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

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| **A.D., Appellant** | ) | |
| **and** | ) | **Docket No. 17-1996** |
| | ) | **Issued: March 5, 2018** |
| **DEPARTMENT OF TRANSPORTATION, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, FEDERAL AVIATION ADMINISTRATION, San Diego, CA, Employer** | ) | |

*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 25, 2017 appellant filed a timely appeal from an August 1, 2017 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.[2]

### ***ISSUE***

The issue is whether appellant met his burden of proof to establish that he reached maximum medical improvement (MMI) thereby warranting consideration of his entitlement to a schedule award pursuant to 5 U.S.C. § 8107.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence after OWCP rendered its August 1, 2017 decision. The Board's jurisdiction is limited to evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

## ***FACTUAL HISTORY***

On April 15, 2015 appellant, then a 33-year-old motor carrier safety inspector, filed a traumatic injury claim (Form CA-1) alleging that, on April 13, 2015, during an inspection for mechanical violations, he leaned over and felt a sharp pain in his lower left back. He stopped work on April 15, 2015. OWCP accepted appellant's claim for sprain of the lumbar region of the back and thoracic or lumbosacral neuritis or radiculitis.[3]

On March 22, 2017 appellant filed a claim for a schedule award (Form CA-7).

By letter dated March 28, 2017, OWCP asked appellant's treating physician, Dr. William C. Eves, a Board-certified orthopedic surgeon, to provide an opinion as to whether appellant had reached MMI. It also asked Dr. Eves to address appellant's physical examination findings, his diagnoses of conditions affecting the extremities, and the percentage of permanent impairment of the affected extremities with an explanation as to how the impairment was calculated pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4]

By development letter dated May 18, 2017, OWCP asked appellant to have his physician provide the above-noted information. Appellant was afforded 30 days to submit the requested medical report.

In a May 17, 2017 report, received by OWCP on June 6, 2017, Dr. Eves diagnosed lumbar disc disorder and L4-5 disc herniation. He noted that appellant had a very good result with one L5 epidural injection in 2015. Dr. Eves noted that he did not think appellant's condition had worsened, but did note that appellant had to cease physical therapy treatments because of exacerbation of his pain. He indicated that, before repeating the L5 epidural injection, he would like to have appellant undergo magnetic resonance imaging (MRI) scan as his prior MRI scan was outdated.

In a June 27, 2017 report, Dr. Kenneth A. Romero, Board-certified anesthesiologist and colleague of Dr. Eves, reviewed the results of a June 15, 2017 MRI scan. He noted that the MRI scan documented a disc herniation at L4-5 with impingement of the traversing left L5 nerve root which correlated to appellant's previous MRI scan from 2015. Dr. Romero indicated that appellant previously benefitted from an epidural injection in 2015. He opined that appellant would benefit from a repeat L4-5 epidural injection, but that he wanted to wait until after his Social Security disability proceedings were completed.

[3] Appellant received wage-loss compensation on the supplemental roll for partial disability on two dates: October 9 and November 30, 2015. By decision dated February 17, 2016, OWCP denied his claim for wage-loss compensation for the period November 23 through 25, 2015 because the medical evidence did not substantiate that the disability was caused by the employment injury. In a decision dated February 26, 2016, it denied appellant's claim for compensation for the period commencing December 14, 2015 because medical reports only contained a diagnosis of pain, and pain is not a valid diagnosis.

[4] A.M.A., *Guides* (6th ed. 2009).

On August 1, 2017 OWCP denied appellant's claim for a schedule award. It determined that the evidence of record did not support that he 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.[5] 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*.[6]

The Board has explained that permanent impairment may only be rated according to the A.M.A., *Guides* after MMI has been achieved.[7] An impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur. 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.[8]

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.[9] The date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.[10]

## ***ANALYSIS***

OWCP accepted that on April 13, 2015 appellant sustained a lumbar sprain and thoracic or lumbosacral neuritis or radiculitis. However, it denied his claim for a schedule award as it determined that he had not yet reached MMI.

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[5] 5 U.S.C. § 8107.

[6] 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 2.808.5a (February 2013).

[7] *See B.C.*, Docket No. 16-2062 (issued November 18, 2016).

[8] 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).

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

[10] *W.S.*, Docket No. 16-0344 (issued April 4, 2016).

The Board notes that it is well established that a schedule award cannot be determined and paid until a claimant reaches MMI.[11] OWCP specifically requested a report from appellant's physician regarding the status of MMI. In their reports, both Dr. Eves and Dr. Romero clearly opined that appellant was currently undergoing treatment which may improve his underlying conditions. Both physicians noted that appellant had prior success with an L5 epidural injection in 2015, and indicated that another injection would be the next step in appellant's treatment. No physician of record indicated that MMI had been reached. Although appellant argued that OWCP never asked Dr. Eves for an opinion with regard to MMI and permanent impairment, the record indicates that a letter was sent to Dr. Eves on March 28, 2017 asking for this information. In addition, OWCP sent a letter to appellant on May 18, 2017 asking him to submit the necessary medical report.

Accordingly, OWCP properly determined that entitlement to schedule award was not established as MMI had not been reached.[12]

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.

## ***CONCLUSION***

The Board finds that appellant did not meet his burden of proof to establish that he reached MMI thereby warranting consideration of his entitlement to a schedule award pursuant to 5 U.S.C. § 8107.

[11] *See Joseph R. Waples*, 44 ECAB 936 (1993).

[12] *See id*.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 1, 2017 is affirmed.

Issued: March 5, 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