* note 7.

the award and the record does not contain the persuasive proof required for finding such a retroactive date.<sup>12</sup>

For the above reasons, the Board finds that OWCP properly identified the date of MMI as October 3, 2016. The Board will thus affirm the April 13, 2017 decision.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

### **LEGAL PRECEDENT -- ISSUE 2**

Any claimant dissatisfied with an OWCP decision shall be afforded an opportunity for either an oral hearing or a review of the written record.<sup>13</sup> A request for a hearing or review on the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.<sup>14</sup> If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. OWCP regulations further provide that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.<sup>15</sup> Although a claimant who has previously sought reconsideration is not, as a matter of right, entitled to a hearing or review of the written record, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing following reconsideration.<sup>16</sup> Similarly, the Branch of Hearings and Review may exercise its discretion to conduct a hearing or review the written record where a claimant requests a second hearing or review on the written record on the same issue.<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

Appellant's request for a review of the written record was dated July 4, 2017 and postmarked July 6, 2017. OWCP issued its last merit decision on April 13, 2017. The regulations provide that the hearing request must be sent within 30 days of the date of the decision for which a hearing is sought. Because appellant's request dated July 4, 2017 was sent on July 6, 2017 it was untimely filed. She therefore was not entitled to a review of the written record as a matter of right. A representative of OWCP's Branch of Hearings and Review also denied appellant's request because it found that the issue of her permanent impairment could be equally well addressed by requesting reconsideration before OWCP. The Board finds that the

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<sup>12</sup> *C.S.*, Docket No. 12-1574 (issued April 12, 2013); *P.C.*, 58 ECAB 539 (2007); *James E. Earle*, 51 ECAB 567 (2000).

<sup>13</sup> 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.615.

<sup>14</sup> *Id.* at 10.616(a).

<sup>15</sup> *Id.*

<sup>16</sup> *D.E.*, 59 ECAB 438 (2008); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

<sup>17</sup> 20 C.F.R. § 10.616(a).

hearing representative properly exercised her discretionary authority in denying appellant's request for a review of the written record by an OWCP hearing representative.<sup>18</sup>

**CONCLUSION**

The Board finds that OWCP properly identified the date of MMI. The Board also finds that OWCP did not abuse its discretion by denying appellant's request for review of the written record as untimely filed.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated August 8 and April 13, 2017 are affirmed.

Issued: March 8, 2018  
Washington, DC

Christopher J. Godfrey, 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

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<sup>18</sup> *Mary B. Moss*, 40 ECAB 640 (1989). Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts. *See André Thyratron*, 54 ECAB 257 (2002).