

FACTUAL HISTORY

On July 16, 2010 appellant, then a 55-year-old census enumerator who worked intermittent hours, filed a traumatic injury claim alleging that on July 13, 2010 he sustained a meniscus tear in his right knee. While walking on an uneven walkway, his knee hyperflexed causing pain. Appellant stopped working on July 16, 2010.² OWCP accepted his claim for specific bursitides of occupational origin, right knee (post-traumatic synovitis of the right knee) and tear of medial meniscus of the right knee. On August 26, 2010 appellant underwent surgery on his right knee for an arthroscopy, partial medial meniscectomy, chondroplasty of the lateral tibial plateau and chondroplasty of the patella.

Pursuant to a pay rate memorandum prepared by OWCP, appellant was paid an hourly rate of \$15.00. OWCP calculated his pay rate by taking the hourly rate of \$15.00 multiplying it by 4.5 hours a day and multiplying this by 150 and dividing the product by 52 to determine that he had a “provisional pay rate for intermittent part-time census employee” of \$194.71 a week. The formula utilized by OWCP was entitled “150 formula.”

On December 23, 2010 appellant filed a claim for a schedule award.

In an October 28, 2010 medical opinion, Dr. Nicholas Diamond, an osteopath, evaluated appellant’s permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009). He diagnosed appellant with post-traumatic right knee contusion/sprain with medial meniscal tear and status post right knee arthroscopy with arthroscopic medial meniscectomy. In evaluating appellant’s impairment, Dr. Diamond noted that, pursuant to Table 16-3 of the A.M.A., *Guides*,³ appellant had a class 1 right knee partial medial meniscectomy which would equal a two percent impairment. He then listed a grade modifier for Functional History (GMFH) of 2, grade modifier for Physical Examination (GMPE) of 2 and a grade modifier for Clinical Studies (GMCS) of 2.⁴ Dr. Diamond then performed calculations and determined that appellant had a right lower extremity impairment after net adjustment of three percent.⁵ He further noted that the date of maximum medical improvement was October 28, 2010.

OWCP forwarded appellant’s file to an OWCP medical adviser who agreed with Dr. Diamond that appellant reached maximum medical improvement on October 28, 2010. Appellant had arthroscopic partial medial meniscectomy/chondroplasty on the right knee for a tear of the medial meniscus and chondral lesions of patella and lateral tibial plateau. Dr. Diamond noted that appellant had residual postoperative tenderness and pain in the right knee and slight weakness with stiffness in the right knee. He calculated that pursuant to the sixth

² Pursuant to CA-110 notes, appellant worked 1¼ hours on July 14, 2010, ¼ hour on July 16, 2010, was off work after July 16, 2010 and was terminated on July 24, 2010 due to lack of work.

³ A.M.A., *Guides* 509.

⁴ *Id.* at 516-19, Tables 16-6, 16-7, 16-8, respectively.

⁵ GMFH - CDX (2-1) = 1; GMPE-CDX (2-1) = 1; GMCS - CDS (2-1) = 1. 1+1+1=3.

edition of the A.M.A., *Guides* appellant had an impairment of three percent to the right lower extremity and that the medical adviser was in agreement with the calculations of Dr. Diamond.

By decision dated February 8, 2011, OWCP issued a schedule award for a three percent impairment of the right lower extremity. It issued an award based on a weekly pay rate, effective July 13, 2010, of \$194.71 multiplied by 66 2/3 to equal \$129.68 per week. The award was to run for 8.64 weeks for the period October 28 through December 27, 2010.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁶ and its implementing federal regulations⁷ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁸ For decisions issued after May 1, 2009, the sixth edition will be used.⁹

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX) which is then adjusted by GMFH, GMPE and GMCS.¹⁰ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP's determination that appellant had a three percent impairment of the right lower extremity is supported by the medical evidence. Both Dr. Diamond and OWCP's medical adviser were in agreement in calculations for making this determination. Both physicians noted that, pursuant to Table 16-3,¹² appellant had a class 1 impairment with a default grade C to equal a two percent impairment. The physicians then applied the grade modifiers of 2 each for GMFH, GMPE and GMCS.¹³ After performing calculations, the physicians agreed that appellant had a three percent impairment of the right lower extremity. There are no other reports in the record indicating that appellant is entitled to a greater schedule award. Therefore, OWCP properly calculated the schedule award.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404(a).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

¹⁰ A.M.A., *Guides* 494-531; *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

¹¹ A.M.A., *Guides* 521.

¹² A.M.A., *Guides* 509.

¹³ *Id.* at 516-19.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

For all claims under FECA, compensation is to be based on the pay rate as determined under section 8101(4) which defines monthly pay as:

“[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...”¹⁴

In applying section 8101(4), the statute requires OWCP to determine monthly pay based on 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).¹⁵

Pursuant to OWCP’s procedure manual, temporary positions as census enumerators historically average 4.5 hours per day, four days per week.¹⁶ However, an individual may have worked more or less depending on the local census office’s operational requirements, and the factual evidence should be evaluated carefully. Because of their irregular federal employment, these employees are usually paid under the provisions of 5 U.S.C. § 8114(d)(3).¹⁷ Pursuant to the procedure manual, when computing compensation for census workers, when disability did not exceed 90 days, compensation should be paid on a daily basis according to 5 U.S.C. § 8114(c). For enumerators who ordinarily worked 4.5 hours per day 4 days a week, where disability extended beyond 90 days and claimant had similar employment during the years prior to the injury, compensation should be paid according to 5 U.S.C. § 8114(d)(1) and (2). Otherwise, it should be based on a weekly basis using the following formula: 150 times the actual daily wage divided by 52. The actual daily wage should be determined by multiplying the hourly pay rate by 4.5 hours.¹⁸

Section 8114(d)(3) of FECA provides:

“If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in

¹⁴ 5 U.S.C. § 8107.

¹⁵ See *Robert A. Flint*, 57 ECAB 369 (2006).

¹⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.3(3) (March 2011).

¹⁷ *Id.* at Chapter 2.900.12(e)(3) (March 2011).

¹⁸ *Id.*, *Computing Compensation*, Chapter 2.901.9(a) (March 2011).

the employment in which he was working at the time of the injury having due regard to the previous earnings of the employee in [f]ederal employment, and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within one year immediately preceding his injury.”¹⁹

ANALYSIS -- ISSUE 2

Appellant was injured on July 13, 2010 and appellant was off work commencing July 16, 2010. Therefore, the pay rate is determined by appellant’s wages at that time. The record reveals that appellant was employed as an intermittent part-time census employee, working 4.5 hours per day, four days per week. Because of his “irregular [f]ederal employment” as defined in chapter 2.900.4(c)²⁰ and further outlined in chapter 2.900.12.e(3) of OWCP’s procedures,²¹ the Board finds that OWCP properly calculated appellant’s pay rate by multiplying appellant’s hourly rate of \$15.00 by 4.5 hours to determine that appellant had a daily pay rate of \$67.50. This figure was then multiplied by 150, which equals \$10,125.00. This product was then divided by 52 to determine that appellant had a provisional pay rate of \$194.71 a week. These calculations are in accordance with OWCP’s procedures as set forth in its procedure manual.

CONCLUSION

The Board finds that appellant has not established that he is entitled to more than a three percent impairment of the right lower extremity for which he received a schedule award. The Board further finds that OWCP utilized the correct pay rate in issuing appellant’s schedule award.

¹⁹ 5 U.S.C. § 8114(d)(3).

²⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c) (March 2011).

²¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates, Computing Compensation, Special Determinations, Census Workers*, Chapter 2.900.12.e(3) (March 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 8, 2011 is affirmed.

Issued: January 26, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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