

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

A.S., Appellant)	
)	
and)	Docket No. 08-61
)	Issued: May 14, 2008
U.S. POSTAL SERVICE, NORTHLAND)	
PERFORMANCE CLUSTER, Minneapolis, MN,)	
Employer)	
)	

Appearances:
Jeffrey P. Zeeland, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 9, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 26, 2007 merit decision concerning her entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she has more than a three percent permanent impairment of her right arm, for which she received a schedule award.

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision on August 13, 2007 setting aside the Office's February 23, 2006 decision and remanding the case to the Office for

further development.¹ The Board discussed deficiencies in the May 23, 2005 report of the Office medical adviser who concluded that appellant had a three percent permanent impairment of her right arm² and noted that, while the Office medical adviser reported a Grade 4 deficit under Table 16-10 of the A.M.A., *Guides*, he did not explain how he chose the particular value for sensory loss from the possible range of values within Grade 4, nor did he adequately explain why he chose the retroactive date of June 7, 2002 for the date of MMI. The Board also noted that on April 30, 2004 Dr. Gulli opined that appellant had a 20 percent impairment due to pain, but he failed to identify the nerve structure that innervated the area of involvement and did not grade the severity of pain under the A.M.A., *Guides*.³ The Board set aside the Office's February 23, 2006 schedule award decision and remanded the case for further development. It directed the Office to issue an appropriate schedule award decision after it conducted such development as it deemed necessary.⁴ The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand the Office referred the case to an Office medical adviser who performed a review of the record. In a September 17, 2007 report, the Office medical adviser concluded that appellant sustained a three percent permanent impairment of her right arm. He noted that appellant had a Grade 3 sensory loss of 40 percent (a mid-range value) under Table 16-10 of the A.M.A., *Guides* because the record revealed that her pain was of such a severity that it interfered with some activity. The Office medical adviser stated that multiplying the 40 percent value times the maximum 5 percent value for sensory loss associated with the suprascapular nerve (Table 16-15) yielded a 2 percent impairment value for sensory loss. The Office medical adviser indicated that it

¹ Docket No. 07-800 (issued August 13, 2007). The Office accepted that on October 31, 1999 appellant, then a 34-year-old distribution clerk, sustained a right shoulder strain, cervical strain and right shoulder impingement due to lifting mail. On September 24, 2001 appellant underwent arthroscopic decompression of the right shoulder which was authorized by the Office. By decision dated November 15, 2005, the Office granted appellant a schedule award for a three percent permanent impairment of her right arm. The award ran for 9.36 weeks from June 7 to August 11, 2002.

² In his May 23, 2005 report, the Office medical adviser asserted that maximum medical improvement (MMI) occurred on June 7, 2002, as that was when Dr. Benjamin Gulli, an attending Board-certified orthopedic surgeon, recommended permanent restrictions for appellant's right shoulder and released her from his care. As appellant experienced right shoulder pain which was exacerbated with repetitive activities, he awarded a two percent right arm impairment due to pain which he classified this as a Grade 4 pain in the distribution of the suprascapular nerve under Table 16-15 and Table 16-10 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). The Office medical adviser used findings from an April 30, 2002 physical therapy report to show that under the A.M.A., *Guides* appellant's 170 degrees of abduction, 78 degrees external rotation and 90 degrees internal rotation did not warrant an impairment rating. He found that appellant's 168 degrees of flexion equaled a one percent impairment. The Office medical adviser then used the Combined Values Chart of the A.M.A., *Guides* to find a three percent impairment of the right arm.

³ In an April 30, 2004 report, Dr. Gulli stated that his examination revealed full range of motion of the right shoulder in all areas except internal rotation, which was noted as 70 degrees. He also advised that appellant had constant, moderate pain, which was worse with activity. Based on his examination, Dr. Gulli opined that appellant had a 20 percent disability of the right shoulder due to pain. Dr. Gulli stated that this rating equaled a 12 percent whole body impairment.

⁴ The Board indicated that the Office should determine whether any change in the date of commencement of the schedule award impacted the pay rate applicable to the schedule award.

was appropriate to use a June 7, 2002 date of MMI because this date was about nine months after appellant's right shoulder surgery and her right shoulder condition did not significantly change after that date. The Office medical adviser indicated that the record now contained an April 10, 2007 report of Dr. Anil Agarwal, a Board-certified orthopedic surgeon, which indicated that appellant had a five percent impairment of the whole person. He indicated that this report was of limited probative value because whole person impairments were not recognized under the Federal Employees' Compensation Act.

In his April 10, 2007 report, Dr. Agarwal provided an extensive discussion of the medical reports in the record. He detailed the results of his examination of appellant, including the following findings for right shoulder motion: 150 degrees of flexion, 45 degrees of extension, 160 degrees of abduction, 60 degrees of adduction, 60 degrees of internal rotation and 90 degrees of extension. Dr. Agarwal concluded that under the A.M.A., *Guides* appellant had a five percent permanent impairment to the body as a whole "because of surgery to the right shoulder and pain which she continues to have intermittently."

In a September 26, 2006 decision, the Office determined that appellant did not have more than a three percent permanent impairment of her right arm, for which she received a schedule award.

LEGAL PRECEDENT

The schedule award provision of the Act⁵ and its implementing regulations⁶ 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.⁷ A schedule award is not payable under section 8107 of the Act for an impairment of the whole person.⁸

It is well established that the period of a schedule award commences on the date that the employee reaches MMI from the residuals of the accepted employment injury. 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 the Office.⁹ The Board has noted a reluctance to find a date of MMI which is retroactive to the award, as retroactive awards often result in payment of less

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

⁷ *Id.*

⁸ See *Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

⁹ *Mark A. Holloway*, 55 ECAB 321 (2004).

compensation benefits.¹⁰ The Board, therefore, requires persuasive proof of MMI for selection of a retroactive date of MMI.¹¹

ANALYSIS

By decision dated November 15, 2005, the Office granted appellant a schedule award for a three percent permanent impairment of her right arm. The award ran for 9.36 weeks from June 7 to August 11, 2002. The Board issued a decision on August 13, 2007 remanding the case to the Office for further development. In a September 26, 2007 decision, the Office determined that appellant was not entitled to any additional schedule award compensation.

On remand, an Office medical adviser produced a September 17, 2007 report in which he concluded that appellant sustained a three percent permanent impairment of her right arm. The Board notes that the Office medical adviser adequately addressed the Board's concerns about the explanation of the impairment for pain related to the right suprascapular nerve. The Office medical adviser noted that appellant had a Grade 3 sensory loss of 40 percent (a mid-range value) under Table 16-10 of the A.M.A., *Guides* because the record revealed that her pain was of such a severity that it interfered with some activity. The Office medical adviser stated that multiplying the 40 percent value times the maximum 5 percent value for sensory loss associated with the suprascapular nerve (Table 16-15) yielded a 2 percent impairment value for sensory loss.¹² The Board notes that this analysis comports with the medical evidence of record and the standards of the A.M.A., *Guides*.

The Office medical adviser mentioned the April 10, 2007 report of Dr. Agarwal, an attending Board-certified orthopedic surgeon, and properly noted that his finding of a five percent impairment of the whole person was of limited probative value because a schedule award is not payable under the Act for an impairment of the whole person.¹³ However, the Office medical adviser did not consider whether the right shoulder motion findings obtained by Dr. Agarwal would entitle appellant to a greater impairment rating for her right arm.¹⁴ Dr. Agarwal found that appellant had 150 degrees of flexion, 45 degrees of extension, 160 degrees of abduction, 60 degrees of adduction, 60 degrees of internal rotation and 90 degrees of extension. Applying the standards of the A.M.A., *Guides* to these findings would suggest that appellant had a six percent impairment due to limited right shoulder motion.¹⁵ The fact that it appears that appellant's range of motion has diminished over time also calls into question the opinion of the Office medical adviser that it is appropriate to use a date of MMI from 2002.

¹⁰ *James E. Earle*, 51 ECAB 567 (2000).

¹¹ *Id.*

¹² See A.M.A., *Guides* 482, 492 Tables 16-10, 16-15.

¹³ See *supra* note 9 and accompanying text.

¹⁴ Appellant had previously received a one percent rating for limited right shoulder motion.

¹⁵ See A.M.A., *Guides* 476, 477, 479 Figures 16-40, 16-43 and 16-46.

For these reasons, the Board finds that the case is in need of further development to determine the extent of the permanent impairment of appellant's right arm. The case should be remanded to the Office to address the above-noted matters. If it is determined that a more recent date of MMI is appropriate, the Office should recalculate the pay rate of the schedule award to reflect this situation. After such development it deems necessary, the Office should issue an appropriate decision on appellant's entitlement to schedule award compensation.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she has more than a three percent permanent impairment of her right arm, for which she received a schedule award. The case is remanded to the Office for further development.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 26, 2007 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: May 14, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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