United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 11-806**
	)	**Issued: January 25, 2012**
DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, Mount Laurel, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 11, 2011 appellant, through his representative, filed a timely appeal from the November 10, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed the pay rate used for his schedule award. Pursuant to the Federal Employees' Compensation Act[1] (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 changed the pay rate of appellant's schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 5, 1996 appellant, a 32-year-old criminal investigator/special agent, injured his right knee in the performance of duty during training. He underwent surgery in April 1996. OWCP accepted appellant's claim for a torn medial meniscus.[2]

On September 22, 1997 appellant filed an occupational disease claim alleging that on September 2, 1997 he felt severe pain in the immediate area of the right medial meniscus. His physician attributed the patellofemoral malalignment to undertaking a rigorous exercise program before his quadriceps muscles were fully rehabilitated after surgery. OWCP accepted appellant's claim for right knee malalignment.[3]

Appellant alleged that he sustained a recurrence of disability on January 13, 2004 when a treadmill belt slipped momentarily and his right knee locked. He did not feel pain immediately but since that time experienced intermittent pain. OWCP advised that it was creating a new file for the claimed injury. It combined the claim files for appellant's 1996 and 1997 employment injuries.

A February 18, 2010 statement of accepted facts listed that appellant sustained an additional injury on January 13, 2004 while running on a treadmill. "The belt slipped causing his right knee to lock which caused injury."

On April 8, 2010 OWCP issued a schedule award using appellant's January 13, 2004 pay rate. On April 16, 2010 it amended the award to reflect his pay rate on March 5, 1996.

In a November 10, 2010 decision, OWCP's hearing representative affirmed the March 5, 1996 pay rate. He found that the January 13, 2004 injury was accepted as a minor, no-time-lost injury that was not formally adjudicated but administratively closed allowing medical payments. The hearing representative noted that the physician who rated impairment did not describe the January 13, 2004 injury or any associated findings or treatment. Further, he did not explain how the January 13, 2004 injury materially contributed to appellant's permanent impairment.

On appeal, appellant's representative argues that OWCP acknowledged a right knee employment injury on January 13, 2004 and therefore should apply the pay rate in existence at that time.

LEGAL PRECEDENT

Compensation for a schedule award is paid as a percentage of monthly pay.[4] "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 if the recurrence begins

[2] Appellant filed a claim for the same injury with the district OWCP in Philadelphia. OWCP File No. xxxxxx857.

[3] OWCP File No. xxxxxx056.

[4] 5 U.S.C. § 8017(a).

more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.[5]

OWCP may review an award for or against payment of compensation at any time on its own motion or on application.[6] The Board has upheld OWCP's authority to reopen a claim at any time on its own motion and, where supported by the evidence, to set aside or modify a prior decision and issue a new decision.[7] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can be set aside only in the manner provided by the compensation statute.[8]

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provisions, where there is good cause for so doing, such as mistake or fraud. It is well established that once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.[9]

ANALYSIS

On April 8, 2010 OWCP issued a schedule award based on the pay rate effective January 13, 2004, the date appellant injured his right knee on a treadmill in the course of his employment. On April 16, 2010, however, it reopened the claim on its own motion and modified its decision. OWCP issued a new schedule award based on the pay rate effective March 5, 1996, when appellant injured his right knee during training. It thereby rescinded the prior schedule award.

OWCP carries the burden of proof to justify the rescission. The new schedule award stated that the January 13, 2004 pay rate was incorrect, but it did not adequately explain why.[10] Section 8101(4) of FECA provides that "monthly pay" is the greater of monthly pay (1) at the time of injury, (2) at the time disability begins or (3) at the time compensable disability recurs (with some qualification). OWCP later explained the earlier pay rate was appropriate because the January 13, 2004 injury was minor, a no-time-lost injury, and there was no indication that it materially contributed to impairment. The Board does not find such an exception in FECA and

[5] *Id.* at § 8101(4); *John D. Williamson*, 40 ECAB 1179 (1989).

[6] *Id*. § 8128(a).

[7] *Eli Jacobs*, 32 ECAB 1147 (1981).

[8] *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

[9] *Walter L. Jordan*, 57 ECAB 218 (2005).

[10] *See* 20 C.F.R. § 10.126 (a decision must contain findings of fact and a statement of reasons).

the hearing representative cited no regulation, procedure or case precedent to support the change of pay rate.[11]

Accordingly, the Board finds that OWCP did not meet its burden of proof to justify the rescission of appellant's April 8, 2010 schedule award. The Board will reverse OWCP's November 10, 2010 decision.[12]

CONCLUSION

The Board finds that OWCP improperly changed the pay rate of appellant's schedule award.

[11] OWCP procedures suggest that a minor, no-time-lost case might still warrant a schedule award for permanent impairment. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Automated System Support for Case Actions*, Chapter 2.401.8.a(4) (September 2009) (noncontroverted no-time-lost cases will be closed without adjudication as soon as they are created and will not subsequently require OWCP's attention unless any of the following apply: (c) evidence is received to show that a schedule award may be payable for permanent impairment).

[12] This case is to be distinguished from *Barbara A. Dunnavant*, 48 ECAB 517 (1997), in which the Board held that the proper pay rate for the claimant's schedule award was the pay rate on the date of maximum medical improvement. *Dunnavant* involved continuing exposure to injurious work factors; therefore, the date of injury was the date of last exposure, which was, for purposes of the schedule award issued, the date she was found to have reached maximum medical improvement. Here, appellant's March 5, 1996 and January 13, 2004 injuries were traumatic and involved no continuing exposure. His September 22, 1997 injury was occupational, provoked by participating too early in a strenuous agency-approved health improvement plan, but there is no evidence that he continued that participation beyond September or October 1997.

ORDER

IT IS HEREBY ORDERED THAT the November 10, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 25, 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