United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 07-781**
	)	**Issued: June 26, 2007**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Norfolk, VA, 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 January 29, 2007 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated December 21, 2006 which denied his 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 case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has an impairment caused by his accepted right knee injury which would entitle him to a schedule award.

FACTUAL HISTORY

On March 17, 2006 appellant, then a 50-year-old materials examiner and identifier, filed a Form CA-1, traumatic injury claim, alleging that on March 16, 2006 he injured his right knee when a forklift driver pushed a pallet into him. He stopped work that day. Appellant came under the care of Dr. Felix M. Kirven, a Board-certified orthopedic surgeon, and on May 2,

2006, the Office accepted that he sustained an employment-related right medial femoral condylar fracture and a right medial collateral ligament strain.

Appellant returned to limited duty on June 15, 2006 and continued to receive physical therapy three times a week. In an August 25, 2006 attending physician's report, Dr. Kirven advised that appellant would have permanent restrictions with current restrictions of no standing over six hours, no forklift operation, no ladder climbing and no prolonged knee bending. In a work capacity evaluation dated August 28, 2006, he advised that appellant could not perform his usual job and provided restrictions of six hours standing, squatting and kneeling, no operating a motor vehicle at work and no climbing. Dr. Kirven advised that the restrictions would apply until December 1, 2006 and that maximum medical improvement had not been reached.

On October 22, 2006 appellant filed a schedule award claim. By letter dated November 15, 2006, the Office advised appellant that additional medical evidence was needed to determine whether he was entitled to a schedule award and attached a letter with a form report that he was to give his physician. The physician was to evaluate appellant in accordance with the A.M.A., *Guides*[1] and submit the form for rating impairment. Appellant was given 30 days to respond.

By decision dated December 21, 2006, the Office denied appellant's schedule award claim on the grounds that the medical evidence of record did not demonstrate a measurable impairment.

LEGAL PRECEDENT

Pursuant to section 8107 of the Federal Employees' Compensation Act[2] and section 10.404 of the implementing federal regulations,[3] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*[4] has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[5]

It is well established that the period covered by the schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The Board has explained that maximum medical improvement

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] A.M.A., *Guides*, *supra* note 1.

[5] *See Joseph Lawrence, Jr., supra* note 1; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record, and is usually considered to the date of the evaluation by the attending physician which is accepted as definitive by the Office.[6]

ANALYSIS

The Board finds that appellant has not established that he is entitled to a schedule award. It is a claimant's burden to submit sufficient evidence to establish entitlement to a schedule award.[7] The Office determined that appellant was not entitled to a schedule award for his accepted right knee injury because the medical evidence of record did not establish any permanent impairment in accordance with the A.M.A., *Guides.* His attending orthopedic surgeon, Dr. Kirven, provided the only medical evidence of record. The only medical evidence of record from Dr. Kirven addressed appellant's work restrictions, noting maximum medical improvement had not been reached. It is well established that the medical evidence must show that the medical condition accepted must reach a fixed state and the physician must address when this occurred.[8] In the work capacity evaluation dated August 28, 2006, Dr. Kirven advised that maximum medical improvement had not been reached. The period covered by any schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury.[9] This determination is factual in nature and depends primarily on the medical evidence.[10] As Dr. Kirven, appellant's attending orthopedist, advised that maximum medical improvement had not been reached, the Office properly denied appellant's schedule award claim.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he is entitled to a schedule award for his accepted right knee injury.

[6] *Mark A. Holloway*, 55 ECAB 321 (2004).

[7] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[8] *See James E. Archie*, 43 ECAB 180 (1991).

[9] *Mark Holloway*, *supra* note 6.

[10] *Peter C. Belking*, 56 ECAB ___ (Docket No. 05-655, issued June 16, 2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 21, 2006 be affirmed.

Issued: June 26, 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