

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

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**M.H., Appellant**

**and**

**DEPARTMENT OF COMMERCE, 2010  
DECENNIAL CENSUS, Dallas, TX, Employer**

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**Docket No. 12-140  
Issued: July 10, 2012**

*Appearances:*

*Alan J. Shapiro, 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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On October 19, 2011 appellant, through her attorney, filed a timely appeal of a September 22, 2011 Office of Workers' Compensation Programs' (OWCP) merit decision denying a schedule award. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c)(1) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUES**

The issues are: (1) whether appellant has more than 13 percent impairment of her right lower extremity for which she received a schedule award; and (2) whether OWCP properly calculated her pay rate for schedule award purposes.

**FACTUAL HISTORY**

On May 6, 2009 appellant, then a 57-year-old census enumerator, filed a traumatic injury claim alleging that she injured her ankle and knee when she stepped in a hole in the performance

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

of duty on May 5, 2009. She underwent a magnetic resonance imaging (MRI) scan on June 16, 2009 which demonstrated severe medial joint compartment osteoarthritis, medial meniscal degenerative tearing of the posterior horn with meniscal extrusion, lateral meniscal tear of the posterior horn and patellar chondromalacia. On July 21, 2009 OWCP accepted appellant's claim for contusion of the knee and lower leg and tear of the medial meniscus of the right knee.

On August 18, 2009 appellant underwent a right knee arthroscopy including a partial medial and lateral meniscectomy, patellar and medial femoral condyle chondroplasty and three compartment synovectomy.

The employing establishment reported on August 24, 2009 that appellant held a temporary, part-time, intermittent appointment. During the year immediately prior to her injury, appellant's gross pay was \$2,028.00. She worked 23 days and 156 hours.

In a letter dated November 12, 2009, OWCP informed appellant that her pay rate was based on the special determination for census enumerators and that the appropriate formula was 150 times the actual daily wage (\$58.50) divided by 52 (the actual daily wage should be determined by multiplying the hourly pay rate by 4.5 hours) ( $\$13.00 \times 4.5 = 58.50$ ) and that her weekly pay rate was 150 times  $\$58.50/52$  or \$168.75. It further stated that she was incorrectly paid at the minimum compensation rate of \$284.44 instead of being paid at 100 percent compensation rate of her pay rate. OWCP stated that appellant had received compensation totaling \$3,785.65 for the period June 7 through October 9, 2009 and was entitled to receive \$4,094.02. It indicated that she would receive an additional \$308.37.

Appellant underwent a functional capacity evaluation on December 9, 2009. According to the report, she did not provide consistent effort during this test and her objective test results correlated with symptom augmentation. On physical examination, appellant ambulated with a straight cane in the right hand and demonstrated decreased stride length bilaterally and decreased stance time on the right with decreased heel-to-toe progression. She had edema or effusion at the mid-patella on the right and knee flexion averaging 79 degrees while knee extension averages 3 degrees. Appellant's motor function was 4/5 in both lower extremities. She demonstrated 0.3 centimeters of thigh atrophy and 0.3 centimeters of mid-calf atrophy. Appellant reported knee pain between 7 and 9 out of 10.

On December 16, 2009 appellant's attending physician, Dr. Mark Bewley, a Board-certified orthopedic surgeon, stated that appellant had reached maximum medical improvement and assigned 13 percent impairment of the lower extremity in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>2</sup> (A.M.A., *Guides*) and her functional capacity evaluation.

Appellant returned to light-duty work on December 28, 2009. In a letter dated January 11, 2010, OWCP ended her compensation benefits effective December 28, 2009. By decision dated March 1, 2010, it found that appellant's actual earnings as a clerk fairly and reasonably represented her wage-earning capacity and reduced her compensation benefits to

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

zero. Counsel requested an oral hearing. By decision dated May 4, 2010, the Branch of Hearings and Review affirmed the March 1, 2010 decision.

Dr. Bewley completed a note dated January 20, 2010 and stated that appellant's physical examination was unchanged and she was able to straighten her knee within 10 degrees of full extension and flex to 100 degrees. Appellant had a stable ligamentous examination with tenderness along the medial and lateral compartments and minimal effusion. Dr. Bewley recommended a total knee arthroplasty.

Appellant filed a notice of recurrence of disability on March 3, 2010 alleging that on February 2, 2010 she sustained a recurrence of her May 5, 2009 employment injury due to exposure to cold air in the performance of her light-duty job. OWCP requested additional factual and medical evidence on May 26, 2010. By decision dated July 26, 2010, it denied appellant's claim for recurrence and suggested that she file a new occupational disease claim. Counsel requested an oral hearing. By decision dated January 11, 2011, OWCP's hearing representative affirmed the July 26, 2010 decision.

Counsel requested a schedule award on behalf of appellant on April 23, 2010. In support of this request, he submitted a report dated April 1, 2010 from Dr. Stuart J. Goodman, a neurologist, who noted appellant's history of injury and medical treatment. Dr. Goodman found that Table 16.3 of the A.M.A., *Guides* indicated that appellant had class 1 or 10 percent impairment of the lower extremity. He found a Functional History (GMFH) grade modifier 2 due to an antalgic gait and routine use of a cane, Physical Examination (GMPE) grade modifier 2 due to continued swelling and pain with decreased range of motion and Clinical Studies (GMCS) grade modifier 1 as the MRI scan did confirm medial and lateral meniscal tearing. Dr. Goodman concluded that appellant had 13 percent impairment of the right lower extremity.

Dr. Bewley completed a note on September 29, 2010 and stated that appellant reported progressive right knee pain with give way episodes. He found range of motion from 0 to 100 degrees, tricompartmental tenderness and positive crepitus in the anterior compartment as well as a severe antalgic gait with a cane. Dr. Bewley found severe bone-on-bone changes in the medial compartment with moderate anterior and lateral compartment degenerative changes on x-ray. He diagnosed right knee progressive degenerative osteoarthritis after previous meniscal tear and stated that appellant's symptoms were worsening after the failure of conservative measures. Dr. Bewley recommended a total knee arthroplasty.

Appellant requested a schedule award on November 22, 2010. On December 1, 2010 Dr. Bewley stated that she reached maximum medical improvement on December 2, 2009 and had 13 percent impairment of her right lower extremity. He completed a form report on December 17, 2010 and stated that appellant experienced constant pain in the medial and lateral compartments and required the use of a cane at all times. Dr. Bewley reported flexion from 15 to 80 degrees and extension to 15 degrees. He stated that appellant had ankylosis from 15 to 80 degrees. Dr. Bewley found 13 percent weakness of the quadriceps. He stated that appellant underwent partial medial and lateral meniscectomies and experienced post-traumatic cartilage loss. Dr. Bewley listed the date of maximum medical improvement as December 2, 2009.

OWCP's medical adviser reviewed this report on February 14, 2011 and found that appellant had 13 percent impairment of the right lower extremity. By decision dated April 8, 2011, OWCP granted appellant a schedule award for 13 percent impairment of the left lower extremity and found that her weekly pay rate was \$126.56.

Counsel requested an oral hearing before an OWCP hearing representative. Appellant testified at the oral hearing on July 7, 2011 and stated that she began work in February 2009 earning \$13.00 an hour working 40 hours every week. She stated that immediately prior to her enumerator position she worked in the private sector as a loan originator for a mortgage company earning from \$40,000.00 to \$50,000.00 a year. Appellant testified that she returned to work at the employing establishment in December 2009 earning \$9.75 an hour and stopped work in February 2009.

By decision dated September 22, 2011, OWCP's hearing representative found that, although appellant testified that she was working full time as a temporary enumerator earning \$13.00 an hour, the pay rate was based on a minimum guarantee of 4.5 hours in accordance with Part 2.901.9 of OWCP's procedure manual.<sup>3</sup> The hearing representative found the medical evidence established that appellant had a 13 percent impairment of the right lower extremity based on Dr. Bewley's reports.

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

The schedule award provision of FECA<sup>4</sup> and its implementing regulations<sup>5</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.<sup>6</sup>

In addressing lower extremity impairments, the sixth edition requires identification of the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers

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<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Special Determinations of Enumerators*, Chapter 2.901.9 (December 1995).

<sup>4</sup> 5 U.S.C. §§ 8101-8193, 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); *id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

based on GMFH, GMPE and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>7</sup>

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

The medical evidence in the record establishes that appellant reached maximum medical improvement in December 2009. Appellant has submitted three medical reports addressing her permanent impairment for schedule award purposes. Two reports were from her attending physician, Dr. Bewley and one from Dr. Goodman, who provided the most comprehensive report comporting with the A.M.A., *Guides* and citing the appropriate tables.

Appellant underwent partial medial and lateral meniscectomies, which are class 1 impairment with a range from 1 to 13 percent. The grade C default value for these conditions is 10 percent.<sup>8</sup> Dr. Goodman properly found that appellant had a moderate problem or GMFH grade modifier 2 as she routinely used a cane.<sup>9</sup> In regards to her GMPE adjustment, he found grade modifier 2 due to her continued swelling and pain with decreased range of motion<sup>10</sup> and GMCS grade modifier 1 as the MRI scan did confirm medial and lateral meniscal tearing.<sup>11</sup> Applying the appropriate formula, appellant has (2-1) + (2-1) + (1-1) or +2 grade E, 13 percent impairment of the left lower extremity for which she has received a schedule award. The Board finds that the weight of the medical evidence establishes that appellant has 13 percent impairment of her left lower extremity.

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.”<sup>12</sup>

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<sup>7</sup> A.M.A., *Guides* 521.

<sup>8</sup> *Id.* at 509, Table 16-3.

<sup>9</sup> *Id.* at 516, Table 16-6.

<sup>10</sup> *Id.* at 517, Table 16-7.

<sup>11</sup> *Id.* at 519, Table 16-8.

<sup>12</sup> 5 U.S.C. § 8101.

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).<sup>13</sup>

Pursuant to OWCP's procedure manual, temporary positions as census enumerators historically average 4.5 hours a day, four days a week.<sup>14</sup> 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).<sup>15</sup> 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 a day, 4 days a week, where disability extended beyond 90 days and the 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.<sup>16</sup>

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 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.”

### **ANALYSIS -- ISSUE 2**

Appellant was injured on May 5, 2009 and stopped work on that date. Therefore, the pay rate is determined by her wages at that time. The evidence shows that appellant did not work in the position in which she was injured substantially for the entire year immediately preceding the injury. The record reveals that she was employed as a temporary, part-time, intermittent census

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<sup>13</sup> See *Robert A. Flint*, 57 ECAB 369 (2006).

<sup>14</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.3(3) (March 2011).

<sup>15</sup> *Id.* at Chapter 2.900.12(e)(3) (March 2011).

<sup>16</sup> *Id.*, *Computing Compensation*, Chapter 2.901.9(a) (December 1995).

employee. During the year, immediately prior to her injury, appellant's gross pay was \$2,028.00. She worked 23 days and 156 hours, earning \$13.00 an hour and working an average of 6.78 hours a day. Prior to her employment at the employing establishment, appellant worked in the private sector as a mortgage originator, which was not similar to her federal employment.<sup>17</sup> The record reveals that she was employed as an intermittent part-time census employee and based on the procedure manual was considered to have been working 4.5 hours a day, four days a week. Because of her irregular federal employment as defined in Chapter 2.900.4(c) and further outlined in Chapter 2.900.12.e(3) of OWCP's procedures, the Board finds that OWCP properly calculated appellant's pay rate by multiplying her hourly rate of \$13.00 by 4.5 hours to determine that she had a daily pay rate of \$58.50. This figure was then multiplied by 150, which equals \$8,775.00. This product was then divided by 52 to determine that appellant had a provisional pay rate of \$168.75 a week. OWCP based her pay rate for schedule award purposes on \$168.75 multiplied by her compensation rate of 75 percent and found that her weekly pay rate was \$126.56. These calculations are in accordance with OWCP's procedures as set forth in its procedure manual.<sup>18</sup>

### CONCLUSION

The Board finds that appellant has no more than 13 percent permanent impairment of her right lower extremity for which she received a schedule award. The Board further finds that OWCP utilized the correct pay rate in issuing her schedule award.

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<sup>17</sup> *Kathleen L. Rinear*, 53 ECAB 524 (2002).

<sup>18</sup> *See G.R.*, Docket No. 11-801 (issued January 26, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 22, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 10, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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