

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

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D.C., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Portland, ME, Employer )

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**Docket No. 13-302  
Issued: October 23, 2013**

*Appearances:*

*Daniel B. Shapiro, Esq.*, for the appellant  
*Catherine P. Carter, Esq.*, for the Director

Oral Argument June 25, 2013

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On November 5, 2012 appellant, through counsel, filed a timely appeal from an October 5, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding a schedule award. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 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 OWCP properly determined the date of maximum medical improvement for appellant's schedule award.

On appeal, counsel asserts that appellant attained maximum medical improvement of his right leg on April 20, 2001 and of his left leg on June 1, 1999. Counsel has not contested the percentage of impairment.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

OWCP accepted that on or before August 25, 2011 appellant, then a 54-year-old letter carrier, sustained permanent aggravation of bilateral knee osteoarthritis. Appellant underwent left knee surgery on June 1, 1998, including anterior cruciate ligament arthroscopy assisted using Achilles tendon allograft. He also underwent a partial medial meniscectomy of his right knee on April 20, 2000. OWCP accepted that these procedures were necessitated by the accepted condition.

On March 22, 2012 appellant claimed a schedule award. He submitted a December 5, 2011 report of Dr. David C. Morley, Jr., an attending Board-certified orthopedic surgeon, who stated that the clinical findings on an August 25, 2011 examination demonstrated 20 percent permanent impairment of appellant's right leg and 28 percent permanent impairment of his left leg according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*), due to postsurgical status. Dr. Morley opined that appellant reached maximum medical improvement in both knees, stating, "[Appellant] reached maximum medical improvement with respect to his right knee around April 2001 (one year after his April 20, 2000 right knee surgery). He reached maximum medical improvement with respect to his left knee around June 1999 (one year after his June 1, 1998 left knee reconstruction)."

In an April 18, 2012 report, an OWCP medical adviser stated that he agreed with Dr. Morley that appellant had 20 percent permanent impairment of his right leg and 28 percent permanent impairment of his left leg. He noted that Dr. Morley provided dates of maximum medical improvement of one year following the operative procedures on each knee and concurred that appellant's right knee reached maximum medical improvement in "April 2001" and that his left knee reached maximum medical improvement in "June 1999."

By decision dated October 5, 2012, OWCP granted appellant schedule awards for 20 percent permanent impairment of his right leg and 28 percent permanent impairment of his left leg. The decision noted that the date of maximum medical improvement for appellant's right leg was April 20, 2001 and that the date of maximum medical improvement for his left leg was June 1, 1999. The period of the awards ran from August 25, 2011 to April 18, 2014.

On June 21, 2013 the Director of OWCP requested leave to file a motion to remand, contending that there was insufficient medical rationale to support that appellant reached maximum medical improvement in April 2001 for his right knee or in June 1999 for his left knee. The Director also advised that, with respect to the determination of maximum medical improvement, OWCP did not consider a claimed right knee injury alleged to have been sustained on June 20, 2005 under File No. xxxxxx887 and a claimed left knee injury alleged to have been sustained around September 20, 2006 under File No. xxxxxx812. Oral argument was held on June 25, 2013. At oral argument, counsel submitted a memorandum asserting that appellant attained maximum medical improvement of his right leg on April 20, 2001 and of his left leg on June 1, 1999. He claimed that the schedule awards should have started running on April 20, 2001.

The Board issued an “Order Allowing Supplemental Pleading” on July 5, 2013. Neither the Director nor appellant submitted any additional pleadings within the allotted time.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.<sup>2</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.<sup>3</sup>

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. Maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.<sup>4</sup> The determination of the date of maximum medical improvement is factual in nature and depends primarily on the medical evidence.<sup>5</sup> The date of maximum medical improvement is usually considered to be the date of the evaluation accepted as definitive by OWCP.<sup>6</sup> The Board has 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 benefits. The Board, therefore, requires persuasive proof of maximum medical improvement if OWCP selects a retroactive date.<sup>7</sup>

### **ANALYSIS**

OWCP accepted that appellant sustained permanent aggravation of bilateral knee osteoarthritis, necessitating left knee surgery on June 1, 1998 and right knee surgery on April 20, 2000. Appellant claimed a schedule award on March 22, 2012. He submitted a December 5, 2011 report of Dr. Morley, an attending Board-certified orthopedic surgeon, rating

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<sup>2</sup> *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9.d (February 2013); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>4</sup> *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

<sup>5</sup> *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

<sup>6</sup> Federal (FECA) Procedure Manual, *supra* note 3 at Chapter 3.700.3.a (January 2010); *see Richard Larry Enders*, 48 ECAB 184 (1996) (the date of maximum medical improvement was the date of the audiologic examination used as the basis of the schedule award).

<sup>7</sup> *C.S.*, Docket No. 12-1574 (issued April 12, 2013); *P.C.*, 58 ECAB 539 (2007); *James E. Earle*, 51 ECAB 567 (2000).

20 percent permanent impairment of the right leg and 28 percent permanent impairment of the left leg according to the A.M.A., *Guides*, based on an August 25, 2011 examination. An OWCP medical adviser concurred with Dr. Morley's impairment rating and the dates of maximum medical improvement. OWCP based its October 5, 2012 schedule award on Dr. Morley's impairment rating as reviewed by its medical adviser. It listed the dates of maximum medical improvement on the schedule award as April 20, 2001 for appellant's right leg and as June 1, 1999 for his left leg; however, it effectively determined that the date of maximum medical improvement was August 25, 2011, the date of Dr. Morley's impairment rating examination, by commencing the schedule award on August 25, 2011.

Counsel asserts that appellant attained maximum medical improvement of his right leg on April 20, 2001 and of his left leg on June 1, 1999. He claimed that appellant's schedule award should have started running on April 20, 2001. The Board is reluctant to find a retroactive date of maximum medical improvement as retroactive awards often result in payment of less compensation benefits.<sup>8</sup> There is insufficient medical evidence of record to establish June 1, 1999 or April 20, 2001 as the appropriate dates of maximum medical improvement.

In a December 5, 2011 report, Dr. Morley concluded that appellant reached maximum medical improvement in his right leg "around April 2001" and in his left leg "around June 1999." Dr. Morley did not specify the objective physical findings supporting that appellant's leg conditions had stabilized as of the dates he identified. He did not address whether appellant's leg conditions worsened after the listed dates. Moreover, Dr. Morley did not discuss the effect on the maximum medical improvement determination of a claimed June 2005 right knee injury and a claimed September 2006 left knee injury. While an OWCP medical adviser concurred with Dr. Morley's statement on the dates of maximum medical improvement, he did not explain the medical reasoning behind his conclusion. Both physicians failed to provide clear, convincing evidence supporting that appellant attained maximum medical improvement of his right leg in April 2001 and of his left leg in June 1999. Therefore, the dates cannot be used to determine the appropriate date on which to commence the schedule award.<sup>9</sup>

The case will be remanded to OWCP for further development to determine the appropriate dates of maximum medical improvement for appellant's legs. OWCP will also determine if the present claim should be doubled with File No. xxxxxx887, involving a claimed right knee injury alleged to have been sustained on June 20, 2005, and File No. xxxxxx812, involving a claimed left knee injury alleged to have been sustained around September 20, 2006. Following this and any other development deemed necessary, it will issue a *de novo* decision in the case.

On appeal, asserts that appellant attained maximum medical improvement on April 20, 2001 for his right leg and on June 1, 1999 for his left leg. For the reasons stated, the case will be remanded to OWCP for further development on the issue of maximum medical improvement.

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<sup>8</sup> C.S., *supra* note 7; P.C., *supra* note 7.

<sup>9</sup> P.C., *supra* note 7; L.H., 58 ECAB 561 (2007).

**CONCLUSION**

The Board finds that the case is not in posture for a decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 5, 2012 is set aside and the case remanded for additional development consistent with this decision.

Issued: October 23, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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