United States Department of Labor
Employees' Compensation Appeals Board

CLIFFORD R. IRWIN, Appellant	)	
and	)	**Docket No. 06-602**
	)	**Issued: July 3, 2006**
DEPARTMENT OF THE ARMY, SENECA ARMY DEPOT, Romulus, NY, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 20, 2006 appellant filed a timely appeal of an April 22, 2005 decision of the Office of Workers' Compensation Programs, finding that appellant was not entitled to a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has a ratable permanent impairment to a scheduled member of the body entitling him to a schedule award under 5 U.S.C. § 8107.

FACTUAL HISTORY

On December 17, 1996 appellant, then a 45-year-old painter, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left knee injury when a chain struck his kneecap while in the performance of duty on December 2, 1996. The Office accepted the claim for left knee contusion and internal derangement of the left knee.

A magnetic resonance imaging scan dated August 18, 1997 revealed a left meniscus tear and appellant underwent left knee surgery on October 31, 1997. He underwent a second left knee surgery on October 23, 2003. In a report dated January 13, 2004, the attending orthopedic surgeon, Dr. Olaf Lieberg, provided results on examination and diagnosed status post partial medial meniscectomy and shaving lateral tibial plateau and patellofemoral joint. Dr. Lieberg stated that appellant had not reached maximum medical improvement.

In reports dated April 13 to December 16, 2004, Dr. Lieberg opined that appellant had a 25 percent leg disability. He did not identify any specific tables under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* or discuss maximum medical improvement. In a January 20, 2005 letter to Dr. Lieberg, the Office noted that it was unclear how the impairment was calculated and the date of maximum medical improvement was not established.

On January 31, 2005 Dr. Lieberg completed a form report provided by the Office with respect to the left knee findings and permanent impairment. Dr. Lieberg responded to a request for the date of maximum medical improvement by stating, "[patient] will eventually need TKA [total knee arthroplasty]." He did not provide any additional information as to maximum medical improvement.

By decision dated April 22, 2005, the Office determined that appellant was not entitled to a schedule award. The Office found that the requirements for a schedule award had not been met as the date of maximum medical improvement had not been established.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[1] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[2]

The evidence required to support a schedule award includes medical evidence that shows the impairment has "reached a permanent and fixed state and indicates the date on which this occurred ('date of maximum medical improvement or DMI')."[3]

[1] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[2] *A. George Lampo*, 45 ECAB 441 (1994).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(b)(1) (August 2002).

ANALYSIS

As noted, the medical evidence necessary to establish entitlement to a schedule award must show that the impairment has reached a permanent and fixed state and establish the date on which this occurred. Dr. Lieberg was asked to provide information regarding maximum medical improvement, but his response indicated that maximum medical improvement had not been reached. He responded to a request for the date of maximum medical improvement by stating that appellant would need further surgery. This response does not establish that the impairment has reached a fixed state. The form report provides an opportunity for additional explanation regarding the date of maximum medical improvement, but Dr. Lieberg did not provide any additional information.

It is appellant's burden of proof to submit the evidence necessary to establish that he has a permanent impairment entitling him to a schedule award.[4] The evidence of record from Dr. Lieberg does not establish that the impairment has reached a permanent and fixed state and therefore appellant did not submit the necessary medical evidence to establish a permanent impairment to a scheduled member of the body. Accordingly, the Board finds that the Office properly determined that appellant was not entitled to a schedule award at this time.

CONCLUSION

The medical evidence did not establish that maximum medical improvement had been reached and therefore appellant was not entitled to a schedule award.

[4] *See James E. Jenkins*, 39 ECAB 860 (1988). The Board notes that only evidence that may be reviewed on this appeal is evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 22, 2005 is affirmed.

Issued: July 3, 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