

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

---

**T.K., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Wilkes-Barre, PA, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 09-1857  
Issued: June 3, 2010**

*Appearances:*

*Jeffrey P. Zeelander, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 13, 2009 appellant, through his representative, filed a timely appeal from the June 29, 2009 merit decision of the Office of Workers' Compensation Programs, which found a five percent impairment of his right lower limb. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

**ISSUES**

The issues are: (1) whether appellant has more than a five percent impairment of his right lower limb; and (2) whether appellant received Consumer Price Index (CPI) adjustments to the June 8, 1991 pay rate used to calculate his June 29, 2009 schedule award.

**FACTUAL HISTORY**

On June 8, 1991 appellant, then a 34-year-old letter carrier, sustained an injury in the performance of duty when he came down on his right ankle the wrong way while delivering

mail. He stopped work immediately and received compensation for intermittent disability based on his date-of-injury pay rate of \$610.80 per week.<sup>1</sup>

The Office accepted appellant's claim for right ankle sprain. Appellant underwent arthroscopy and debridement of the right ankle on October 7, 1993 with excision of two to three Morton's neuroma and exploration of the three to four web space. The Office expanded its acceptance to include the Morton's neuroma.

On January 20, 2009 Dr. Emmanuel E. Jacob, a Board-certified physiatrist, evaluated appellant's impairment. He related appellant's chief complaint and history and reviewed the medical record. Dr. Jacob described his findings on physical examination and diagnosed, among other things, right ankle sprain and superficial peroneal nerve lesion of the right foot.

Dr. Jacob calculated a three percent impairment based on mild ligamentous laxity with no modification based on functional history or clinical studies but with mild objective physical findings. He also rated a two percent impairment based on a mild superficial peroneal nerve lesion with no modification based on functional history.

Appellant filed a claim for a schedule award. An Office medical adviser reviewed Dr. Jacob's evaluation and confirmed that appellant had a five percent impairment of his right lower limb.

On June 29, 2009 the Office issued a schedule award for a five percent impairment of appellant's right lower limb. The schedule award showed on its face that the Office applied no cost-of-living adjustments to the June 8, 1991 pay rate used to calculate appellant's compensation.<sup>2</sup>

On appeal, appellant's representative asks the Board to review the rating calculation and questions the Office's failure to apply cost-of-living adjustments to appellant's June 8, 1991 pay rate.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8107 of the Federal Employees' Compensation Act<sup>3</sup> authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the

---

<sup>1</sup> A December 3, 2002 fiscal case history shows that appellant received \$857.67 in disability compensation on the daily rolls from October 7, 1991 to January 22, 1993.

<sup>2</sup> "After Cost-of-Living Adjustments, Your Weekly Compensation is: \$N/A."

<sup>3</sup> 5 U.S.C. § 8107.

American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A. *Guides*).<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

Diagnosis-based impairment is the primary method of evaluation for the lower limb.<sup>5</sup> Dr. Jacob, the evaluating physiatrist, diagnosed right ankle strain and applied Table 16-2, page 502 of the A.M.A., *Guides*. Table 16-2 gives a default impairment value of five percent for mild ligamentous laxity. Following the adjustment formula on page 521, the default value is decreased by one percent for a lack of functional interference and by another one percent for a lack of relevant findings on clinical studies. The result is a three percent impairment of the right lower limb due to mild ligamentous laxity.

Dr. Jacob also diagnosed a superficial peroneal nerve lesion of the right foot and applied Table 16-12, page 534 of the A.M.A., *Guides*. Table 16-12 gives a default impairment value of three percent for a mild sensory deficit of the superficial peroneal nerve. This default value is decreased by one percent for a lack of functional interference. The result is a two percent impairment of the right lower limb due to a mild superficial peroneal nerve lesion.

Peripheral nerve impairment may be combined with a diagnosis-based impairment of the lower limb when the diagnosis-based impairment does not already include the nerve impairment.<sup>6</sup> Appellant's three percent impairment for the right ankle sprain combines with his two percent impairment for the superficial peroneal nerve lesion for a five percent total impairment of his right lower limb.

The Board finds that Dr. Jacob properly applied the A.M.A., *Guides* and that the Office properly found a five percent impairment of appellant's right lower limb. The Board will therefore affirm the Office's June 29, 2009 decision on the issue of the percentage impairment.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8146a of the Act provides that "compensation payable on account of disability or death which occurred more than one year" before the effective date of a cost-of-living increase (determined in accordance with the provisions of the section) shall be increased by the percent of the increase.<sup>7</sup> Legislative history shows that this phrase means compensation payable for an

---

<sup>4</sup> 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

<sup>5</sup> A.M.A., *Guides* 497 (6<sup>th</sup> ed. 2008).

<sup>6</sup> *Id.* at 531.

<sup>7</sup> *Id.* at § 8146a.

employment-related condition where the entitlement to such compensation occurred more than one year before the effective date of the cost-of-living increase.<sup>8</sup>

In cases of disability, a beneficiary is eligible for cost-of-living adjustments under section 8146a where injury-related disability began more than one year prior to the date the cost-of-living adjustment took effect. The employee's use of continuation of pay, as provided by section 8118, or of sick or annual leave during any part of the period of disability does not affect the computation of the one-year period.<sup>9</sup> The disability need not have been continuous for the whole year before the increase.<sup>10</sup>

When an injury does not result in disability but compensation is payable for permanent impairment, a beneficiary is eligible for cost-of-living adjustments under section 8146a where the award for such impairment began more than one year prior to the date the cost-of-living adjustment took effect.<sup>11</sup> When there is prior injury-related disability, Office procedures indicate that the CPI start date for the schedule award is the effective date of the applicable pay rate.<sup>12</sup>

### ANALYSIS -- ISSUE 2

Appellant's representative questions the Office's failure to apply CPI adjustments to the June 8, 1991 pay rate used to calculate the June 29, 2009 schedule award. He offers no argument and cites no authority, but the implicit argument is that the Office should not pay appellant's 2009 schedule award in 1991 in dollars. Office procedures support that appellant is entitled to CPI adjustments to his June 8, 1991 pay rate. The early medical evidence shows that he was totally disabled for work after June 8, 1991, and the fiscal history shows that he received compensation for intermittent periods of disability. Given appellant's history of prior injury-related disability, the CPI start date for his schedule award is June 8, 1991, the date of injury.<sup>13</sup>

The Board, however, cannot determine whether the Office applied CPI adjustments to appellant's June 8, 1991 pay rate. The schedule award indicates that cost-of-living adjustments were not applicable. It appears the Office paid significantly more compensation than can be calculated with an unadjusted pay rate.

---

<sup>8</sup> *Franklin L. Armfield*, 29 ECAB 500 (1978) (holding that the claimant was not eligible for a cost-of-living increase, as provided by section 8146a, unless the date of his entitlement to compensation occurred more than a year before the effective date of the cost-of-living increase).

<sup>9</sup> 20 C.F.R. § 10.420(a). In general, if compensation has been paid in a disability case for over a year, CPI adjustments are made to compensation. Federal (FECA) Procedure Manual, Part 2 -- Claims, *General Provisions of the FECA*, Chapter 2.200.2.1 (July 2004).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.12.a(1) (December 1995).

<sup>11</sup> 20 C.F.R. § 10.420(b).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900, Exhibit 1 (January 2010) (Determining Effective Pay Rate Date for Schedule Awards).

<sup>13</sup> *Id.*

The total loss of a lower limb, as with amputation at the hip, entitles an employee to 288 weeks' compensation.<sup>14</sup> A five percent impairment is five percent of 288 weeks, or 14.4 weeks' compensation.<sup>15</sup> Appellant's June 8, 1991 pay rate was \$610.80 per week, and he is entitled to basic compensation under the schedule at the rate of two-thirds his pay.<sup>16</sup> So two-thirds of \$610.80 per week is \$407.20 per week, times 14.4 weeks equals \$5,863.68. Yet the Office paid \$8,870.40 under the schedule award.

Because the Office did not explain how it calculated the amount of the award and did not make clear whether it adjusted appellant's June 8, 1991 pay rate to reflect applicable CPI increases, the Board will set aside the Office's June 29, 2009 decision on the issue of pay rate and remand the case for further development. It shall review whether appellant's injury-related disability began more than one year prior to the date any CPI adjustments took effect, thereby making him eligible for CPI adjustments under section 8146a of the Act. The Office shall then issue an appropriate final decision on appellant's entitlement to schedule award compensation with a clear explanation of how it calculated the amount of the award, including the application of CPI adjustments.

### CONCLUSION

The Board finds that appellant has a five percent impairment of his right lower limb. The Board also finds that this case is not in posture for decision on whether appellant received CPI adjustments to the June 8, 1991 pay rate used to calculate his June 29, 2009 schedule award. Further development is required.

---

<sup>14</sup> 5 U.S.C. § 8107(c)(2).

<sup>15</sup> *Id.* at § 8107(c)(19) (partial losses are compensated proportionately).

<sup>16</sup> *Id.* at § 8107(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 29, 2009 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this opinion.

Issued: June 3, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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