United States Department of Labor
Employees' Compensation Appeals Board

C.H., Appellant	)	
and	)	**Docket No. 06-1703**
	)	**Issued: January 17, 2007**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Little Rock, AR, 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 July 19, 2006 appellant filed a timely appeal of the June 7, 2006 merit decision of the Office of Workers' Compensation Programs, which granted a schedule award for a 22 percent impairment of the left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's June 7, 2006 schedule award.[1]

ISSUE

The issue is whether the Office properly determined appellant's pay rate, the period of the award and whether he was entitled to augmented compensation for one or more dependents.

[1] After appellant filed his appeal, the Office issued a July 27, 2006 schedule award for an additional 19 percent impairment of the left lower extremity. Appellant has not requested review of the Office's July 27, 2006 decision, thus, the Board does not have jurisdiction over this subsequently issued schedule award.

FACTUAL HISTORY

On July 9, 1999 appellant, then a 43-year-old mail handler, sustained a left knee injury while pulling a bulk mail carrier. The Office initially accepted the claim for internal derangement of the left knee and authorized a July 26, 1999 arthroscopic procedure.[2] The claim was later expanded to include left patellar chondromalacia as an accepted condition. On February 27, 2001 the Office granted a schedule award for a nine percent impairment of the left lower extremity.[3] It paid compensation at the basic rate of 66⅔ percent while utilizing a date-of-injury weekly pay rate of $476.00.

On April 10, 2001 appellant underwent another surgical procedure -- a left high tibial osteotomy. Following surgery, the Office paid him wage-loss compensation at the basic rate of 66⅔ percent based on a weekly pay rate of $639.31 in effect at the time of his April 8, 2001 work stoppage.[4] Appellant returned to work, performing limited duty on June 26, 2001.

Appellant filed for an additional schedule award on August 5, 2001. He listed his then 23-year-old stepdaughter as a dependent.[5] At the time, appellant presented evidence of only a minimal increase in his impairment. Almost two years passed without the Office taking any action with respect to the August 2001 schedule award claim. In May 2003, appellant's congressional representative intervened on his behalf and the Office subsequently authorized a one-time consultation with an orthopedic specialist to obtain a current impairment rating. Dr. James S. Mulhollan, an orthopedic surgeon, examined appellant on May 22, 2003 and found a 20 percent impairment of the left lower extremity due to arthritis in the knee joint. The Office's medical adviser concurred with Dr. Mulhollan's 20 percent impairment rating for left knee arthritis, which was evident by x-ray. He also calculated a 2 percent additional impairment because of appellant's July 1999 partial meniscectomy, for a total left lower extremity impairment of 22 percent.

On July 4, 2003 the Office began paying appellant a schedule award for a 22 percent impairment of the left lower extremity. The period of the award was from May 22, 2003 to August 7, 2004. The Office calculated payments based on the basic rate of 66⅔ percent and a

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[2] Dr. Thomas P. Rooney, an orthopedic surgeon, performed a partial lateral meniscectomy and debridement of the median femoral condyle.

[3] On July 17, 2000 appellant's orthopedic surgeon advised that he had a seven percent impairment of the left lower extremity due to arthritis in the knee joint. He also indicated that the degenerative changes were progressive and that appellant might require further surgery. The Office's medical adviser concurred with the seven percent rating for left knee arthritis, but he also recommended an additional two percent impairment for the July 26, 1999 partial meniscectomy, for a total left lower extremity impairment of nine percent.

[4] Appellant's annual base pay at the time was $30,200.00. In addition to his base pay of $580.77 per week, appellant earned 8 hours of Sunday premium pay ($3.63 per hour) and 25 hours of night differential ($1.18 per hour) each week totaling $58.54.

[5] Appellant would later explain that, while he was no longer married to her mother, he claimed his adult stepdaughter as a dependent because she resided with him and was working only part time after graduating from college.

date-of-injury pay rate of $476.00 per week.[6] Appellant requested a lump-sum payment of the schedule award and he later signed a November 3, 2003 agreement purportedly representing "full and final settlement" of the schedule award for the period May 22, 2003 to August 7, 2004. On November 6, 2003 the Office disbursed a final check in the amount $13,487.63. Despite the disbursement of payments, there is no record of a formal schedule award decision being issued at the time.

On November 9, 2004 appellant underwent a left knee partial medial meniscectomy and open UniSpacer arthroplasty. The Office paid wage-loss compensation based on a weekly pay rate of $766.38 as of November 9, 2004. Appellant continued to be compensated at the basic rate of 66⅔ percent. He returned to light-duty work on February 8, 2005.

Appellant filed another claim for a schedule award on August 4, 2005. In a March 20, 2006 report, Dr. Rooney, appellant's surgeon, found a 50 percent impairment of the left lower extremity due to appellant's November 9, 2004 knee replacement surgery. The Office's medical adviser reviewed the relevant evidence and on May 30, 2006 he similarly found a 50 percent impairment of the left lower extremity due to appellant's total left knee replacement, which yielded only fair results. Additionally, the Office's medical adviser recommended that the current 50 percent impairment should be reduced by the previous assessment of 22 percent impairment.

On June 7, 2006 the Office issued a decision granting a schedule award for a 22 percent impairment of the left lower extremity. The award covered a period of 63.36 weeks from May 22, 2003 to August 7, 2004. The decision indicated that benefits were based on a compensation rate of 75 percent and a weekly pay rate of $476.00 effective July 9, 1999, the date of appellant's employment injury.[7]

On July 11, 2006 appellant filed an appeal utilizing the form that accompanied the June 7, 2006 schedule award decision. However, he identified a May 22, 2003 decision as the subject of his current appeal. The Board received the appeal on July 19, 2006.

The Office issued another schedule award on July 27, 2006. This most recent award was for an additional 19 percent impairment of the left lower extremity. The decision explained that, while appellant was currently rated 50 percent impaired, this latest award would be reduced by appellant's two previous awards that totaled 31 percent. The 19 percent award covered a period

[6] Although the Office paid appellant based on his date-of-injury pay rate, the Office had just recently issued a June 12, 2003 wage-earning capacity determination, which found that appellant was reemployed as a modified mail handler effective June 26, 2001 and he currently earned $730.44 a week. The Office found that this position fairly and reasonably represented appellant's wage-earning capacity. Because his actual earnings met or exceeded the current wages of his date-of-injury position, appellant did not have a loss in earning capacity and thus, was not entitled to wage-loss compensation. A June 30, 2003 schedule award payment worksheet indicates that the Office considered paying appellant's schedule award based on his then current weekly earnings of $730.44, but that figure was crossed out and substituted with the July 9, 1999 date-of-injury pay rate of $476.00.

[7] With the exception of the noted "75 percent" compensation rate, the June 7, 2006 decision replicates the schedule award the Office previously paid appellant in 2003. There is no evidence that the Office disbursed any additional payments for the same May 22, 2003 to August 7, 2004 period. While the decision notes a 75 percent compensation rate, the Office later clarified that appellant had been paid at the basic rate of 66⅔ percent.

of 54.72 weeks from March 20, 2006 to April 9, 2007. The Office continued to compensate appellant at the basic rate of 66⅔ percent, but relied on a weekly pay rate of $766.38 effective November 9, 2004.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[8] For a total, or 100 percent loss of use of a leg, an employee shall receive 288 weeks of compensation.[9] Compensation for schedule awards is payable at 66⅔ percent of the employee's monthly pay or 75 percent of the pay when the employee has at least one dependent, such as a spouse or an unmarried child.[10] Monthly pay for compensation purposes means 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 … whichever is greater."[11]

ANALYSIS

Appellant does not challenge the Office's decision to grant a schedule award for 22 percent impairment of the left lower extremity. He does, however, challenge the Office's calculation of his pay rate and the period of the award. He also claims he is entitled to augmented compensation. With respect to the latter issue, the Office properly paid appellant at the basic rate of 66⅔ percent because of his stepdaughter's age. On the August 5, 2001 schedule award claim (Form CA-7) appellant listed his stepdaughter's date of birth as March 14, 1978, which would make her more than 23 years old at that time. Because of her advanced age and the absence of evidence indicating that she was incapable of self-support, appellant's stepdaughter is not an eligible dependent.[12] As appellant did not claim any additional dependents at the time, he is only entitled to compensation at the basic rate of 66⅔ percent.[13]

Appellant also took issue with the period of the schedule award, which ran from May 22, 2003 to August 7, 2004. The May 22, 2003 start date represents the date of maximum medical improvement and properly coincides with Dr. Mulhollan's examination, which the Office relied

[8] 5 U.S.C. § 8107.

[9] 5 U.S.C. § 8107(c)(2).

[10] 5 U.S.C. §§ 8107(a), 8110(a), (b); *see* 20 C.F.R. §§ 10.404(b), 10.405 (2006); *Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

[11] 5 U.S.C. § 8101(4); *see Samuel C. Miller*, 55 ECAB 119, 120 (2003).

[12] 20 C.F.R. § 10.405 (2006).

[13] 20 C.F.R. § 10.404(b) (2006).

upon in determining the extent of appellant's impairment.[14] The award covers 63.36 weeks with a termination date of August 7, 2004.[15] The Office's findings with respect to the commencement date and the length of the schedule award are appropriate.

The final issue appellant raised was the propriety of the Office's reliance on his date-of-injury pay rate in determining the amount of compensation due. When he sustained his employment injury in July 1999 appellant earned $476.00 per week. When appellant stopped work in April 2001 to undergo another surgical procedure, the Office paid him wage-loss compensation based on an April 8, 2001 pay rate of $639.31 a week. In July 2003 when the Office began paying the 22 percent award appellant was earning $730.44 a week as reflected in the Office's June 12, 2003 wage-earning capacity decision. While there apparently was some consideration given to compensating appellant at his then-current weekly pay rate, the Office ultimately relied on his date-of-injury pay rate.

For compensation purposes monthly pay means 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 … whichever is greater."[16] In the present case, the Office provides no justification for awarding compensation based on appellant's date-of-injury pay rate of $476.00 a week. The Office's reliance on appellant's date-of-injury pay rate is particularly perplexing given the fact that prior to this schedule award he had most recently been paid wage-loss compensation at the higher April 8, 2001 pay rate of $639.31 a week. Accordingly, the Office erred in paying the May 22, 2003 to August 7, 2004 scheduled award based on the date-of-injury pay rate of $476.00 per week. The case is, therefore, remanded to the Office for determination of the appropriate pay rate to be applied in calculating appellant's May 22, 2003 to August 7, 2004 scheduled award.

CONCLUSION

The Board finds that the Office erred in determining the applicable pay rate.

[14] *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

[15] The number of weeks of compensation is calculated by taking the percentage impairment of the lower extremity, in this case 22 percent and multiplying it by the total number of weeks of compensation allowed for 100 percent loss of use of the leg (288 weeks). Based on this formula, the Office properly computed appellant's award at 63.36 weeks (.22 x 288 = 63.36).

[16] *See supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the June 7, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further action consistent with this decision.

Issued: January 17, 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