

Board-certified orthopedic surgeon, performed an arthroscopy of the left knee with removal of multiple chondral fragments, partial anterior horn medial meniscectomy and limited synovectomy on August 29, 2006. In a treatment note dated February 27, 1997, he stated that appellant was currently experiencing very little pain or swelling and that his left knee condition was improving with physical therapy. Dr. Swany listed his impression as “improving left knee.” He directed appellant to finish another four weeks of physical therapy.

Appellant filed a notice of recurrence of disability on June 21, 1999 alleging that on June 2, 1999 he experienced a recurrence of his July 10, 1996 employment injury as his left knee began to swell. The Office expanded his claim to include the additional condition of left knee osteoarthritis on October 20, 1999. Appellant requested a schedule award on May 13, 2002. The Office referred him for a second opinion evaluation and Dr. Stephen Shaffer, a Board-certified orthopedic surgeon, found in his January 31, 2003 report that appellant had not yet reached MMI. The Office denied appellant’s claim for a schedule award on February 26, 2003. He requested an oral hearing and by decision dated July 28, 2003, the hearing representative remanded his claim for a supplemental report from Dr. Shaffer addressing appellant’s date of MMI. After further development, the Office again denied appellant’s claim for a schedule award as the medical evidence did not establish that he had reached MMI. Appellant appealed this decision to the Board. By decision dated February 13, 2004,¹ the Board remanded the case for further development of the issue of whether appellant had reached MMI. The facts and the circumstances of the case as set forth in the Board’s prior decision are adopted herein by reference.

On May 11, 2004 the Office referred appellant to Dr. Thomas Koenig, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the extent of his permanent impairment and the date of MMI. In a report dated May 21, 2004, Dr. Koenig noted appellant’s history of injury and reviewed the medical records. He reviewed left knee x-rays dated July 30, 1996 and November 19, 2002 and found that appellant demonstrated moderately severe patellofemoral osteoarthritis with a three millimeter cartilage interval with “no significant interval change.” Dr. Koenig found that appellant had two percent impairment of the left lower extremity due to the partial medial meniscectomy on August 29, 1996 and seven percent impairment of the left lower extremity due to loss of cartilage for a total impairment rating of nine percent of the left lower extremity. He found that appellant had 0 degrees of extension and 125 degrees of flexion which were not ratable impairments. Dr. Koenig noted no ankylosis, found that appellant had normal strength and noted that appellant was not entitled to an additional impairment rating for pain under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

Regarding the date of MMI, Dr. Koenig stated:

“It is this orthopedist’s opinion that this patient likely reached his date of [MMI] on or about February 1997 (six months from the date of his August 29, 1996 surgery). It is this orthopedist’s opinion that additional symptoms thereafter are primarily secondary to the preexisting osteoarthritis....”

¹ Docket No. 04-82 (issued February 13, 2004).

The Office medical adviser reviewed this report on June 28, 2004 and found that appellant reached MMI on February 28, 1997 and agreed that appellant had nine percent impairment of his left lower extremity. By decision dated July 2, 2004, the Office granted appellant a schedule award for nine percent impairment of the left lower extremity for the period February 28 to August 28, 1997.

Appellant, through his attorney, requested an oral hearing and contested the date of MMI. On April 17, 2005 he changed this request to a review of the written record. By decision dated October 27, 2005, the hearing representative affirmed the Office's finding that appellant had nine percent impairment of his left lower extremity set aside the Office's July 2, 2004 decision in regard to the date of MMI and remanded for further development to determine this date.

On December 13, 2005 in response to the Office's query, the district medical adviser stated that the MMI date of February 28, 1997 should stand as, "The osteoarthritis of the left knee was preexisting and measured three millimeters cartilage interval November 17, 2002 with no further change noted in Dr. Koenig's report of May 21, 2004." By decision dated February 24, 2006, the Office found that the appropriate date of MMI in this case was February 28, 1997. Appellant requested a review of the written record on March 2, 2006. By decision dated July 24, 2006, the hearing representative set aside the February 24, 2006 decision and directed the Office to advise the Office medical adviser that the osteoarthritis of the left leg had been accepted as due to appellant's employment and request an appropriate date of MMI based on this information, supported with medical rationale.

The district medical adviser responded and opined that the date of MMI was February 1997. In support of this opinion, he stated that the accepted recurrence of osteoarthritis was the continuation of the arthritis disease process. The district medical adviser stated, "Final MMI is six months post arthroscopic surgery [i]n February 1997."

By decision dated September 22, 2006, the Office concluded that the date of MMI would remain February 28, 1997.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ 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.⁴ Effective

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ *Id.*

February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁵

ANALYSIS – ISSUE 1

Dr. Koenig, a Board-certified orthopedic surgeon and Office referral physician, evaluated appellant's permanent impairment in accordance with the A.M.A., *Guides*. He noted that a partial medial meniscectomy is two percent impairment.⁶ Dr. Koenig further noted that three millimeters of cartilage interval as demonstrated by x-rays is seven percent impairment.⁷ He concluded that appellant had no impairment due to loss of range of motion for 0 degrees of extension and 125 degrees of flexion.⁸ Dr. Koenig properly noted that any pain appellant experienced was included in the arthritis evaluation⁹ and appellant's impairments should be combined to reach an impairment rating of nine percent of the left lower extremity.¹⁰ There is no evidence in the record supporting a greater or different impairment rating and Dr. Koenig's report establishes that appellant had no more than nine percent impairment of his left lower extremity.

LEGAL PRECEDENT – ISSUE 2

It is well established that the period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the employment injury. The Board has defined MMI 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 MMI, which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, requires persuasive proof of MMI of the selection of a retroactive date of MMI.¹¹ 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.¹²

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

⁶ A.M.A., *Guides* 546, Table 17-33.

⁷ *Id.* at 544, Table 17-31.

⁸ *Id.* at 537, Table 17-10.

⁹ *Id.* at 525, Table 17.2 Methods of Assessment.

¹⁰ *Id.* at 604, Combined Values Chart.

¹¹ *J.C.*, 58 ECAB ____ (Docket No. 06-1018, issued January 10, 2007); *D.R.*, 57 ECAB ____ (Docket No. 06-668, issued August 22, 2006); *James E. Earle*, 51 ECAB 567 (2000).

¹² *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

ANALYSIS -- ISSUE 2

The second opinion physician, Dr. Koenig, a Board-certified orthopedic surgeon, opined in his May 21, 2004 report that it was “likely” that appellant had reached MMI by February 1997, six months after his August 29, 2006 surgery. He found that appellant’s accepted osteoarthritis had not worsened since July 30, 1996 based on x-rays and concluded that the remainder of appellant’s left knee conditions should have resolved by six months after the surgery. Dr. Koenig further noted that appellant’s continuing symptoms were due to the osteoarthritis. The Office medical advisers agreed with this conclusion and offered the date of February 28, 1997 as the date of MMI.

The Board finds that there is no persuasive evidence that appellant had reached MMI by February 28, 1997. Appellant’s surgeon, Dr. Swamy, completed a treatment note on February 27, 1997, stating that appellant was currently experiencing pain or swelling and that his left knee condition was improving with physical therapy. He listed his impression as “improving left knee” and recommended another four weeks of physical therapy. This report negates Dr. Koenig’s supposition that appellant had “likely” reached MMI by February 1997. As appellant had not fully recovered from his surgery by February 28, 1997, he had not reached MMI in the opinion of his attending physician. As there is no persuasive evidence of a retroactive date of MMI, the Board, therefore, finds that the period of the schedule award should commence on May 21, 2004, the date of the evaluation by Dr. Koenig which is accepted as definitive by the Office.¹³ The case will 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 nine percent impairment of his left lower extremity for which he received a schedule award. The Board further finds that the record does not contain the necessary persuasive proof to support a retroactive date of MMI.

¹³ *D.R., supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the October 27, 2005 decision of the Office of Workers' Compensation Programs is set aside and remanded for further proceedings consistent with this decision of the Board. The September 22, 2006 decision of the Office is affirmed.

Issued: June 18, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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