

underwent a right knee arthroscopy and a partial lateral meniscectomy on July 28, 1998. On July 18, 2000 appellant filed a claim for a schedule award.

In a report dated December 13, 2000, Dr. Thomas L. Rodts, an orthopedic surgeon, opined that appellant had a 17 percent impairment of the right lower extremity, including 12 percent for weakness, atrophy, pain or discomfort and 5 percent for decreased flexion. On June 27, 2001 Dr. Rodts indicated that appellant had chronic residual weakness of the right quadriceps muscle group as a result of her employment injury as well as right knee pain and discomfort.

In a report dated December 17, 2001, Dr. David H. Garelick, an Office district medical adviser, indicated that he had reviewed the reports of Dr. Rodts. Dr. Garelick found that appellant had a 2 percent impairment of the right lower extremity for a partial lateral meniscectomy according to Table 17-33 at page 546 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). He indicated that the date of appellant's maximum medical improvement "is estimated to have occurred [six] months postoperatively, January 28, 1999."

By decision dated February 5, 2002, the Office granted appellant a schedule award for a 2 percent impairment of the right lower extremity for 5.76 weeks of compensation. Appellant requested a review of the written record.

By decision dated October 1, 2002, an Office hearing representative affirmed the Office's February 5, 2002 decision. Appellant requested reconsideration contending that she had a 17 percent impairment of the right leg. By decision dated May 7, 2003, the Office denied appellant's request for reconsideration.

On June 24, 2003 appellant requested reconsideration and submitted additional evidence.

In a report dated May 22, 2003, Dr. Vikram H. Gandhi, a Board-certified orthopedic surgeon, stated that appellant had a 13.5 percent impairment of the whole person² based on a partial lateral meniscectomy, right thigh atrophy,³ degenerative joint disease of the right knee and weakness of the right ankle and right great toe. He stated that appellant had moderately severe pain in the right leg that interfered with activities and post-traumatic arthritis affecting the cartilage.

² A schedule award is not payable under section 8107 of the Federal Employees' Compensation Act for an impairment of the whole person. *Gordon G. McNeill*, 42 ECAB 140 (1990).

³ Measurement of the circumference of the right calf was 66 1/2 centimeters as compared to 68 1/2 on the left.

In a report dated July 14, 2003, Dr. Garelick stated that appellant had an eight percent impairment of the right lower extremity based on the findings in Dr. Gandhi's report. He noted that appellant had residual atrophy of the quadriceps muscle. He stated:

“Physical examination demonstrated 2 cm [centimeters] of quadriceps atrophy on the right when compared to the left awarding 8 percent [impairment] according to Table 17-6, p[age] 530 of the [A.M.A., *Guides*]...

“[Appellant] had previously been awarded 2 percent [impairment] for the lateral meniscal tear according to Table 17-33, p[age] 546 of the [A.M.A., *Guides*]. New medical information has been submitted documenting the quadriceps atrophy. Table 17-2, p[age] 526 is quite clear stating that one cannot combine [impairment] for atrophy, a meniscal tear DBE [Diagnosis-Based Estimate] and a peripheral nerve injury (pain). In quoting from the text, ‘If more than one method can be used, the method that provides the higher rating should be adopted.’⁴ Thus, in this case, the residual atrophy awards [eight] percent [right lower extremity] [impairment] and will be used. The date of MMI [maximum medical improvement remains [January 28, 1999].”

By decision dated July 23, 2003, the Office vacated its May 7, 2003 decision and granted appellant a schedule award for an 8 percent impairment of the right lower extremity and authorized the payment of 23.04 weeks of compensation, less than the compensation previously awarded for a 2 percent impairment. The date of maximum medical improvement used by the Office to calculate the schedule award was January 28, 1999.⁵

LEGAL PRECEDENT

The schedule award provision of the Act⁶ and its implementing regulation⁷ 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

⁴ A.M.A., *Guides*, 527.

⁵ Appellant submitted additional evidence subsequent to the Office decision of July 23, 2003. However, the Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c).

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

all claimants. The A.M.A., *Guides*⁸ has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁹

ANALYSIS

Dr. Gandhi stated that appellant had a 13.5 percent impairment of the whole person¹⁰ based on a partial lateral meniscectomy, right thigh atrophy (66 1/2 centimeters compared to 68 1/2 on the left), degenerative joint disease of the right knee and weakness of the right ankle and right great toe. He stated that appellant had moderately severe pain in the right leg that interfered with activities and post-traumatic arthritis affecting the cartilage.

Dr. Garelick applied Dr. Gandhi's findings to the A.M.A., *Guides* and correctly found that appellant had an eight percent impairment of the right lower extremity. He indicated that appellant had two centimeters of atrophy of the quadriceps muscle, which equaled an eight percent impairment according to Table 17-6 at page 530 of the A.M.A., *Guides*. Dr. Garelick noted that appellant had previously been awarded a schedule award for a two percent impairment for a lateral meniscal tear according to Table 17-33 at page 546 of the A.M.A., *Guides* but Table 17-2 at page 526 did not allow for combining impairments for atrophy and a meniscal tear (diagnosis-based estimate).¹¹ He correctly noted that the A.M.A., *Guides* provided that if more than one rating method could be used, the method that provided the higher rating should be adopted and the residual atrophy rating of eight percent should be used because it exceeded the two percent rating for a meniscal tear.

Regarding the January 28, 1999 date of maximum medical improvement used by the Office in its July 23, 2003 schedule award, Dr. Garelick provided no explanation in his July 14, 2003 report as to why he chose that date rather than the date of the medical report he used for determining appellant's impairment, the May 22, 2003 report of Dr. Gandhi. The Board has noted a reluctance to find a date of maximum medical improvement which is retroactive to the date of the schedule award because retroactive awards often result in payment of less compensation benefits. The Board has required persuasive proof of maximum medical improvement for selection of a retroactive date of maximum medical improvement.¹²

CONCLUSION

The medical evidence establishes that appellant has no more than an eight percent impairment of the right lower extremity, for which she received a schedule award. However,

⁸ A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

⁹ *Id.*

¹⁰ As noted above, a schedule award is not payable under the Act for an impairment of the whole person.

¹¹ The Board notes that Dr. Gandhi also stated in his report that appellant had moderately severe pain (peripheral nerve injury) in the right leg that interfered with activities and post-traumatic arthritis. However, Table 17-2 does not permit the combination of a rating for atrophy with a rating for a peripheral nerve injury or arthritis.

¹² See *James E. Earle*, 51 ECAB 567 (2000).

further development is required regarding the date of maximum medical improvement. On remand, the Office should ask the district medical adviser to provide a date of maximum medical improvement for appellant's right lower extremity condition and a reasoned explanation for his choice. After such further development as necessary, the Office shall issue an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 23, 2003 is affirmed as to the percentage of appellant's impairment of her right lower extremity and the case is remanded for further development regarding her date of maximum medical improvement.

Issued: March 19, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
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Michael E. Groom
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