

**United States Department of Labor
Employees' Compensation Appeals Board**

PAMELA D. ALLEN, Appellant

and

**U.S. POSTAL SERVICE, AIR MAIL CENTER,
O'HARE AIRPORT, Chicago, IL, Employer**

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**Docket No. 04-1601
Issued: November 26, 2004**

Appearances:
Pamela D. Allen, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 8, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated June 1, 2004, adjudicating her claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

ISSUE

The issue is whether the Office properly determined the date of maximum medical improvement for appellant's accepted right lower extremity condition.

FACTUAL HISTORY

This case was previously before the Board.¹ By decision dated March 19, 2004, the Board affirmed a July 23, 2003 Office decision which found that appellant had no more than an eight percent impairment of the right lower extremity, for which she received a schedule award.

¹ Docket No. 04-49 (issued March 19, 2004).

The Board remanded the case for further development on the issue of the date of maximum medical improvement (MMI).² The date of MMI used by the Office to calculate the schedule award in its July 23, 2003 decision was January 28, 1999. The factual background of the case as set forth in the Board's decision is incorporated herein by reference.

In a report dated May 24, 2004, Dr. David H. Garelick, an Office medical adviser, stated that he had reviewed the notes of Dr. Thomas L. Rodts, appellant's attending orthopedic surgeon. He stated that it was customary to assign MMI following a straightforward knee arthroscopy within three to six months following surgery. Dr. Garelick stated:

"It is clear from the medical records that [appellant] did take an extraordinary time to recover following her right knee arthroscopy on July 28, 1998. When determining the date of MMI, it is important for the examiner to differentiate between the claimant's residual complaints versus objective physical exam[ination] findings. Secondly, while [appellant] did recover from the arthroscopy, it is my opinion that many of the residual symptoms that she exhibited were due to her patellofemoral syndrome, and not her meniscal tear or arthroscopy.

"Upon further review of Dr. Rodts' notes, it is clear [that] no substantive improvement in the physical examination had occurred for many months at the May 6, 1999 office visit (February 1, 1999: '[Appellant] shows no significant clinical changes despite her increased symptoms.' March 16, 1999:³ '[Appellant's] condition appears stable.') However, the May 6, 1999 office visit is now chosen as the new date of MMI as [appellant] was no longer using a cane upon presentation. [Impairment] remains 8 percent."

On June 1, 2004 the Office issued a decision granting appellant compensation for 23.04 weeks based on an eight percent permanent impairment of the right lower extremity, the same percentage as granted in its July 23, 2003 schedule award decision.⁴ However, the Office changed the date of MMI to May 6, 1999 based on the reasoned explanation of Dr. Garelick in

² On May 19, 1998 appellant, then a 35-year-old mail handler, filed a traumatic injury claim alleging that she injured her right knee on that date when she slipped and fell on the workroom floor. The Office accepted appellant's claim for internal derangement of the right knee. She underwent right knee arthroscopy and a partial lateral meniscectomy on July 28, 1998. On July 18, 2000 appellant filed a claim for a schedule award.

³ The date of this report is actually March 15 not 16, 1999.

⁴ As noted above, the Board, in its March 19, 2004 decision, affirmed the Office's decision granting of a schedule award based on an eight percent impairment of the right lower extremity. The Office based its schedule award decision on the May 22, 2003 report of Dr. Vikram H. Gandhi, a Board-certified orthopedic surgeon. Appellant had asked the Office to reconsider its October 1, 2002 decision based on the May 22, 2003 report of Dr. Gandhi. Although Dr. Gandhi indicated that the date of MMI was December 13, 2000, Dr. Garelick, the Office medical adviser, determined that the MMI date was January 28, 1999. Because Dr. Garelick did not provide a reasoned explanation for selecting January 28, 1999 as the date of MMI, the date in the Office's July 23, 2003 decision, the Board remanded the case for further development of the MMI issue. The Board notes that the number of weeks of compensation for an eight percent impairment of the right lower extremity would be the same if the date of MMI were December 13, 2000.

his May 24, 2004 report.⁵ The period covered by the schedule award was May 6 to October 14, 1999.

LEGAL PRECEDENT

A disabled employee has the right to compensation for periods of temporary total or partial disability until the point of maximum medical improvement is reached. Upon reaching maximum medical improvement, the evidence ordinarily permits a determination to be made as to the precise degree of permanent loss of use of the schedule member of the body.⁶ It is well established that 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.⁷ The issue of maximum medical improvement was extensively treated by the Board in its two decisions in *Marie J. Born*.⁸

In *Born*, the Board reviewed the well-settled rule that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement and 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 Board also 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.

ANALYSIS

In the present case, the evidence clearly and convincingly establishes that appellant reached MMI by May 6, 1999. In a report dated May 24, 2004, Dr. Garelick reviewed the reports of Dr. Rodts and found that appellant had reached MMI on May 6, 1999. Dr. Garelick noted that it was customary to assign a MMI date following a straightforward knee arthroscopy within three to six months after the surgery.⁹ He further noted that it was clear from the medical records that appellant took an extraordinary time to recover following her right knee arthroscopy on July 28, 1998. Dr. Garelick explained that, when determining the date of MMI, it is important for the examiner to differentiate between the claimant’s residual complaints and the objective physical findings. He stated that appellant recovered from the arthroscopy surgery and many of her residual symptoms were due to her patellofemoral syndrome, not her accepted meniscal tear or arthroscopy. His reasoned explanation for selecting May 6, 1999 as the date of MMI was that there was no substantive improvement in appellant’s physical examination for many months

⁵ In its July 23, 2003 schedule award decision, the Office based the award of 23.04 weeks of compensation on a January 28, 1999 MMI date and the award covered the period January 28 to July 8, 1999.

⁶ *Michael Vining (Kevin M. Vining)*, 52 ECAB 354, 356 (2001).

⁷ *Yolanda Librera (Michael Librera)*, 37 ECAB 388, 392 (1986).

⁸ 27 ECAB 623 (1976); *petition for recon. denied*, 28 ECAB 89 (1976).

⁹ As noted above, appellant underwent surgery on July 28, 1998.

prior to the May 6, 1999 office visit as indicated in the February 1 and March 16, 1999 notes of Dr. Rodts but, at the May 6, 1999 office visit with Dr. Rodts, appellant no longer needed to use a cane. The record thus contains persuasive evidence from Dr. Garelick that appellant reached MMI on May 6, 1999.

Therefore, as the weight of the medical evidence of record clearly and convincingly establishes that appellant reached MMI by May 6, 1999, the Office properly used this date as the date of MMI in its June 1, 2004 schedule award.

On appeal, appellant contends that the date of MMI should be December 13, 2000, the date of Dr. Rodts' report in which he opined that appellant had a 17 percent impairment of the right lower extremity. However, the record shows that the Office did not use Dr. Rodts' December 13, 2000 report in its July 23, 2003 schedule award decision granting appellant a schedule award based on an eight percent impairment of the right lower extremity.¹⁰ Dr. Rodts' opinions regarding appellant's permanent impairment were of limited probative value because they were conclusory and offered no medical rationale or explanation. He offered no explanation as to why MMI was only reached in December 13, 2000, when his reports otherwise suggested that appellant's condition had not improved after May 6, 1999. The physical examination findings reported by Dr. Rodt were however used by Dr. Garelick to determine the date of MMI.

CONCLUSION

The Board finds that the Office, in its June 1, 2004 schedule award decision, properly determined that May 6, 1999 was the date of MMI for appellant's accepted right lower extremity condition.

¹⁰ As noted above, the Board affirmed the Office's July 23, 2003 decision as to the issue of the percentage of impairment to appellant's right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 1, 2004 is affirmed.

Issued: November 26, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member