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

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| **C.H., Appellant** | ) | |
| **and** | ) | **Docket No. 19-1639** |
| **U.S. POSTAL SERVICE, POST OFFICE, Alpharetta, GA, Employer** | ) | **Issued: April 3, 2020** |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

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

### ***JURISDICTION***

On July 30, 2019 appellant, through counsel, filed a timely appeal from a July 9, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that following the July 9, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## ***ISSUE***

The issue is whether appellant has met her burden of proof to establish a date of maximum medical improvement (MMI) prior to August 12, 2018.

## ***FACTUAL HISTORY***

On September 11, 2015 appellant, then a 52-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date cases fell and struck her head and right upper arm and shoulder while she was in the performance of duty. She stopped work that day. OWCP accepted the claim for cervical sprain, right shoulder sprain, right shoulder contusion, contusion of right upper arm, and aggravation of degenerative disc disease of the lumbar spine. Acceptance of the claim was later expanded to include unspecified rotator cuff tear or rupture of right shoulder, impingement syndrome of right shoulder, superior glenoid labrum lesion of right shoulder, bicipital tendinitis, right shoulder, and hypertrophy of bone, right shoulder. Appellant underwent OWCP-approved right shoulder arthroscopic labral debridement, subacromial decompression and distal clavicle excision on March 17, 2017. She has not returned to work. OWCP paid appellant wage-loss compensation benefits on the supplemental rolls commencing November 14, 2015 and on the periodic rolls as of March 6, 2016.

In an April 23, 2018 report, Dr. Kevin G. McCowan, a general surgeon, opined that appellant had reached MMI for her cervical/lumbar spine condition on September 21, 2016 and MMI for her right shoulder condition on June 13, 2017. He noted that she received her final cortisone injection into the right shoulder joint on June 13, 2017.

On June 20, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated July 2, 2018, OWCP advised appellant of the deficiencies of her claim and requested medical evidence containing a detailed description of her permanent impairment specific to the accepted work-related conditions, a date of MMI, a final rating of permanent impairment, and a discussion of the rationale for calculation of the impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] supporting her schedule award claim. It afforded her 30 days to respond. No further evidence was received.

By decision dated August 7, 2018, OWCP denied appellant's schedule award claim finding that she had not submitted evidence establishing a permanent impairment of a scheduled member due to her accepted September 11, 2015 employment injury.

On August 10, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

An August 12, 2018 impairment rating from Keith Blankenship, a physical therapist, was submitted, which indicated zero percent impairment of each upper and lower extremity due to cervical/lumbar spine under *The Guides Newsletter,* Rating Spinal Nerve Extremity Impairment

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

Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*). The report was not countersigned.

In another August 12, 2018 impairment report, Mr. Blankenship calculated 11 percent right upper extremity permanent impairment for the shoulder under the A.M.A., *Guides* using the diagnosis-based impairment (DBI) methodology for a right shoulder distal clavicle resection. Under Table 15-5, page 403, he found that appellant had 10 percent upper extremity impairment for a class of diagnosis (CDX) of 1 for distal clavicle excision. Mr. Blankenship assigned a grade modifier for functional history (GMFH) of 1 under Table 15-7, page 406; a grade modifier for physical examination (GMPE) of 1 under Table 15-8, page 408; and a grade modifier for clinical studies (GMCS) of 2 under Table 15-9, page 410. He utilized the net adjustment formula on page 411 and found a net grade modifier adjustment of 1, which resulted in a right upper extremity permanent impairment rating of 11 percent. Mr. Blankenship also provided three range of motion measurements of the right shoulder with averages noted as: flexion 160 degrees, extension 60 degrees, abduction 170 degrees, adduction 70 degrees, internal rotation 80 degrees, and external rotation 90 degrees. Appellant was observed to have no documented neurologic deficit consistent with either cervical or lumbar radiculopathy. On November 15, 2018 Dr. Sri Mandyam, Board-certified in anesthesiology and pain management, countersigned this report, indicating his concurrence with the permanent impairment rating.

By decision dated December 4, 2018, an OWCP hearing representative set aside OWCP's August 7, 2018 decision and remanded the case for further development. The hearing representative ordered that OWCP should refer the relevant medical records to a district medical adviser (DMA) for review of Dr. Mandyam's impairment rating of the right upper extremity pursuant to the sixth edition of the A.M.A., *Guides* and FECA Bulletin No. 17-06.

In a December 13, 2018 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a DMA, reviewed the medical evidence of record. The DMA found that, under the DBI methodology, appellant had zero percent permanent impairment of either upper extremity due to cervical radiculopathy as she did not have a neurologic deficit consistent with cervical radiculopathy in either extremity.

For the right shoulder, the DMA opined that appellant had 11 percent impairment under the DBI methodology for distal clavicle excision and 8 percent impairment under the range of motion (ROM) methodology, which was properly documented three times and averaged, based upon the August 12, 2018 report which was countersigned by Dr. Mandyam. He found that the DBI method provided the higher impairment rating at 11 percent permanent impairment and should be used as the method of evaluation. The DMA opined that appellant had reached MMI on August 12, 2018.

By decision dated February 27, 2019, OWCP granted appellant a schedule award for 11 percent permanent impairment of the right upper extremity, which covered the period August 12, 2018 to April 9, 2019, with a date of MMI of August 12, 2018. The impairment rating was based on the DMA's evaluation of the August 12, 2018 medical findings countersigned by Dr. Mandyam.

On April 9, 2019 appellant, through counsel, requested reconsideration contending that the date of MMI should be June 13, 2017. Counsel related that the sole issue on reconsideration was

the date of MMI. A copy of a form dated April 18, 2018 from Dr. McCowan was provided which indicated that MMI for the right shoulder occurred on June 13, 2017.

OWCP continued to receive medical evidence which did not address the date on which appellant was at MMI for her accepted conditions.

By decision dated July 9, 2019, OWCP denied modification of its February 27, 2019 decision. It specifically affirmed the August 12, 2018 MMI date.

## ***LEGAL PRECEDENT***

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 employment injury. The Board has defined MMI as meaning that the physical condition of the injured member of the body has stabilized and will not improve further. The question of when MMI has been reached is a factual inquiry 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.[5] The date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.[6]

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 in the selection of a retroactive date of MMI.[7] The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician, which is accepted as definitive by OWCP.[8]

## ***ANALYSIS***

The Board finds that appellant has not met her burden of proof to establish a date of MMI prior to August 12, 2018.

In its February 27, 2019 decision, OWCP granted appellant a schedule award for 11 percent permanent impairment of the right upper extremity. It determined a period of award from August 12, 2018 to April 9, 2019, based on the date of her August 12, 2018 permanent impairment evaluation, which was countersigned by Dr. Mandyam. On appeal appellant does not contest the finding that she was entitled to a schedule award for 11 percent permanent impairment of the right upper extremity, but asserts that the period of award should be paid retroactively from the date of a prior evaluation by Dr. McGowan on June 13, 2017, when he administered appellant's final cortisone injection to her right shoulder.

[5] *C.R.*, Docket No. 17-1872 (issued March 8, 2018); *Peter C. Belkind*, 56 ECAB 580 (2005); *Marie J. Born*, 27 ECAB 623 (1976).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3 (January 2010).

[7] *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *J.H.*, Docket No. 14-1584 (issued October 5, 2016).

[8] *Id*.

Based on the evidence of record, the Board finds that there is no indication that OWCP improperly found August 12, 2018 to be the proper date of MMI for appellant's schedule award and, furthermore, it correctly determined that the date of the award started August 12, 2018.[9] Dr. Harris, serving as the DMA, concurred with the MMI date designation based upon appellant's August 12, 2018 permanent impairment evaluation.[10] The Board notes that, while appellant relies on Dr. McGowan's assertions to support the date of MMI, the evidence of record does not indicate that Dr. McGowan conducted a permanent impairment evaluation on June 13, 2017, but rather administered a cortisone injection to appellant's right shoulder on that date. Since this evidence indicates that appellant actually required active treatment on June 13, 2017, the evidence does not establish that she reached MMI by that date.

The Board finds that OWCP properly determined that appellant's schedule award commenced August 12, 2018, the date of appellant's definitive permanent impairment evaluation. There is no other evidence of record pertaining to the issue of the proper date of MMI.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

## ***CONCLUSION***

The Board finds that appellant has not met her burden of proof to establish a date of MMI prior to August 12, 2019.

[9] *J.P.*, Docket No. 19-0501 (issued October 18, 2019).

[10] *Id*.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the July 9, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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