United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 19-0032**
	)	**Issued: June 10, 2021**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Ontario, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 4, 2018 appellant filed a timely appeal from an August 9, 2018 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 to consider the merits of this case.

ISSUE

The issue is whether OWCP properly identified the date of maximum medical improvement (MMI) for payment of appellant's schedule award compensation.

FACTUAL HISTORY

On August 26, 2010 appellant, then a 36-year-old human resource specialist, filed a traumatic injury claim (Form CA-1), alleging that she sustained several injuries as a result of an

[1] 5 U.S.C. § 8101 *et seq.*

August 24, 2010 slip and fall when on official travel while in the performance of duty. OWCP accepted her claim for contusion of the left shoulder and upper arm, left shoulder strain, lumbar strain, left wrist sprain, and sciatica. It subsequently expanded the acceptance of appellant's claim to include left adhesive capsulitis, left-side sciatica, sprain of the neck, and cervical spondylosis without myelopathy.

A magnetic resonance imaging (MRI) scan of the left shoulder dated September 22, 2010 revealed mild tendinopathy with possible undersurface tear of the infraspinatus tendon and supraspinatus tendon.

On August 31, 2011 Dr. Michael Sukay, a Board-certified orthopedist, performed a left shoulder arthroscopy with Mumford procedure and diagnosed impingement syndrome of the shoulder.

On August 1, 2012 appellant filed a claim for a schedule award (Form CA-7).

On August 13, 2012 OWCP referred appellant, along with a statement of accepted facts (SOAF), to an OWCP district medical adviser (DMA) for an opinion on the permanent impairment of appellant's left upper extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[2] and the date of maximum medical improvement (MMI). In an August 14, 2012 report, Dr. Ellen Pichey, a family medicine specialist serving as the DMA, noted that she had reviewed the medical records provided by OWCP. She provided an impairment rating pursuant to the A.M.A., *Guides*' diagnosis-based impairment (DBI) methodology, of 11 percent permanent impairment citing to Table 15-5 for a diagnosis of distal clavicle resection.[3]

By decision dated September 25, 2012, OWCP granted appellant a schedule award for 11 percent impairment of the left upper extremity. The award ran for 34.32 weeks from June 7, 2012 to February 2, 2013.

In a January 12, 2016 report, Dr. Guirguis Hanna, Board-certified in occupational medicine, provided a history of injury and physical examination findings. He diagnosed impingement syndrome of the left shoulder, history of arthroscopic shoulder surgery of the left shoulder on August 31, 2011 adhesive capsulitis of the left shoulder, left side sciatica, and lumbar radiculopathy, caused or aggravated by appellant's employment injury. Dr. Hanna used the sixth edition of the A.M.A., *Guides*, to rate her bilateral shoulder impairment. He indicated that he rated appellant's impairment utilizing the DBI and range of motion (ROM) methodology. Dr. Hanna noted that, while both methods were reviewed, she was rated using the ROM methodology because it resulted in a higher rating. Using Table 15-34, page 475, Figures 15-35, page 477, and Table 15-36, page 477, he found left shoulder flexion of 50 degrees for nine percent impairment, extension of 30 degrees for one percent impairment, abduction of 45 degrees for six percent impairment, adduction of 20 degrees for one percent upper extremity impairment, external rotation of zero degrees for two percent impairment, and internal rotation of 40 degrees for four percent

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

[3] *Id*. at 403, Table 15-5.

upper extremity impairment. Dr. Hanna determined, after adding the impairment values, that appellant had a total left upper extremity permanent impairment rating of 23 percent. He further found that she reached MMI on June 6, 2012.

On March 18, 2016 appellant filed a claim for an additional schedule award (Form CA-7).

On April 11, 2016 OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA. It requested that he review the medical evidence of record, including Dr. Hanna's January 12, 2016 report, and provide an opinion regarding the permanent impairment of her left upper extremity under the sixth edition of the A.M.A., *Guides*.

In an April 12, 2016 report, Dr. Katz, reviewed Dr. Hanna's January 12, 2016 report and determined that Dr. Hanna's impairment evaluation could not be considered as probative for the purpose of recommending a schedule award under FECA as it does not allow a schedule award for the spine unless "it results in permanent impairment of the extremities, generally manifest as spinal nerve impairment." He further indicated that the record lacked sufficient detail to permit assignment of an impairment rating.

OWCP subsequently referred appellant for a second opinion evaluation with Dr. Mark Bernhard, an osteopath and Board-certified physiatrist, to provide an opinion on the permanent impairment of her left upper extremity.

In a January 24, 2017 report, Dr. Bernhard reviewed the medical evidence and performed a physical examination. He noted that the accepted conditions were contusion of the left shoulder and upper arm, sprain of the left shoulder and upper arm, lumbar sprain, left wrist sprain, adhesive capsulitis of the left should, cervical strain, sciatica, and cervical spondylosis without myelopathy. Dr. Bernhard noted ROM for the left shoulder for flexion was 65 degrees, extension of 30 degrees, abduction of 45 degrees, adduction of 40 degrees, external rotation of 50 degrees, and internal rotation of 52 degrees. He rated appellant according to the most impairing condition, distal clavicle requiring resection, acromioclavicular joint injury or disease with mild residual symptoms, and status post distal clavicle resection. Using the A.M.A., *Guides*, DBI method for rating permanent impairment of the upper extremity Dr. Bernhard determined that appellant fell into an impairment class 1 default of C, 10 percent upper extremity impairment pursuant to Table 15-5, Shoulder Regional Grid. Dr. Bernhard noted that his examination revealed permanent limitations in reaching with the left shoulder, pain, lack of full ROM, stiffness, and complaints with activities of daily living. Based on these findings he selected a grade modifier for functional history (GMFH) of 2, for a moderate problem with pain symptoms with normal activity and occasional medications to control symptoms. Dr. Bernhard indicated that he would not use the *Quick*DASH score of 89 since that would rate appellant as a very severe problem and would not accurately reflect the level of functional impairment because she was able to work and perform activities of daily living. With regard to physical examination he noted mild tenderness, symptoms with activities, and moderate decrease ROM resulted in a grade modifier for physical examination (GMPE) of 2. Dr. Bernhard indicated that since clinical studies were utilized originally in making the original diagnoses they would not be applied as a modifier. He likewise noted that the *Quick*DASH score of 89 would not accurately reflect the degree of functional limitations described by appellant. Using these calculations the net adjustment formula resulted in a net adjustment of +2 which would move

appellant from a Grade C to Grade E or 12 percent left upper extremity permanent impairment as a result of the left shoulder distal clavicle resection, left shoulder arthroscopy on August 31, 2011.

OWCP referred appellant's case back to Dr. Katz, serving in his role as a DMA. It requested that he review the medical evidence of record, including Dr. Bernhard's January 24, 2017 report and provide an opinion regarding permanent impairment of appellant's left upper extremity under the sixth edition of the A.M.A., *Guides*.

In his March 6, 2017 report, Dr. Katz opined that Dr. Bernhard's determination that appellant had 12 percent permanent impairment of the left upper extremity was supported by the records reviewed and was consistent with the methodology set forth by the A.M.A., *Guides*. He found that the date of MMI was January 24, 2017, the date of Dr. Bernhard's examination. Dr. Katz concluded that the net additional award for the left upper extremity was one percent impairment of the left upper extremity.

By decision dated April 3, 2017, OWCP granted appellant a schedule award for an additional one percent impairment of the left upper extremity, for a total 12 percent permanent impairment of the left upper extremity. It noted that she was previously paid a schedule award for 11 percent impairment of the left upper extremity by decision dated September 25, 2012. The date of MMI was listed as January 24, 2017, and the period of the award ran for 3.12 weeks from March 8 to 29, 2017.

On March 7, 2017 Dr. Hanna diagnosed sciatica left side, lumbar radiculopathy, and adhesive capsulitis of the left shoulder and repeated his impairment rating as noted in his January 12, 2016 report. He again opined that, based on the ROM method, which resulted in a higher rating, appellant had a total left upper extremity permanent impairment rating of 23 percent. Dr. Hanna found that she had reached MMI on June 6, 2012.

On April 4, 2017 Dr. Thomas Pham, Board-certified in occupational medicine, provided an attending physician's supplementary report requesting an ergonomic evaluation of appellant's workstation. He reviewed her history of injury and medical treatment, including arthroscopic surgery on August 21, 2011. Dr. Pham referenced Dr. Hanna's January 12, 2016 and March 7, 2017 reports.

On April 4, 2017 appellant filed a claim for a schedule award (Form CA-7) for her left lower extremity.

OWCP referred appellant for a second opinion evaluation with Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, for an opinion on permanent impairment of her bilateral lower extremities.

In a June 1, 2017 report, Dr. Einbund, reviewed the medical evidence of record and performed a physical examination. He diagnosed cervical sprain, resolved, cervical spondylosis without myelopathy, left shoulder capsulitis, status post left shoulder arthroscopy on August 31, 2011 lumbar sprain, resolved, and sciatica. Dr. Einbund noted that appellant continued to have residuals of the injury as it related to her left shoulder and sciatica. On examination, the left shoulder revealed a healed arthroscopic scar, abduction was 80 degrees, flexion was 90 degrees, extension was 35 degrees, external rotation was 70 degrees, internal rotation was 45 degrees, and

adduction was 40 degrees. Dr. Einbund further noted left shoulder motor weakness of 4/5. He found that, pursuant to *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), appellant had a one percent left lower extremity permanent impairment.

OWCP again referred appellant's case back to Dr. Katz, serving in his role as a DMA. It requested that he review the medical evidence of record, including Dr. Einbund June 1, 2017 report and provide an opinion regarding permanent impairment of her bilateral lower extremities under the sixth edition of the A.M.A., *Guides*.

In a July 20, 2017 report, Dr. Katz noted that he concurred with Dr. Einbund's determination that appellant had one percent permanent impairment of the left lower extremity. He found that she reached MMI on June 1, 2017, the date of Dr. Einbund's examination.

By decision dated August 23, 2017, an OWCP hearing representative set aside the April 3, 2017 decision and remanded the case to reevaluate the extent of appellant's permanent impairment of her left upper extremity applying the tenets provided in FECA Bulletin No. 17-06. Pursuant to the Bulletin, if the A.M.A., *Guides* allowed for both the ROM and DBI methodologies in calculating permanent impairment of the upper extremity, the method that yielded the higher impairment rating should be used.

On June 4, 2018 OWCP referred appellant's case back to Dr. Katz, serving in his role as a DMA, for a supplemental report. It specifically requested that he apply the tenets provided in FECA Bulletin No. 17-06 in rendering an opinion regarding permanent impairment of her left upper extremity.

In a June 5, 2018 report, Dr. Katz noted that he reviewed the SOAF and medical records provided by OWCP, applying FECA Bulletin 17-06. He opined that Dr. Hanna's recorded motion of the left shoulder in his January 12, 2016 report did not meet the criteria for determination of impairment on the basis of the ROM method because the report failed to document three independent measurements of each arc with the greatest ROM use for the determination of impairment. Dr. Katz further noted that the second opinion evaluation of Dr. Einbund dated June 1, 2017 also failed to document three independent measurements of the shoulder motion arc, which does not conform to the guidelines set forth in FECA Bulletin 17-06 for a ROM rating. He opined that, based on the information provided in the records reviewed, a probative ROM rating could not be calculated.

In a decision dated August 9, 2018, OWCP denied appellant's claim for an additional schedule award for the left upper extremity.

LEGAL PRECEDENT

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.[4] MMI means that the physical condition of the injured member of the body has stabilized and will not improve further.[5]

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.[6]

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.[7] The date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.[8]

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.[9] 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.[10]

ANALYSIS

On appeal appellant does not contest the percentage of permanent impairment of her schedule award. Rather, she contests the date the schedule award began. The Board will therefore review whether OWCP properly identified the date of MMI.

The Board finds that OWCP properly identified the date of MMI.

[4] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3a(1) (January 2010); *see also C.R.*, Docket No. 17-1872 (issued March 8, 2018); *P.L.*, Docket No. 13-1340 (issued October 28, 2013).

[5] *C.R., id.*; *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

[6] 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); *see R.I.*, Docket No. 09-1559 (issued August 23, 2010).

[7] *C.H.*, Docket No. 19-1639 (issued April 3, 2020); *Peter C. Belkind*, 56 ECAB 580 (2005); *Marie J. Born*, 27 ECAB 623 (1976).

[8] *Supra* note 4 at Chapter 3.700.3 (January 2010).

[9] *C.H.*, *supra* note 7; *C.W.*, Docket No. 13-1501 (issued November 15, 2013).

[10] *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *C.H., id.*

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.[11] OWCP referred appellant for a second opinion evaluation with Dr. Bernhard to determine her impairment using the sixth edition of the A.M.A., *Guides*. Dr. Bernhard provided sufficient explanation regarding appellant's physical examination findings and diagnoses to allow OWCP's DMA, Dr. Katz, to calculate that appellant had an additional one percent permanent impairment of left upper extremity. Dr. Katz found that appellant had reached MMI on January 24, 2017, the date of Dr. Bernhard's examination.

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.[12] January 24, 2017 was the date that Dr. Bernhard conducted a comprehensive evaluation of appellant's left upper extremity conditions.

For the above reasons, the Board finds that OWCP properly identified the date of MMI as January 24, 2017. The Board will thus affirm OWCP's August 9, 2018 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.

[11] *Id.*

[12] *C.R.*, *supra* note 4.

CONCLUSION

The Board finds that OWCP properly identified the date of MMI for payment of appellant's schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 9, 2018 is affirmed.

Issued: June 10, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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