United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 06-1077**
	)	**Issued: November 15, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Bright Waters, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 14, 2006 appellant filed a timely appeal from the March 20, 2006 merit decision of the Office of Workers' Compensation Programs, finding a five percent permanent impairment of her right lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a five percent permanent impairment of her right lower extremity, for which she received a schedule award.

FACTUAL HISTORY

On September 30, 1985 appellant, then a 33-year-old letter carrier, filed a traumatic injury claim alleging that she injured her right ankle and knee when she tripped while carrying a mail cart. The Office accepted her claim for right knee and right ankle sprain, and torn lateral and medial menisci of the right knee. The Office later approved arthroscopic surgery of the right

knee; however, the surgery was never performed. On April 5, 2003 appellant returned to restricted duty on a full-time basis.

On May 19, 2003 appellant requested a schedule award. On May 29, 2003 the Office asked appellant's treating physician, Dr. Ray Allen Haag, a Board-certified orthopedic surgeon, for an opinion as to whether appellant had reached maximum medical improvement (MMI) and, if so, the percentage of permanent impairment of her right lower extremity.

In unsigned notes dated May 1, 2003, Dr. Haag stated that appellant had not reached MMI. Unsigned notes dated June 9, 2003 reflected appellant's continued complaints of stiffness in her right knee. In an August 4, 2003 report, Dr. Haag related the history of his treatment of appellant since 1991 for an injury to her right knee and ankle. He stated that "she has remained stationary and has really not changed much, so I guess that she has reached [MMI]." Dr. Haag reported that motion of her right knee was slightly restricted, 0 to 90 degrees, and noted some atrophy of the quadriceps muscle; no sensory changes and no ankylosis. He indicated that appellant had pain with motion of the right knee, which locked on occasion. In September 29, 2003 and February 17, 2004 duty status reports, Dr. Haag indicated that appellant could work 8 hours per day with restrictions, which prohibited lifting more than 5 pounds continuously or 10 pounds intermittently; kneeling; walking, climbing or driving a vehicle for more than 1 hour; bending, stooping, twisting, pushing or pulling for more than 2 hours; or reaching above the shoulder for more than 3 hours. On September 29, 2003 he stated, "I do n[o]t think she is schedulable and she remains permanently partially disabled, because she has never had surgery." On February 17, 2004 he stated that appellant still lacked full flexion of her right knee and had slight swelling and atrophy of her right quad. Notes dated May 17, 2004 reflected that appellant was moving to Nevada.

The record contains an October 25, 2004 authorization for right knee arthroscopy surgery.

In unsigned notes dated October 20, 2004, Dr. Mario Porras, a Board-certified orthopedic surgeon, related appellant's complaints regarding her right knee, including popping, locking and giving way; swelling and discomfort and instability. Physical examination of the knee revealed light effusion; tenderness along the medial joint line; full range of motion; and no crepitus of the patella on flexion and extension. Dr. Porras provided an impression of torn medial and lateral meniscus of the right knee, symptomatic, and recommended an arthroscopic medial and lateral meniscectomy to stop the progression of appellant's disease.

On September 29, 2005 the Office asked Dr. Porras for an opinion as to whether appellant had reached MMI and, if so, the percentage of permanent impairment of her right lower extremity. An undated note from Dr. Porras' office indicated that he did not perform examinations for schedule award purposes.

On October 18, 2005 the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. M.P. Reddy, a Board-certified physiatrist, for a second opinion examination and determination of the extent of permanent impairment of appellant's right lower extremity and the date of MMI.

In a November 3, 2005 report, Dr. Reddy indicated that he had reviewed the statement of accepted facts and the entire medical record.[1] He accurately reported the factual and medical history and noted appellant's complaints of chronic intermittent locking of her right knee, as well as occasional swelling and pain. No ankle pain was reported. Appellant also reported that prolonged standing and walking increased her knee pain, and that the pain interfered with her daily activities, in that she was unable to perform kneeling activities, do deep knee bends or to run. She described her right knee pain as uncomfortable most of the time and occasionally distressing. Dr. Reddy's physical examination of the right knee revealed no evidence of swelling or effusion; tenderness over anterolateral aspect; no anterior, posterior or mediolateral instability; no ankylosis; and no atrophy or weakness. Circumference of the right and left knees were 39/39 cm, respectively. Dr. Reddy noted that appellant had a tendency to lock the right knee at times due to her meniscus tears. Examination of the right ankle revealed no evidence of pain, tenderness, deformity or discoloration. Circumference of the right and left ankles were 26/26 cm. respectively. He found no medial or lateral instability; no atrophy or weakness and no ankylosis. Dr. Reddy measured and tabulated range of motion of the right knee and ankle with the goniometer, as required by the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). Range of motion for the right ankle was consistently normal: dorsiflexion -- 20 degrees (normal -- 20 degrees); plantar flexion -- 40 degrees (normal -- 40 degrees); inversion -- 30 degrees (normal -- 30 degrees); eversion -- 20 degrees (normal -- 20 degrees). Regarding the right knee, flexion was 110 degrees (normal -- 150 degrees). Extension was zero degrees (normal -- zero degrees). Attached to Dr. Reddy's narrative report were two forms, which had been provided by the Office, for the calculation of appellant's impairment pursuant to the A.M.A., *Guides*. Appellant completed, signed and dated the forms "November 3, 2005." Each form provided a space for the date of MMI. In the space provided on the form entitled, "RIGHT KNEE," Dr. Reddy indicated that the date of MMI was "November 3, 2004," adding that "no further conservative care will change her right knee symptoms, she is refusing right knee surgery." In the space provided on the form entitled, "RIGHT ANKLE," Dr. Reddy indicated that the date of MMI was "November 3, 2005." He stated that muscle strength was 5/5 in all muscle groups of the bilateral lower extremities; circumferences of the right and left thighs and calves were 54/53 cm and 40/39 cm, respectively. Dr. Reddy found no atrophy of the right lower extremity muscles, and found that the knee and ankle reflexes were normal and symmetrical. He found no sensory impairment to pinprick and a normal gait. Dr. Reddy concluded that appellant's right ankle symptoms had resolved and that she had reached MMI. He opined that she continued to have right knee locking and pain due to her meniscal tear, but that she had reached MMI, in that she was not considering surgery.

The Office forwarded Dr. Reddy's second opinion report to an Office medical adviser for review. In a January 28, 2006 report, the medical adviser concluded that appellant had a five percent impairment of her right lower extremity. Based upon Dr. Reddy's objective findings, the medical director recommended grading appellant's pain complaints as "quite high." Referring to Table 16-10 at page 482 of the fifth edition of the A.M.A., *Guides*, he determined that appellant's "pain that prevents certain activities" should be graded between 61 and 80 percent

[1] The Board notes that Dr. Reddy's report was dated October 3, 2005. However, the record reflects that the second opinion examination was scheduled for November 3, 2005, and that the forms accompanying Dr. Reddy's report were signed and dated on November 3, 2005. Therefore, it appears that the report was actually signed on, and should have been dated, November 3, 2005.

(Grade 2), and recommended a 70 percent grade of a maximal 7 percent (femoral nerve), which was equivalent to a 4.9 percent (rounded to 5 percent) impairment for pain. He noted that Dr. Reddy found no atrophy or weakness that could form the basis of an impairment rating. Based on Dr. Reddy's findings of 110/150 degrees flexion and 0/0 degrees extension, the medical director provided a rating of zero percent for range of motion pursuant to Table 17-10 at page 537. He further opined that the date of MMI was November 3, 2004, the date that Dr. Reddy allegedly stated that no further conservative care would change appellant's right knee condition.

On March 20, 2006 the Office granted appellant a schedule award for a five percent impairment of her right lower extremity. The award was for 14.4 weeks, for the period November 3, 2004 through February 11, 2005.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing federal regulation,[3] 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* (5th ed. 2001) as the uniform standard applicable to all claimants.[4] 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.[5]

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[6]

It is well established that the period covered by the schedule award commences on the date that the employee reaches MMI from the residuals of the accepted employment injury. The Board has explained that MMI means that the physical condition of the injured member of the body has stabilized and will not improve further. 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.[7]

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] 20 C.F.R. § 10.404(a).

[5] *See* FECA Bulletin No. 01-5, issued January 29, 2001.

[6] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (March 1995).

[7] *See D.R.*, 57 ECAB ___ (Docket No. 06-668, issued August 22, 2006); *see also Mark A. Holloway*, 55 ECAB ___ (Docket No. 03-2144, issued February 13, 2004).

ANALYSIS

Dr. Reddy found that prolonged standing and walking increased appellant's knee pain which interfered with her daily activities, in that she was unable to perform kneeling activities, do deep knee bends or to run. Her pain was described as uncomfortable most of the time and occasionally distressing. Dr. Reddy's physical examination of the right knee revealed no evidence of swelling or effusion; tenderness over anterolateral aspect; no anterior, posterior or mediolateral instability; no ankylosis; and no atrophy or weakness. Dr. Reddy noted that appellant had a tendency to lock the right knee at times due to her meniscus tears. Regarding range of motion, right knee flexion was 110/150 degrees, and extension was 0/0 degrees. All aspects of the right ankle were reported as normal. Dr. Reddy opined that appellant had reached MMI, in that she was not considering surgery. An assessment of appellant's permanent impairment of the right lower extremity was not provided.

The Office medical adviser reviewed Dr. Reddy's report and the case record in order to determine the degree of permanent functional loss of use of appellant's right lower extremity, as well as the date of MMI. In a January 28, 2006 report, the medical advisers applied the appropriate tables of the A.M.A., *Guides* to determine that appellant had a five percent permanent impairment of her right lower extremity. Using Dr. Reddy's findings as the basis of his report, the medical director concluded that appellant had no ratable impairment due to loss of range of motion, atrophy or weakness. In evaluating impairment due to sensory deficit or pain, the medical adviser referred to Table 16-10 at page 482. Based on Dr. Reddy's objective findings, the medical director rated the level of symptoms as Grade 2. He determined that appellant's "pain that prevents certain activities" should be at 70 percent of a maximal 7 percent (femoral nerve),[8] which was equivalent to a 4.9 percent (rounded to 5 percent) impairment for pain. There is no other medical evidence of record conforming to the A.M.A., *Guides* that supports any greater impairment. The Board finds that the Office properly concluded that appellant has no more than a five percent impairment of her right lower extremity.

The Office medical adviser opined that the date of MMI was November 3, 2004, the date that Dr. Reddy indicated that no further conservative care would change appellant's right knee condition. The Office specified that the period of the schedule award ran from November 3, 2004 through February 11, 2005. It is well established that the period of a schedule award commences on the date that the employee reaches MMI from the residuals of the accepted employment injury. The determination of whether MMI has been reached is based on the probative medical evidence of record.[9] The Board has noted a reluctance to find a date of MMI which is retroactive to the award, as retroactive awards often result in payment of less

[8] A.M.A., *Guides* 552, Table 17-37.

[9] *See Mark Holloway*, *supra* note 7.

compensation benefits.[10] The Board requires persuasive evidence of MMI for selection of a retroactive date of MMI.[11]

In his narrative report, Dr. Reddy stated that appellant had reached MMI, in that she was not considering surgery. As noted, it appears that the October 3, 2005 date on Dr. Reddy's second opinion report was a typographical error, given that the examination of appellant occurred and the accompanying forms were signed one month later on November 3, 2005. In a blank space provided on an attached form entitled "KNEE," Dr. Reddy indicated that the date of MMI was "November 3, 2004," adding that "no further conservative care will change her right knee symptoms, she is refusing right knee surgery." In the space provided on the attached form entitled "ANKLE," Dr. Reddy indicated that the date of MMI was "November 3, 2005."

The Board notes that while the form entitled "KNEE," that was attached to Dr. Reddy's narrative report, reflects that "November 3, 2004" was the date of MMI, the narrative report itself reflects that appellant had reached MMI as of the date of the examination, namely November 3, 2005. In that Dr. Reddy gave no explanation as to why a different date was assigned as the date of MMI on the form attached to his narrative report, it is reasonable to assume that the "KNEE" form also contained a typographical error, and that he intended to designate November 3, 2005 as the date of MMI. In any event, the Board finds that the medical director has failed to provide the persuasive proof necessary to support a retroactive date of MMI.

The case will be remanded to the Office for a determination of the date of MMI, to be followed by an appropriate decision in order to protect appellant's rights of appeal.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained more than a five percent impairment of her right lower extremity. The Board further finds that the Office improperly determined the date of MMI.

[10] *James E. Earle*, 51 ECAB 567 (2000).

[11] *Id. see also D.R., supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 20, 2006 is affirmed as to its determination that appellant has no more than a five percent permanent impairment of her right lower extremity. It is further ordered that the Office's decision is set aside on the issue of the date of MMI, and the case is remanded for further proceedings consistent with this order.

Issued: November 15, 2006
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