United States Department of Labor
Employees' Compensation Appeals Board

D.G., Appellant	)	
and	)	**Docket No. 08-626**
	)	**Issued: July 16, 2008**
DEPARTMENT OF LABOR, OFFICE OF ASSISTANT SECRETARY ADMINISTRATION & MANAGEMENT, Kansas City, MO, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 30, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' November 15, 2007 merit decision granting a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than 10 percent impairment of her right lower extremity for which she has received a schedule award; and (2) whether the Office utilized the correct pay rate in calculating her schedule award.

FACTUAL HISTORY

This case has previously been before the Board. On March 24, 2003 appellant, then a 45-year-old senior claims examiner, sustained injury to her lower back with radicular pain down her right leg. At the time of injury, she was earning $73,831.00 per year. Appellant sustained a

second traumatic injury to her low back on October 9, 2003 when she fell from a chair at work landing on her buttocks. The record does not contain appellant's pay rate at the time of her second traumatic injury. The Office accepted appellant's March 24, 2003 claim for herniated disc on June 8, 2004. It accepted appellant's October 9, 2003 claim for aggravation of herniated disc on June 8, 2004. The Office combined appellant's claim files in the master file currently before the Board. In a letter dated October 5, 2004, appellant requested a schedule award for seven percent permanent impairment of her left leg. She requested a lump-sum payment. In a report dated October 18, 2006, Dr. Pedro A. Murati, a physician Board-certified in physical medicine and rehabilitation, diagnosed low back pain secondary to radiculopathy and left S1 joint dysfunction. He opined that appellant reached maximum medical improvement on September 9, 2006. Dr. Murati noted that appellant reported pain in her right leg, which radiated into her toes on the right foot with a burning sensation. He found that appellant had three percent impairment of the right lower extremity due to pain and numbness from the L5 nerve root.

In a report dated February 21, 2007, an Office medical adviser noted that Dr. Murati provided an impairment rating of nine percent due to sensory loss and weakness of the right toe extensors. He found that, as appellant had experienced pain in the right lower extremity on March 24, 2003, her right leg condition was due to her employment. Dr. Murati stated that the date of maximum medical improvement was October 9, 2004.

By decision dated March 13, 2007, the Office granted appellant a schedule award for nine percent impairment of her right lower extremity. It found that she had reached maximum medical improvement on October 9, 2004 and that she was entitled to compensation based on her pay rate effective March 24, 2003. Appellant appealed this decision to the Board. By decision dated October 9, 2007,[1] the Board remanded the case for the Office medical adviser to address the extent of appellant's sensory impairment of the L5 nerve root, as well as the appropriate date of maximum medical improvement. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

The Office medical adviser, Dr. Lawrence A. Manning, reviewed the medical evidence on November 1, 2007. He opined that appellant reached maximum medical improvement on October 9, 2004 noting that this date was one year after the accepted aggravation of herniated disc. Dr. Manning stated, "A year following injury or surgery is often appropriate as it gives time for adequate treatment and healing of injury areas." He found that by October 9, 2004 appellant's condition was well stabilized and unlikely to change substantially, that there was no evidence of a progressive problem and that appellant did not seem to substantially improve clinically by 2006. Dr. Manning concluded that appellant reached maximum medical improvement on October 2004.

As to appellant's sensory impairment of the right lower extremity due to the L5 root impairment, Dr. Manning noted that appellant experienced pain radiating into the toes of the right foot along with a burning sensation in the toes of her right foot. He classified this as Grade 4 under the American Medical Association, *Guides to the Evaluation of Permanent*

[1] Docket No. 07-1353 (issued October 9, 2007).

Impairment (A.M.A., *Guides*) or 25 percent deficit as appellant demonstrated distorted superficial tactile sensibility with some abnormal sensations or slight pain which was forgotten during activity. Dr. Manning noted that the L5 nerve root which has a maximum sensory deficit of five percent. He concluded that appellant had one percent impairment due to sensory loss. Dr. Manning stated that appellant did not demonstrate the abnormal sensation or slight pain that interfered with some activity which would result in three percent impairment as found by Dr. Murati.

By decision dated November 15, 2007, the Office granted appellant a schedule award for an additional one percent impairment of her right lower extremity. It indicated that appellant reached maximum medical improvement on October 9, 2004 and that her effective date of pay rate was March 24, 2003.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. The Board has defined maximum medical improvement as meaning "that the physical condition of the injured member of the body has stabilized and will not improve further." The Board has also noted a reluctance to find a date of maximum medical improvement, which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, requires persuasive proof of maximum medical improvement in the selection of a retroactive date of maximum medical improvement.[4] 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.[5]

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *J.C.*, 58 ECAB ___ (Docket No. 06-1018, issued January 10, 2007); *D.R.*, 57 ECAB 720 (2006); *James E. Earle*, 51 ECAB 567 (2000).

[5] *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

ANALYSIS -- ISSUE 1

The Board remanded the case for the Office to consider appellant's entitlement to an additional schedule award due to sensory deficits in the right lower extremity. The Office medical adviser, Dr. Manning, reviewed the October 18, 2006 report of Dr. Murati and found that appellant reported pain radiating into the toes of the right foot along with a burning sensation in the toes of her right foot. He concluded that this was a Grade 4 sensory deficit under the A.M.A., *Guides* or 25 percent of the L5 nerve root as appellant demonstrated distorted superficial tactile sensibility with some abnormal sensations or slight pain which was forgotten during activity.[6] Dr. Manning noted that the L5 nerve root has a maximum sensory deficit of five percent[7] and concluded that appellant had one percent impairment due to sensory loss. As he provided medical reasoning supporting his impairment rating and correlated the findings to the A.M.A., *Guides*, he has established that appellant had an additional one percent impairment of her right lower extremity for which she has received a schedule award.

The Board notes that Dr. Manning also provided his medical reasoning for finding that appellant had reached maximum medical improvement on October 9, 2004. He noted that this date was one year after the accepted aggravation of herniated disc and stated, "A year following injury or surgery is often appropriate as it gives time for adequate treatment and healing of injury areas." Dr. Manning found that by October 9, 2004 appellant's condition was well stabilized and unlikely to change substantially, that there was no evidence of a progressive problem and that she did not seem to substantially improve clinically by 2006. The Board finds that the medical evidence establishes October 9, 2004 as the date of maximum medical improvement.

LEGAL PRECEDENT -- ISSUE 2

Section 8105(a) of the Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[8] Under 5 U.S.C. § 8101(4), "monthly pay" means the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater. The Board has held that the rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).[9]

ANALYSIS -- ISSUE 2

The Office based appellant's pay rate for her schedule award on her initial date of injury, March 24, 2003. The record establishes that appellant sustained a second back injury on

[6] A.M.A., *Guides* 424, Table 15-15.

[7] *Id*. at 424, Table 15-18.

[8] 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

[9] *Robert A. Flint*, 57 ECAB 369 (2006).

October 9, 2003 which also impacted her lower extremities and was accepted for aggravation of herniated disc. As she has not sustained a recurrence of disability, she is entitled to the greater of the pay rates between her March 24 and October 9, 2003 employment injuries. As the record does not contain appellant's pay rate information on October 9, 2003, the Board is unable to determine whether she received the appropriate pay rate for the purposes of her schedule award. On remand, the Office showed request the appropriate pay rate information from the employing establishment and determine the greater of the two pay rates for schedule award purposes.[10]

CONCLUSION

The Board finds that appellant has no more than 10 percent impairment of her right lower extremity for which she received a schedule award. The Board further finds that the case is not in posture for decision regarding appellant's pay rate for schedule award purposes.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 15, 2007 is affirmed in part relative to the percentage of impairment of appellant's right lower extremity and remanded in part relative to the rate of pay upon which the schedule award is based.

Issued: July 16, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[10] *See D.H.*, Docket No. 07-427 (issued January 7, 2008).