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LORRAINE McGOWAN, Appellant)	
)	
and)	Docket No. 05-1308
)	Issued: January 10, 2006
U.S. POSTAL SERVICE, POST OFFICE,)	
Clementon, NJ, Employer)	
)	

Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 31, 2005 appellant, through her attorney, filed an appeal from a hearing representative's decision of the Office of Workers' Compensation Programs dated January 18, 2005, affirming a schedule award for the lower extremities. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than a three percent impairment of the right lower extremity and a nine percent impairment of the left lower extremity, for which she received a schedule award.

FACTUAL HISTORY

On February 14, 1996 appellant, then a 49-year-old letter carrier, filed an occupational disease claim alleging that she sustained bone spurs and chondromalacia of her knees causally related to factors of her federal employment. The Office accepted her claim for bilateral synovitis and chondromalacia of the knees.

Appellant filed a claim for a schedule award on October 28, 2002. In support of her claim, she submitted an impairment evaluation dated August 28, 2002 from Dr. David Weiss, an osteopath. He discussed her current complaints of “bilateral knee pain and stiffness daily in nature that waxes and wanes. She admits to locking of her bilateral, right greater than left, knees.” Dr. Weiss stated:

“Examination of the left knee reveals tenderness over the lateral patellar facet. Patellar apprehension and inhibition signs are negative. Patellofemoral compression produces crepitus at 30 degrees but no pain. Valgus and varus stress tests produce firm end points. Drawer and Lacman signs are negative. There is no tenderness elicited over the medial or lateral joint space or medial or lateral midline. Range of motion is 0-140/140 degrees.

“Examination of the right knee reveals no effusion. Range of motion is 0-140/140 degrees. Patellofemoral compression produces no pain or crepitus at 30 degrees. Patellar apprehension and inhibition signs are positive. There is tenderness over the medial and lateral patellar facets. Valgus and varus stress tests produce firm end points. Drawer and Lacman signs are negative.

“Gastrocnemius circumference measures 34 cm [centimeters] on the right versus 33 cm on the left.

“Quadriceps circumference at 10 cm above the patella measures 42 cm on the right versus 41 cm on the left.”

Citing to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), he concluded that appellant had a three percent impairment of the right lower extremity due to pain. Dr. Weiss further determined that, for the left lower extremity, she had an 8 percent impairment due to thigh atrophy, an 8 percent impairment due to calf atrophy and a 3 percent impairment due to pain, for a total impairment of 18 percent. He opined that the date of maximum medical improvement was August 28, 2002.

An Office medical adviser reviewed Dr. Weiss’ report and concurred that appellant had a 3 percent impairment of the right lower extremity due to pain pursuant to Figure 18-1 on page 574 of the A.M.A., *Guides*. He further found that, for the left lower extremity, appellant had a three percent impairment resulting from one cm of calf atrophy and a three percent impairment resulting from one cm of thigh atrophy according to Table 17-6 on page 530. He added the impairments due to atrophy to find a total impairment of six percent. The Office medical adviser then added a three percent impairment due to pain according to Figure 18-1 on page 574 to the six percent impairment due to atrophy and found a total left lower extremity impairment of nine percent. He opined that the date of maximum medical improvement was August 28, 2002.

By decision dated February 5, 2004, the Office issued appellant a schedule award for a three percent impairment of the right lower extremity and a nine percent impairment of the left lower extremity. The period of the award ran for 34.56 weeks from February 14 to October 13, 1995.

On February 20, 2004 appellant, through her attorney, requested an oral hearing, which was held on October 20, 2004.

In a decision dated January 18, 2005, the hearing representative affirmed the February 5, 2004 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,¹ and its implementing regulation,² sets 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* as the uniform standards applicable to all claimants.³ The 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, 2001.⁴

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 that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to the date of the evaluation by the attending physician, which is accepted as definitive by the Office.⁵ The Board has 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. The Board, therefore, requires persuasive proof of maximum medical improvement for selection of a retroactive date of maximum medical improvement.⁶

ANALYSIS

The Office accepted that appellant sustained bilateral synovitis and chondromalacia of the knees due to factors of her federal employment. She filed a claim for a schedule award on October 28, 2002 and submitted an impairment evaluation dated August 28, 2002 from Dr. Weiss in support of her request. Dr. Weiss found full-range of motion of 0 to 140 degrees for both knees. He found tenderness of the lateral patellar facet of the left knee and tenderness over the medial and lateral patellar facets of the right knee. Dr. Weiss measured appellant's

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

³ 20 C.F.R. § 10.404(a).

⁴ See FECA Bulletin No. 01-05 (issued January 20, 2001).

⁵ *Mark A. Holloway*, 55 ECAB ____ (Docket No. 03-2144, issued February 13, 2004).

⁶ *Marie J. Born*, 27 ECAB 623 (1976), *petition for recon. denied*, 28 ECAB 89 (1976).

gastrocnemius circumference as 34 cm on the right and 33 cm on the left and her quadriceps circumference as 42 cm on the right and 41 cm on the left. He determined that appellant had a three percent impairment due to pain on the right side. On the left side he concluded that she had an 8 percent impairment due to thigh atrophy, an 8 percent impairment due to calf atrophy and a 3 percent impairment due to pain, for a total left lower extremity impairment of 18 percent. Dr. Weiss opined that the date of maximum medical improvement was August 28, 2002.

An Office medical adviser applied the tables and pages of the A.M.A., *Guides* to Dr. Weiss' findings. For the left lower extremity, the Office medical adviser found a three percent impairment due to one cm of calf atrophy and a three percent impairment due to one cm of thigh atrophy. According to Table 17-6 on page 530 of the A.M.A., *Guides*, a 1 to 1.9 centimeter difference in calf and thigh circumference represents a mild impairment within the range of a 3 to 8 percent impairment of the lower extremity. As appellant had one cm of atrophy of the left calf and thigh, the Office medical adviser properly assigned her the low end of the impairment range or three percent. He added the three percent impairments due to calf and thigh atrophy to find a six percent impairment. The Office medical adviser then added 3 percent for pain in the right knee pursuant to Figure 18-1 on pages 574 to find a total left lower extremity impairment of 9 percent. The Office medical adviser further concurred with Dr. Weiss' finding that appellant had a 3 percent impairment of the right lower extremity due to pain pursuant to Figure 18-1 on pages 574 of the A.M.A., *Guides*. He indicated that the date of maximum medical improvement was August 18, 2002.

The Board notes that both Dr. Weiss and the Office medical adviser failed to explain the additional three percent impairment awarded appellant bilaterally due to pain. Section 18.3b on pages 571 of the A.M.A., *Guides* specifically states that examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ rating systems found in the other chapters. Neither Dr. Weiss nor the Office medical adviser addressed why appellant's pain could not be adequately assessed under the protocols of Chapter 17, nor was reference made to the cross usage chart at Table 17-2 to discuss whether atrophy and pain impairments may be combined.

The Board finds that the weight of the medical evidence of record establishes that appellant has no more than a three percent impairment of the right lower extremity and a nine percent impairment of the left lower extremity.

On appeal, appellant's attorney argues that a conflict in medical opinion exists between Dr. Weiss and the Office medical adviser. As discussed above, however, the Office medical adviser properly determined that one centimeter of both thigh and calf atrophy equaled a three percent impairment, respectively, rather than the eight percent respective impairment found by Dr. Weiss.⁷

The Office specified that the period of the schedule award ran from February 14 to October 13, 1995. It is well established, however, 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 determination of whether maximum medical

⁷ A.M.A., *Guides* 530, Table 17-6.

improvement has been reached is based on the probative medical evidence of record and is usually considered to the date of the evaluation by the attending physician, which is accepted as definitive by the Office.⁸ Both Dr. Weiss and the Office medical adviser concluded that appellant reached maximum medical improvement on August 28, 2002, the date of the impairment evaluation by Dr. Weiss. The Board, therefore, finds that the period of the schedule award should commence on August 28, 2002. The case, consequently, must be remanded for the Office to determine whether the change in the date of commencement of the schedule award changes the pay rate applicable to the schedule award.

CONCLUSION

The Board finds that appellant has no more than a three percent impairment of the right lower extremity and a nine percent impairment of the left lower extremity, for which she received a schedule award. The case will be remanded for the Office to change the date of commencement of the schedule award and determine what effect, if any, the change in date has on the pay rate used in calculating the schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 18, 2005 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 10, 2006
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

⁸ See Mark A. Holloway, *supra* note 5.