United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 11-1469**
	)	**Issued: February 14, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Santa Rosa, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 8, 2011 appellant filed a timely appeal from the May 16, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which awarded schedule compensation. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a three percent impairment of her right upper extremity, for which she received a schedule award.

FACTUAL HISTORY

On June 20, 1995 appellant, a 35-year-old city letter carrier, filed an occupational disease claim alleging that she developed an injury to the right shoulder area in the performance of duty. She performed modified casing duties and did not stop work. OWCP accepted appellant's claim

[1] 5 U.S.C. § 8101 *et seq*.

for right trapezius strain. Following a second-opinion examination on March 15, 2001, it expanded its acceptance to include right shoulder tendinitis.[2]

In 2010 appellant claimed a schedule award. OWCP asked Dr. Eric S. Schmidt, the attending Board-certified orthopedic surgeon, to evaluate impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009). Dr. Schmidt referred appellant to Dr. John W. Alchemy, a Board-certified family physician.

Dr. Alchemy evaluated appellant on March 9, 2010. He related her history and complaints. Dr. Alchemy described the activities of daily living affected by the injury. He described his finding on physical examination. Dr. Alchemy noted no magnetic resonance imaging (MRI) scan in the chart.[3] A May 15, 2009 fluoroscan of the right shoulder showed mild degenerative changes of the acromioclavicular joint, type 2 acromial configuration, normal acromiohumeral interval and normal appearing glenohumeral joint. Dr. Alchemy diagnosed right shoulder strain. He found that appellant was permanent and stationary "as of today *i.e.,* [m]aximal [m]edical [i]mprovement with no additional meaningful improvement in the next 12 months."[4] Using the fifth edition of the A.M.A., *Guides*, Dr. Alchemy calculated a three percent impairment of the right upper extremity due to loss of flexion and abduction.

Dr. Schmidt reviewed Dr. Alchemy's impairment evaluation and concurred with his findings.

OWCP's orthopedic consultant, Dr. Arthur S. Harris, reviewed Dr. Alchemy's findings under the sixth edition of the A.M.A., *Guides*. Referring to Table 15-5, page 402, he found that appellant had a three percent impairment of the right upper extremity due to shoulder tendinitis. Dr. Harris noted that the date of maximum medical improvement was March 9, 2010, when Dr. Alchemy evaluated her impairment.

On May 16, 2011 OWCP issued a schedule award for a three percent impairment of appellant's right upper extremity. It explained that a schedule award is not payable concurrently with compensation for wage loss and as she received compensation for wage loss through May 7, 2011, the starting date of the award was adjusted from March 9, 2010 to May 8, 2011.

On appeal, appellant disagrees with her rating. She points out that Dr. Alchemy evaluated her when she was three months out of work and, thus, not in a repetitive stress environment. Appellant argues that she reached maximum medical improvement in 1996. She

[2] On April 27, 2009 appellant sustained an injury in the performance of duty when a door swung open and struck her in the back. OWCP accepted that claim for contusion of the right shoulder and upper arm, other affections of the right shoulder region not elsewhere classified and sprain of the right shoulder and upper arm, unspecified site. OWCP File No. xxxxxx283.

[3] A July 24, 2001 MRI scan report noted that there may be some straightening of the mid-cervical spine, but the cervicothoracic lordosis was reasonably well maintained and the vertebral bodies and disc elements showed no evidence of abnormality. The other findings were unremarkable.

[4] In 1997 Dr. Howard Ballinger, Board-certified in preventive medicine, indicated that appellant was permanent and stationary in 1996.

took issue with Dr. Harris' mention of right rotator cuff tendinitis. Appellant argues that a second-opinion evaluation in 2001 injured her neck. She also argues that, if she were only three percent impaired, there would have been no reason for the employing establishment to remove her under the National Reassessment Process.

LEGAL PRECEDENT

FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.[5] Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[6]

ANALYSIS

Diagnosis-based impairment is the primary method of evaluation for the upper extremity.[7] Table 15-5, pages 401-05 of the A.M.A., *Guides* provides the upper extremity impairment ratings for diagnoses of the shoulder region. The default impairment value for shoulder tendinitis (residual loss, functional with normal motion) is three percent. This is what Dr. Harris, OWCP's orthopedic consultant, found.

There is more to evaluating impairment under the sixth edition, however, than finding the default impairment value. Appellant's default impairment value may be adjusted up or down by one or two percent, depending on her functional history, findings on physical examination and clinical studies. Dr. Harris did not apply these grade modifiers to determine the net adjustment. Because he did not follow the protocols of the sixth edition of the A.M.A., *Guides*, the Board will set aside OWCP's May 16, 2011 decision and remand the case for further development of the medical evidence. Following such further development as may become necessary, OWCP shall issue an appropriate final decision on appellant's schedule award claim.

Appellant argues that the timing of her impairment evaluation led directly to the low rating. As the A.M.A., *Guides* explains, however, impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur.[8] Had Dr. Alchemy evaluated appellant while she was being injured at work, while her work duties aggravated her right shoulder, her rating might have been adjusted slightly higher,[9] but her condition would not have been considered static or well stabilized. It is appellant's condition away from injurious or aggravating factors, after a reasonable time has passed for healing or recovery, that defines her permanent impairment.

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[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.0808.6.a (January 2010).

[7] A.M.A., *Guides* 387 (6th ed. 2009).

[8] *Id*. at 24.

[9] The highest impairment rating any claimant may receive for shoulder tendinitis is five percent.

Appellant argues that she reached maximum medical improvement in 1996. 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. Maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.[10] The determination of the date of maximum improvement is factual in nature and depends primarily on the medical evidence.[11] The date of maximum medical improvement is usually considered to be the date of the evaluation accepted as definitive by OWCP.[12]

For schedule award purposes maximum medical improvement should not be fixed at some distant time in the past on a date that was prior to the time that the employee was able to return to work on a regular basis, unless the evidence clearly and convincingly establishes that maximum improvement had in fact been reached by that date and unless the employee's rights can be fully protected.[13] If the date of maximum improvement is to be fixed at a distant past date, such as a year previously, while the employee was still disabled (and therefore usually entitled to compensation for temporary disability), the rules for determining the date of maximum improvement remain the same as in all other situations; however, in such a situation the type of evidence needed to support the retroactive finding of fact, adverse to the employee's best interest, must be stronger than that which might otherwise be sufficient.[14]

In 1997 Dr. Ballinger indicated that appellant was permanent and stationary in 1996. As the Board is remanding this case for further development on the precise percentage of her impairment, OWCP should further develop the issue of maximum medical improvement. It should address Dr. Ballinger's opinion and determine, with reasons, whether appellant's schedule award should begin in 1996 or on some more recent date and whether such a date would be to her best interest.

The Board notes that a schedule award pays compensation for a limited number of weeks. A three percent impairment of an upper extremity, for example, entitles a claimant to 9.36 weeks of compensation, regardless of whether the award begins in 1996 or 2011.[15]

Dr. Harris' mention of right rotator cuff tendinitis is immaterial to appellant's impairment rating. The operative diagnosis under Table 15-5, page 402 of the A.M.A., *Guides* is simply

[10] *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

[11] *Franklin L. Armfield*, 28 ECAB 445 (1977).

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.a (October 1990); *see Richard Larry Enders*, 48 ECAB 184 (1996) (the date of maximum medical improvement was the date of the audiologic examination used as the basis of the schedule award).

[13] *Marie J. Born*, 27 ECAB 623, 631 (1976).

[14] *Id.* at 28 ECAB 89, 93 (1976), *petition for recon., granted* (reaffirming the Board's decision).

[15] The total loss of an upper extremity entitles a claimant to 312 weeks of compensation. 5 U.S.C. § 8107(c)(1). Partial losses are compensated proportionately. 5 U.S.C. § 8107(c)(19). Thus, a three percent loss or loss of use of an upper extremity entitles a claimant to 9.36 weeks of compensation, even though the impairment is considered permanent and will last the rest of the claimant's life.

tendinitis, which OWCP accepted. OWCP also accepted appellant's claim for right trapezius strain, the default impairment value for which is only one percent (soft-tissue diagnoses are usually assigned the lowest impairment values). Typically, one diagnosis will adequately characterize the impairment and its impact on activities of daily living. Selection of the optimal diagnosis requires judgment and experience. If more than one diagnosis can be used, the highest causally-related impairment rating should be used. This will generally be the more specific diagnosis.[16]

OWCP has not accepted that a second-opinion examination in 2001 injured appellant's neck. It has accepted only a right trapezius strain and right shoulder tendinitis.

The employing establishment withdrew appellant's limited duty not because physical impairment disabled her from performing her tasks, but because the employing establishment considered those tasks to be unnecessary. Disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[17] Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn the wages.[18] The employing establishment's withdrawal of limited duty under the National Reassessment Process was no barometer of the physical impairment caused by appellant's accepted employment injury.

CONCLUSION

The Board finds that this case is not in posture for decision. Further development of the medical evidence is warranted regarding the percentage of appellant's impairment and the date of her maximum medical improvement.

[16] A.M.A., *Guides* 389.

[17] 20 C.F.R. § 10.5(f).

[18] *E.g., J.L.*, Docket No. 11-1193 (issued December 9, 2011).

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: February 14, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board