United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	**Docket No. 07-2337**
	)	**Issued: May 8, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 14, 2007 appellant filed a timely appeal from an April 25, 2007 merit decision of the Office of Workers' Compensation Programs granting her a schedule award and a July 11, 2007 nonmerit decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the July 11, 2007 nonmerit decision.

ISSUES

The issues are: (1) whether appellant has more than a nine percent permanent impairment of the left upper extremity; and (2) whether the Office properly denied her request for merit review under 5 U.S.C. § 8128.

FACTUAL HISTORY

On December 19, 2001 appellant, then a 40-year-old retired manual distribution clerk, filed an occupational disease claim alleging that she sustained bilateral wrist tendinitis and de Quervain's tenosynovitis of the left wrist due to factors of her federal employment. She

retired on disability on December 29, 2000 and was last exposed to the factors alleged to have caused her condition on December 28, 2000.[1]

The Office accepted the claim for bilateral wrist tenosynovitis. On April 20, 2002 appellant filed a claim for a schedule award. On July 17, 2002 and April 17, 2003 the Office requested that her attending physician provide an impairment evaluation in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). In a report dated October 11, 2004, Dr. John B. McClellan, a Board-certified orthopedic surgeon, discussed appellant's complaints of pain, loss of motion and weakness of the wrists, left worse than right. He found tenderness at the first extensor compartment of the left wrist and a painful Finkelstein test. Dr. McClellan diagnosed de Quervain's syndrome of the left wrist. He scheduled appellant for a de Quervain's release on October 29, 2004. In an impairment evaluation of the same date, Dr. McClellan noted her complaints of moderately severe pain and reduced sensation of the left wrist. He measured range of motion for the left wrist and found decreased grip strength of approximately 50 percent on the left side. Dr. McClellan asserted that appellant reached maximum medical improvement on October 11, 2004.

On October 29, 2004 Dr. McClellan performed a left first dorsal compartment release. By letter dated October 13, 2005, the Office requested that the physician determine the extent of appellant's permanent impairment in accordance with the A.M.A., *Guides*.

On September 21, 2006 appellant again requested a schedule award and enclosed Dr. McClellan's October 11, 2004 impairment evaluation. She questioned whether an impairment evaluation was in the record following her wrist surgery on October 29, 2004. Appellant continued to experience wrist problems.

On October 2, 2006 the Office requested that an Office medical adviser review the file and determine the extent of appellant's upper extremity impairment due to her employment injury. The Office inaccurately indicated that Dr. McClellan performed an impairment evaluation on September 16, 2006 rather than October 11, 2004.[2]

On October 11, 2006 an Office medical adviser noted that appellant underwent a left first dorsal compartment release on October 29, 2005.[3] He applied the tables and pages of the A.M.A., *Guides* to Dr. McClellan's findings in his October 11, 2004 impairment evaluation. The Office medical adviser determined that appellant had a nine percent permanent impairment of the left upper extremity. He concluded that she reached maximum medical improvement on October 11, 2004.

[1] The employing establishment indicated that she retired on December 29, 2001; however, this appears to be a typographical error given her date of last exposure.

[2] On September 18, 2006 Dr. McClellan diagnosed de Quervain's syndrome, status post first dorsal compartment release and chronic extensor tendinitis. He noted that a bone scan showed increased uptake in the carpometacarpal joint and a magnetic resonance imaging (MRI) scan study revealed flexor and extensor tendinopathy.

[3] The date of appellant's first dorsal compartment release was October 29, 2004.

By decision dated April 25, 2007, the Office granted appellant a schedule award for a nine percent permanent impairment of the left upper extremity. The period of the award ran for 28.08 weeks from October 11, 2004 to April 25, 2005.

On June 11, 2007 appellant requested reconsideration. In a decision dated July 12, 2007, the Office denied merit review of the claim on the grounds that she submitted no new and relevant evidence and raised no substantive legal argument.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act,[4] and its implementing federal regulations,[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.[6] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[7]

It is well established that the period covered by the schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The Board has explained, and the A.M.A., *Guides* provides, that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.[8] The determination of whether maximum medical improvement 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 the Office.[9]

The A.M.A., *Guides* explains that an impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized:

> "It is understood that an individual's condition is dynamic. Maximum medical improvement [MMI] refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] 20 C.F.R. § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[8] *Mark A. Holloway*, 55 ECAB 321 (2004); A.M.A., *Guides* 19.

[9] *See Mark A. Holloway*, *supra* note 8.

an individual has reached MMI, a permanent impairment rating may be performed."[10]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained bilateral wrist tenosynovitis due to factors of her federal employment. She filed a claim for a schedule award on April 20, 2002. On October 11, 2004 Dr. McClellan diagnosed de Quervain's syndrome of the left wrist and recommended a de Quervain's release. He described the extent of appellant's permanent impairment of the left wrist and found that she reached maximum medical improvement on October 11, 2004. Dr. McClellan performed a left first dorsal compartment release on October 29, 2004.

On October 10, 2006 an Office medical adviser reviewed Dr. McClellan's October 11, 2004 report and found that appellant had a nine percent permanent impairment of the left upper extremity. At the time of Dr. McClellan's October 11, 2004 report, however, appellant had not yet undergone surgery on her left wrist. An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized.[11] The A.M.A., *Guides* provides that MMI refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Only when an impairment has reached maximum medical improvement can a permanent impairment rating be performed.[12]

The Board finds that the probative medical evidence establishes that appellant had not yet reached maximum medical improvement on October 11, 2004. In his October 11, 2004 report, Dr. McClellan found that appellant required surgery on her left wrist. He performed the surgery on October 29, 2004. The Office thus improperly determined the extent of appellant's permanent impairment of the left upper extremity based on a report obtained before she underwent surgical treatment of her condition.[13] Upon return of the case record, the Office should further develop the claim to determine whether she has reached maximum medical improvement and, if so, the extent of any permanent impairment. Following this and any further development as deemed necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision on the issue of appellant's entitlement to a schedule award.[14]

---

[10] A.M.A., *Guides* 19.

[11] *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

[12] A.M.A., *Guides* 19; *Patricia J. Penney-Guzman*, *supra* note 11.

[13] *See Patricia J. Penney-Guzman*, *supra* note 11.

[14] In view of the Board's disposition of the schedule award issue, the issue of whether the Office properly denied appellant's request for merit review of the claim is moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 11 and April 25, 2007 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 8, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board