U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH J. COTTLE and U.S. POSTAL SERVICE,
POST OFFICE, South Suburban, IL

Docket No. 02-2027; Submitted on the Record;
Issued May 27, 2004

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant had a 37 percent permanent impairment of her right lower extremity, for which she was entitled to a schedule award; and (2) whether appellant's rate of pay used in determining her schedule award was properly determined.

This is appellant's second appeal before the Board on this issue. In the prior appeal, the Board modified a February 22, 2001 decision of the Office of Workers' Compensation Programs[1] and found that appellant had a 37 percent permanent impairment of her right lower extremity.[2] The facts and the circumstances of the case are fully set forth in the prior decision,[3] and are hereby incorporated by reference.[4]

Following return of the case record, the Office confirmed that the Office medical adviser had applied the diagnosis-based estimates provided at Table 64, page 85 of the American

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[1] Which had determined that appellant had a 15 percent impairment of her right lower extremity.

[2] Docket No. 01-1246 (issued January 4, 2002). The Board notes that appellant had received a schedule award for a 14 percent permanent impairment of her right lower extremity.

[3] Appellant was injured on August 31, 1994. She stopped work on September 1, 1994. She was released to limited duty with restrictions on October 31, 1994, and she returned to work for one day only on November 15, 1994. Appellant stopped work again on November 16, 1994 and did not return, and she did not provide any medical evidence supporting a cessation of work. Thereafter appellant was absent without leave and she continued without any medical report supporting injury, disability, or a recurrence of her accepted right knee contusion injury or any other disabling medical problem.

[4] Appellant sustained internal derangement of her right knee which was accepted for right knee contusion as a result of bumping her knee on the corner of a belt. She had undergone a previous complete medial meniscectomy, a primary repair of her medial collateral ligament, a lateral retinacular release of her patella and a primary repair of her anterior cruciate ligament, related to a 1984 automobile accident. Appellant was diagnosed as having anterior cruciate ligamentous tears of the right knee and degenerative arthritis, and underwent arthroscopic surgery on September 30, 1997.

Medical Association, *Guides to the Evaluation of Permanent Impairment* (Fourth edition 1993)[5] based on his characterization of appellant's May 14, 1998 total knee replacement arthroplasty surgery results as "good," and calculated that appellant had a 15 percent impairment of her right lower extremity. The Office, however, noted that thereafter the Board had determined that, under Table 64, page 85 of the A.M.A., *Guides,* a total knee replacement with good results corresponded to a 15 percent whole-person impairment and a 37 percent impairment of the right lower extremity. As the Federal Employees' Compensation Act does not provide for awards based upon a whole person impairment,[6] the Board directed the Office to modify its February 22, 2001 decision to reflect this increased impairment percentage, noting that, for a 100 percent loss of use of a leg under the Act,[7] an employee shall receive 288 weeks of compensation, such that, for a 37 percent impairment, appellant was entitled to 37 percent of 288 or 106.56 weeks of compensation. As appellant had previously received 43.2 weeks of compensation, representing a 15 percent impairment, 106.56 minus 43.2 equals 63.36,[8] she was entitled to 63.36 additional weeks of compensation.

The Office took this calculation for a 22 percent additional impairment due and added a 1 percent adjustment for compensation previously paid for the wrong number of days,[9] noted that 1 percent of 288 weeks was 2.88 weeks, added this to 63.36 weeks and arrived at 66.24 weeks of compensation due, or 463.68 days of compensation. On February 21, 2002 the Office calculated that appellant was due compensation for a 23 percent impairment, (22 percent plus 1 percent equaled 23 percent), or 463.68 days of compensation at the augmented ¾ percent rate at a weekly pay rate of $499.18. Appellant's pay rate was determined by her job and step when injured on August 31, 1994. It was $499.18 per week.[10] Three fourths percent of $499.18 is $374.39, which the Office calculated, was the amount of compensation due appellant per week. The Office granted appellant 66.24 weeks of compensation at $374.39 per week, which it calculated equaled $27,393.38. The Office then subtracted $3,533.76 from $27,393.38, to arrive at $23,859.62, which it granted appellant in a lump sum.

On March 1, 2002 the Office granted appellant a schedule award for an additional 23 percent permanent impairment of her right lower extremity for the period June 3, 1999 to September 8, 2000 for an additional 66.24 weeks of compensation.[11] This award was granted in a lump sum equal to $23,859.62.

Appellant had previously, by undated letter and Form CA-7, claimed compensation benefits for wage loss for various periods dating from 1994 through 1998.

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[5] A.M.A., *Guides* (fourth edition 1993), Table 64, page 85.

[6] *See James E. Mills*, 43 ECAB 215 (1991) (neither the Act nor its implementing federal regulations provides for a schedule award for impairment to the body as a whole).

[7] 5 U.S.C. § 8107(c)(2).

[8] 37 percent minus 15 percent equals 22 percent.

[9] A 14 percent impairment was paid for the period December 30, 1997 to October 8, 1998.

[10] This pay rate is the only pay rate mentioned anywhere in appellant's case record.

[11] Appellant did not actually disagree with this award.

By informational letter dated June 24, 2002, the Office advised appellant that a review of her record did not indicate that any additional benefits were due her. Copies of all compensation benefits paid were provided.

The Board finds that appellant has a 37 percent permanent impairment of her right lower extremity.

In accordance with 20 C.F.R. § 501.2(c), the Board can only take jurisdiction over the March 1, 2002 schedule award decision, as there was no formal final decision on June 24, 2002.

The schedule award provisions of the Federal Employees' Compensation Act[12] and its implementing regulation[13] 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 loss of use.[14]

In this case the Board had determined in its previous decision[15] that, under Table 64, page 85 of the A.M.A., *Guides*, a total knee replacement with good results corresponded to a 37 percent impairment of the right lower extremity. The Board directed the Office to modify its February 22, 2001 decision to reflect this increased impairment percentage, noting that, for a 100 percent loss of use of a leg under the Act,[16] an employee shall receive 288 weeks of compensation, such that, for a 37 percent impairment, appellant was entitled to 37 percent of 288 or 106.56 weeks of compensation. The Board determined that, as appellant had previously received 43.2 weeks of compensation, representing 15 percent impairment, 106.56 minus 43.2 equals 63.36,[17] she was entitled to 63.36 additional weeks of compensation.

Therefore, appellant was entitled to a schedule award for a schedule award for an additional 22 percent impairment, plus the 1 percent impairment for a previously incorrect calculation as noted above, for a total right lower extremity impairment of 37 percent.

The Board finds, however, that the case is not in posture for decision as to the amount of the schedule award paid appellant.

In this case, the Office paid appellant a lump-sum schedule award in proportion to the percentage loss of use, 23 percent, as she had already been paid for a 14 percent permanent

[12] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[13] 20 C.F.R. § 10.404.

[14] 5 U.S.C. § 8107(c)(19).

[15] Docket No. 01-1246, (issued January 4, 2002).

[16] 5 U.S.C. § 8107(c)(2).

[17] 37 percent minus 15 percent equals 22 percent.

impairment of her right lower extremity, and as her total right lower extremity impairment had been found to be 37 percent.

The Office paid appellant her schedule award based upon a rate of pay of $499.18.[18] Compensation is based on an employee's monthly pay, which is defined under section 8101(4) as the greatest of the rate of pay at the time of injury, the rate of pay at the time disability begins, or the rate of pay at the time compensable disability recurs if the recurrence begins more than six months after an injured employee resumes regular full-time employment.[19] In this case, appellant was injured on August 31, 1994 and stopped work on September 1, 1994. Her rate of pay was the same for both sequential days, and it was noted as being $499.18 per week. Appellant returned to work in a limited duty position following her August 31, 1994 injury, on November 15, 1994 for one day only, and thereafter was absent without leave and without any medical report supporting injury, disability, or a recurrence of her accepted right knee contusion injury or any other disabling medical problem. As appellant failed to establish that a compensable disability recurred on November 16, 1994, and as this was not more than six months after she resumed full time employment, her rate of pay remained what it was at the time of her injury and onset of disability. Therefore, appellant's rate of pay for compensation purposes according to her record was $499.18. As appellant provided no medical evidence establishing that she sustained a recurrence of disability when she stopped work again on November 16, 1994, she was designated as being absent without leave. Appellant continued in an absent without leave status, and after several offers of limited duty, declined to report for duty, and she persisted in her failure to submit medical evidence supporting her absence. Appellant was removed from employment effective February 6, 1995 for being absent without leave and because of her continued refusal to provide medical documentation for her absence and her continued failure to report for duty.

Therefore, appellant's rate of pay on November 15, 1994 for compensation purposes was her rate of pay on August 31-September 1, 1994, which was $499.18. The Office determined that appellant's date of maximum medical improvement was December 30, 1997 and it noted, separately, that appellant's rate of pay at that time remained as $499.18; the same as the date of injury and disability, since she did not provide medical evidence supporting that a recurrence of disability occurred more than six months after she resumed regular full-time employment.[20]

Accordingly the Office properly used $499.18 as appellant's rate of pay in its calculation of the additional schedule award owed appellant.

The Office granted appellant 66.24 weeks of compensation at three-quarters of $499.18 which is $374.39 per week, which it calculated equaled $27,393.38. The Office then subtracted

[18] This is the only reference to appellant's rate of pay that appears in the present case record, and it appears in several different places on Office worksheets.

[19] *See Jeffrey T. Hunter*, 52 ECAB 503 (2001).

[20] Appellant never resumed regular employment, and her one-day return to duty, followed by being AWOL, was not six months or more after her original injury. She did provide some physician's prescriptions from Dr. Azeem M. Ahsan, a Board-certified family practitioner, which indicated that she could return to work on Monday, November 28, 1994 and on December 14, 1994, but she did not act upon these recommendations.

some amount from $27,393.38 and added a cost of living adjustment to arrive at $23,859.62, which it granted appellant in a lump sum. In accordance with the Federal (FECA) Procedure Manual, Part -- 2, Claims, *Lump-Sum Payments*, Chapter 2.0013.4 which was applicable at the time of the lump-sum award determination,[21] the lump sum will be determined using the Lump-Sum Schedule Award calculator program. In accordance with this calculation, the Office will enter a commutation date that is at least one full periodic roll cycle in the future from the date the actual lump-sum calculation is made. The procedure manual requires that these calculations be made part of the case record. In appellant's case no such calculation sheet appears, such that the Board cannot determine whether the lump-sum calculator was correctly calculated. Further, the Board notes that appellant's lump-sum payment three quarters rate was supplemented by cost of living adjustments, the calculations for which are also missing from the case record.

The Board cannot determine how the Office arrived at a gross amount of schedule award due of $27,393.38, as its own calculations of $374.39 per week for 66.24 weeks results in a $24,799.59 gross award without any lump-sum calculator reduction, which is less that the amount the Office determined. It cannot find the Office's calculations of the lump-sum calculator used in the award calculation and it cannot determine what the cost-of-living supplement increase was, such that the Board cannot determine whether the final amount of the $23,859.62 lump-sum schedule award was correct.

As the Board cannot determine how the Office reached the calculated amount of schedule award granted, it finds that this previously paid amount of $23,859.62 must be set aside and the case remanded to the Office for clarification of its calculation of the lump sum due appellant.

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 1, 2002 is hereby set aside and the case is remanded for clarification of the calculation of the amount of schedule award due appellant.

Dated, Washington, DC
May 27, 2004

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[21] This section was amended in July 2003, such that the pre-2003 section was applicable in this case.