United States Department of Labor
Employees' Compensation Appeals Board

CHARLES A. McBEE, Appellant	)	
and	)	**Docket No. 04-276**
	)	**Issued: July 22, 2004**
DEPARMENT OF ENERGY, PANTEX COURIER SECTION, Albuquerque, NM, Employer	)	

Appearances:
Charles A. McBee, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 12, 2003 appellant filed a timely appeal of the August 29, 2003 merit decision wherein the Office of Workers' Compensation Programs issued a schedule award for an eight percent impairment of appellant's right leg and indicated that maximum medical improvement was reached on June 6, 2003. Pursuant to 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 an eight percent impairment of his right lower extremity for which he received a schedule award.

FACTUAL HISTORY

On March 14, 1996 appellant, then a 32-year-old special agent, filed a traumatic injury claim, alleging that on February 28, 1996, as part of a job-sanctioned physical fitness program, he developed a sharp pain to his right knee while running. Appellant's claim was accepted for

right knee sprain, medial meniscus derangement and synovitis of the right knee. Appellant had surgery on his knee on October 21, 1996 and April 16, 1998.

On January 24, 1997 Dr. Roy S. Marokus indicated that appellant had reached maximum medical improvement. He noted that appellant "does have a full [range of motion] but develops considerable pain [and] discomfort after exercise." He further indicated:

"At [maximum medical improvement], Impairment as follows:

> Table 39, p[age] 77, 4th edition; [i]mpairment from [l]ower [e]xtremity [w]eakness is 10 percent [k]nee surgery X 2, Table 64, p[age] 85 is 1 percent [plus] 1 percent [equals] 2 percent. 10 [plus] 2 percent [equals] 12 percent."

On June 5, 1997 Dr. Robert W. Higgins, a Board-certified orthopedic surgeon, determined that, pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[1] appellant had a total lower extremity impairment of five percent. He reached his conclusion as follows:

> "*RANGE OF MOTION:* Table 33, page 61: Goniometric measurements taken bilaterally were [r]ight 7 to 138 degrees and [l]eft 0 to 138 degrees. This equals a 0 percent lower extremity impairment.
>
> "*STRENGTH:* Table 11, Part B, #1-4, page 41. A gross [manual muscle test] was performed bilaterally on quadriceps and hamstrings. Quadriceps were [r]ight 4/5 and Left 5/5. Hamstrings were [r]ight 4/5 and left 5/5. This equals a 5 percent lower extremity impairment rating.
>
> "*DISORDER*: Table 36, #1-10, Page 61. This table shows a possible impairment of 0 [to] 20 percent for arthritis due to any etiology, including trauma, chondromalacia."

On April 16, 1998 appellant had surgery on his right knee, specifically, a partial synovectomy with the Ortec Tissue Ablation system.

In a medical report dated December 9, 1998, Dr. Rick E. Parsons, appellant's Board-certified orthopedic surgeon, noted, "well-healed portal sites with minimal palpitation over the knee and no effusion or instability. Patient has full [range of motion] but still has moderate quad atrophy." He also noted that there was no change in the impairment or work restrictions.

By letter dated March 6, 2001, appellant indicated that he elected disability retirement benefits and asked that the Office calculate his schedule award.

[1] A.M.A., *Guides* (5th ed. 2001).

By letter dated April 16, 2001, the Office asked Dr. Parsons to determine permanent partial impairment due to right medial meniscus derangement due to the February 28, 1996 employment injury. Dr. Parsons noted:

> "Physical exam[ination] shows a healthy-appearing male in no obvious distress. [Appellant's] legs are well tanned with no obvious deformities except for well-healed surgical incisions. Quad size proximal to the patella shows the right to be 35 cm [centimeters] and the left to be 36 cm. He has no obvious deformity. He has no obvious effusion in his knee. He is still tender over the medial joint line with a negative McMurray's, Lachman and Drawer. Motor and sensory exam[ination]s are grossly intact."

On May 3, 2001 Dr. Parsons concluded that, based on the A.M.A., *Guides*, appellant had no impairment based on his arthroscopic examination, office examination and functional capacity evaluation. By letter dated July 16, 2001, the Office informed appellant that Dr. Parsons found no impairment based on his arthroscopic evaluation and further noted that there was no claim in the record for a schedule award to the knee.

On December 11, 2001 appellant filed for a schedule award. In a decision dated March 18, 2002, the Office denied appellant's claim for a schedule award to the right knee based on Dr. Parsons' report. By decision dated October 24, 2002, the Office affirmed the March 18, 2002 decision denying the schedule award.

In a medical report dated June 6, 2003, Dr. Martin R. Baker, a Board-certified orthopedic surgeon, noted that appellant did not need another arthroscopic procedure and opined that appellant "does have some necessity for participating in a modified job environment not requiring kneeling, crawling, squatting or any other activity which requires attaining and maintaining acute flexion of the right knee." He continued:

> "I would be of the opinion that he has 2 [to] 3 percent permanency because of chronic anterior compartment synovitis. This is not relatable to any table or section in the Guides to the [e]valuation of [p]hysical [i]mpairment, 5th [e]dition. The only objective finding at this time for this patient is 1½ cm of atrophy at the right thigh. Reference is made to the [A.M.A., *Guides*], [p]age 530, Table 17-6, which allows eight percent impairment to the lower extremity because of atrophy. Combining the foregoing, I would be of the opinion that this patient has 10 percent impairment to his right lower extremity as a direct result of his injury of February 1996."

Dr. Baker's report was reviewed by the Office medical adviser on August 7, 2003, who opined:

> "[Impartial medical examiner] [sic] Martin R. Baker, M.D., examined claimant on June 6, 2003 and found 1.5 cm right thigh atrophy, due to the [accepted condition], for an 8 percent permanent partial impairment of the right lower extremity per the A.M.A., *Guides*, 5th ed., Table 17-6.

"He also alleged a 2 [to] 3 percent [permanent impairment] for anterior (knee) compartment synovitis, but there is no provision for this in the A.M.A., *Guides*, 5th [e]d.

"Thus claimant has 8 percent [permanent impairment] of the [right lower extremity], due to [atrophy]."

By decision dated August 28, 2003 and issued on August 29, 2003, the Office vacated the October 24, 2002 decision and issued a schedule award for an eight percent impairment of appellant's right leg. The Office determined that the date of maximum medical improvement was June 6, 2003.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[2] and section 10.404 of the implementing federal regulation,[3] schedule awards are payable for permanent impairment of specified body members, functions or organs. However the Act does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*[4] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[5] Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6]

A schedule award is not payable until maximum improvement of appellant's condition has been reached.[7] Maximum improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.[8] Generally, maximum improvement has not been reached until medical treatment has been discontinued.[9] The determination of the date of maximum medical improvement is factual in nature and depends primarily on the medical evidence.[10]

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[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (2002).

[4] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

[5] *See Joseph Lawrence, supra* note 4; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[6] FECA Bulletin No. 01-05 (issued January 29, 2001).

[7] *Orlando Vivens*, 43 ECAB 303, 308 (1991); *Robert L. Mitchell*, 35 ECAB 8, 13 (1982).

[8] *Id.*

[9] *Id.*

[10] *Jerre R. Rinehart*, 45 ECAB 518, 520 n.3 (1994).

ANALYSIS

As noted, the Office applies the fifth edition of the A.M.A., *Guides* effective February 1, 2001. The letter wherein appellant first requests a schedule award is dated March 6, 2001, and appellant officially filed his request on December 11, 2001. At the time appellant filed his request, the Office appropriately asked for further development of the medical evidence as the last report with regard to appellant's level of impairment was dated June 5, 1997, approximately four years earlier. Although the Office initially found zero percent impairment, based on Dr. Parson's May 3, 2001 report, the Office later appropriately determined that appellant had an eight percent impairment of the right lower extremity. Dr. Baker properly applied the A.M.A., *Guides* (5th ed.) when he made reference to page 530, Table 17-6 and determined that appellant was entitled to an eight percent impairment of the lower extremity because of atrophy. However, Dr. Baker also noted that he would allow a two to three percent impairment based on chronic anterior compartment synovitis, although he admitted that this was not relatable to any table in the fifth edition of the A.M.A., *Guides*. The Office medical adviser also noted that Dr. Baker properly applied the A.M.A., *Guides* in determining that appellant had an eight percent impairment due to atrophy, but indicated that the A.M.A., *Guides* did not support the award based on chronic anterior compartment synovitis. As previously stated, the Office's award must be based on the fifth edition of the A.M.A., *Guides.* Appellant contends that he reached maximum medical improvement prior to June 6, 2003 and also that the December 9, 1998 report by Dr. Parsons should supercede any additional impairments issued after that time. The Board is not persuaded by appellant's argument. Although Dr. Marokus had initially stated that appellant reached maximum medical improvement on January 24, 1997, this date is not appropriate as it is clear that appellant could not have reached maximum medical improvement until after his April 16, 1998 surgery on his right knee, as he was still undergoing treatment at that time.[11] Furthermore, Dr. Parsons' statement in his December 9, 1998 report that there was no change from appellant's previous impairment does not refer to the report of Dr. Marokus.

CONCLUSION

The Office properly issued a schedule award for an eight percent impairment of the right lower extremity.

[11] *See Orlando Vivens, supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 28, 2003 and issued on August 29, 2003 is hereby affirmed.

Issued: July 22, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member