United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 07-1267**
	)	**Issued: November 14, 2007**
DEPARTMENT OF STATE, AMERICAN CONSULATE GENERAL, El Paso, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 11, 2007 appellant filed a timely appeal of a March 30, 2007 merit decision, finding a two percent impairment of the left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this schedule award case.

ISSUES

The issues are: (1) whether appellant has established that he has more than a two percent impairment of the left lower extremity, for which he received a schedule award; and (2) whether his schedule award compensation was paid at the proper pay rate. On appeal, he contends that the pay rate should have been based on his salary at the time his claim was approved on March 12, 2004.

FACTUAL HISTORY

This case has previously been before the Board. In a June 20, 2005 decision, the Board found that the Office properly terminated appellant's compensation benefits effective

December 26, 2004, on the grounds that he no longer had any disability causally related to his August 21, 2003 employment injury.[1] The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.[2] The facts and the history relevant to the present issue are set forth.

By letter dated June 27, 2005, the employing establishment advised the Office that appellant resigned from his position as a consular officer effective March 30, 2004. Appellant was a GS 9, step 4 and his annual base salary as of January 2003 was $42,830.00 and it was $44,500.00 as of January 2004. The employing establishment stated that he did not receive any premium pay. A Notice of Personnel Action (SF-50 Form) indicated that appellant's total annual pay rate at the time of his retirement on March 30, 2004 was $44,500.00.

On June 30, 2005 appellant filed a claim for a schedule award. A July 2, 2005 medical report of Dr. Jose A. Alicea, a Board-certified orthopedic surgeon, provided a history that appellant underwent arthroscopic surgery in March 2004 for a work-related left knee injury. Dr. Alicea stated that appellant reached maximum medical improvement on June 29, 2005. He noted that the partial medial meniscectomy constituted a one percent impairment of the whole person and his degenerative changes at the time of the arthroscopic surgery constituted a three percent impairment of the whole person based on Tables 17-33 and 17-31 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). Dr. Alicea combined these impairment ratings to conclude that appellant had a four percent impairment of the whole person which constituted a nine percent impairment to the left lower extremity.

On April 7, 2006 an Office medical adviser reviewed the medical records and found that appellant reached maximum medical improvement on July 2, 2005. He determined that a partial medial meniscectomy constituted a two percent impairment of the left lower extremity (A.M.A., *Guides* 546, Table 17-33). The medical adviser further determined that appellant was not entitled to additional impairment for degenerative arthritis. He stated that Dr. Alicea's reliance on Table 17-31 on page 544 of the A.M.A., *Guides* was incorrect because the A.M.A., *Guides* provided impairment for degenerative changes that were quantified based on cartilage intervals as demonstrated by x-ray and not on intra-articular observations during surgery.

By decision dated March 30, 2007, the Office granted appellant a schedule award for a two percent impairment of the left lower extremity for 5.76 weeks of compensation for the period July 2 through August 11, 2005, based on a weekly pay rate of $839.60 effective March 30, 2004.[3]

[1] Docket No. 05-531 (issued June 20, 2005).

[2] On December 23, 2003 appellant, then a 48-year-old consular officer, filed a traumatic injury claim. He hurt his left knee on August 21, 2003 when he stepped off a platform at work. By letter dated March 12, 2004, the Office accepted appellant's claim for a medial meniscus tear of the left knee and authorized arthroscopic surgery which was performed on March 29, 2004.

[3] The Board notes that appellant's weekly pay rate of $839.60 was based on an annual salary of $43,659.00.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[5] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[6] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[7]

The A.M.A., *Guides* provides in pertinent part:

> "The best roentgenographic indicator of disease stage and impairment for a person with arthritis is the cartilage interval or joint space. The hallmark of all types of arthritis is thinning of the articular cartilage; this correlates well with disease progression.
>
> "The need for joint replacement or major reconstruction usually corresponds with complete loss of the articular surface (joint space). The impairment estimates in a person with arthritis (Table 17-31) are based on standard x-rays taken with the individual standing, if possible. The ideal film-to-camera distance is 90 [centimeters] (36 inches), and the beam should be at the level of and parallel to the joint surface. The estimate for the patellofemoral joint is based on a 'sunrise view' taken at 40 degrees flexion or on a true lateral view.
>
> "In the case of the knee, the joint must be in the neutral flexion-extension position (zero degrees) to evaluate the x-rays."[8]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a medial meniscus tear of the left knee and underwent a partial medial meniscectomy. He filed a claim for a schedule award on June 30, 2005 and submitted Dr. Alicea's July 2, 2005 impairment evaluation. Dr. Alicea opined that appellant reached maximum medical improvement on June 29, 2005. He determined that his partial medial meniscectomy constituted a one percent impairment of the whole person (A.M.A., *Guides* 546, Table 17-33). Dr. Alicea further determined that appellant had a three percent impairment of the whole person for his degenerative changes at the time of the arthroscopic

[4] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[5] 20 C.F.R. § 10.404.

[6] 5 U.S.C. § 8107(c)(19).

[7] *See* note 5, *supra*.

[8] A.M.A., *Guides* 544.

surgery (A.M.A., *Guides* 544, Table 17-31). He combined the one percent impairment for the partial medial meniscectomy and the two percent impairment for arthritis to conclude that appellant had a four percent impairment of the whole person which constituted a nine percent impairment of the lower extremity. However, Dr. Alicea did not provide a cartilage level measurement obtained by x-ray in support of his impairment rating for arthritis as required for application of Table 17-31**.** Therefore, his determination of appellant's permanent impairment of the left lower extremity is not based on correct application of the A.M.A., *Guides*. The Board finds that Dr. Alicea's July 2, 2005 impairment rating is of diminished probative value.

The Office medical adviser reviewed Dr. Alicea's findings, rating impairment based on the A.M.A., *Guides*. He opined that appellant reached maximum medical improvement on July 2, 2005. The medical adviser determined that a partial medial meniscectomy constituted a two percent impairment of the left lower extremity (A.M.A., *Guides* 546, Table 17-33). He further determined that appellant was not entitled to additional impairment for degenerative arthritis. The medical adviser explained that Dr. Alicea's reliance on Table 17-31 on page 544 of the A.M.A., *Guides* was incorrect because the A.M.A., *Guides* provided impairment for degenerative changes that are quantified based on cartilage intervals as demonstrated by x-ray and not on intra-articular observations. As noted, Dr. Alicea did not obtain any x-ray to determine appellant's arthritis impairment. The Office medical adviser properly applied the A.M.A., *Guides* and provided rationale for rating a two percent impairment of the left lower extremity. The Board finds that the opinion of the medical adviser represents the weight of the medical opinion evidence of record. Appellant has no more than a two percent impairment of the left lower extremity. There is no discretion on the part of the Office or Board to grant additional compensation for such losses.[9]

On appeal, appellant contends that the period of the schedule award, the number of weeks of compensation and the effective date of his pay rate used for the award did not apply to his case. Under the Act, the maximum award for an impairment of the leg is 288 weeks of compensation.[10] The two percent impairment of the left leg entitled appellant to two percent of 288 weeks or 5.76 weeks of compensation. The Board finds that the Office correctly determined appellant's schedule award to be 5.76 weeks of compensation. He is entitled to no more under the Act.

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.[11] Maximum improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.[12] In this case, the Office medical adviser properly found that appellant reached maximum medical improvement on July 2, 2005, the date of examination by Dr. Alicea. The Board, therefore, finds that the schedule award properly runs for 5.76 weeks commencing on July 2, 2005.

[9] *Donald Mueller*, 32 ECAB 33 (1980).

[10] 5 U.S.C. § 8107(c)(2).

[11] *Albert Valverde*, 36 ECAB 233, 237 (1984).

[12] *Adela Hernandez-Piris*, 35 ECAB 839 (1984); *James T. Rogers*, 33 ECAB 347 (1981).

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act[13] provides that compensation for a schedule award shall be based on the employee's monthly pay.[14] Section 8105(a) of the Act provides: If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.[15]

Section 8101(4) of the Act defines monthly pay for purposes of computing compensation benefits as follows: The monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.[16] Office regulations provide that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition resulting from a previous injury or illness without a new or intervening injury.[17]

In applying section 8101(4), the statute requires the Office to determine monthly pay by determining the date of the greater pay rate, based on the date of injury, date of disability or the date of recurrent disability. The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).[18]

ANALYSIS -- ISSUE 2

On appeal, appellant contends that the pay rate for his schedule award should have been based on his salary at the time his traumatic injury claim was approved by the Office on March 12, 2004. The Board finds that this contention is without merit. In determining appellant's schedule award pay rate, the Office utilized the pay rate effective March 30, 2004, the date he retired, $43,659.00 annually or $839.60 per week. This date also represents the date disability began as appellant underwent authorized left knee surgery on March 29, 2004. Based on the provisions of 5 U.S.C. § 8101(4), the Board finds that the Office properly determined that the applicable date for determining appellant's pay rate was March 30, 2004. The Board, however, finds that the Office used the incorrect pay rate in calculating appellant's schedule award. The employing establishment stated that appellant's pay rate as of January 2004 was

[13] 5 U.S.C. §§ 8101-8193.

[14] 5 U.S.C. § 8107.

[15] 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

[16] 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

[17] 20 C.F.R. § 10.5(x).

[18] *Robert A. Flint*, 57 ECAB ___ (Docket No. 05-1106, issued February 7, 2006).

$44,500.00 annually or $855.77 per week. It also stated that he did not receive premium pay. Further, the SF-50 form found in the case record indicated that the pay rate effective March 30, 2004 was $44,500.00 annually or $855.77 per week. The Board finds that appellant is entitled to a schedule award based on an annual salary of $44,500.00 or $855.77 per week.

CONCLUSION

The Board finds that appellant has no more than a two percent impairment of the left lower extremity. The Board further finds that appellant is entitled to a schedule award based on the $855.77 weekly pay rate effective March 30, 2004. This case is remanded to the Office to calculate the additional amount of compensation to which appellant is entitled (the difference between the $839.60 per week previously paid and the correct weekly pay rate of $855.77).

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2007 decision of the Office of Workers' Compensation Programs is affirmed in part with respect to the percentage of impairment of the left lower extremity. The case is remanded in part for the recomputation of the schedule award based on the correct rate of pay.

Issued: November 14, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board