



## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated March 27, 2007, the Board found that OWCP properly denied authorization for a recommended surgical procedure to appellant's right knee.<sup>2</sup> In a May 2, 2011 decision, the Board found that OWCP properly terminated appellant's monetary compensation effective August 3, 2009 on the grounds that he was no longer disabled from work due to his accepted conditions. The weight of medical evidence was represented by the referee opinion of Dr. Alexander P. Russoniello, a Board-certified orthopedic surgeon.<sup>3</sup> The facts of the previous Board decisions are incorporated herein by reference.

Appellant stopped work on June 19, 2002 when he underwent left knee arthroscopic surgery. He was placed on the periodic compensation rolls. Appellant's monetary compensation was terminated on August 3, 2009. On January 11, 2010 he had bilateral total knee replacement surgery. Appellant filed a recurrence of disability claim on February 9, 2010. The employing establishment noted that he had taken an early-out incentive settlement of \$15,000.00 and retired on October 31, 2009. On March 31, 2010 OWCP accepted the recurrence claim and authorized surgery. Appellant filed a claim for compensation for the period January 11 to March 24, 2010. In letters dated April 2 and 26, 2010, OWCP informed him and his attorney that his claim for compensation could not be processed until he submitted information regarding his early retirement incentive and other retirement benefits received. Appellant did not further pursue entitlement to monetary compensation of the accepted recurrence at that time.

On January 30, 2012 appellant filed a schedule award claim. In a July 12, 2011 report, Dr. Nicholas Diamond, an osteopath, provided physical examination findings and diagnosed post-traumatic bilateral knee medial meniscus tear, status post left knee arthroscopic repair and status post bilateral total knee replacement surgery. He advised that, under Table 16-3, Knee Regional Grid, appellant had bilateral class 3 impairments. Dr. Diamond applied the modifiers and net adjustment formula and concluded that appellant had 34 percent impairment to each leg. In reports dated February 29 and March 13, 2012, Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed Dr. Diamond's report. He advised that the date of maximum medical improvement was July 12, 2011, and agreed with Dr. Diamond's conclusion that appellant had 34 percent impairment of each lower extremity.

Pay rate information found in the record indicates that, on the date disability began, June 19, 2002, appellant's salary was \$41,679.00 a year or \$801.52 per week, plus \$10.02 in

---

<sup>2</sup> Docket No. 06-2106 (issued March 27, 2007). On August 31, 2001 appellant, then a 52-year-old distribution window and mark-up clerk, sustained a left knee sprain. On June 19, 2002 he had left knee arthroscopic repair. Appellant stopped work that day and was placed on the periodic compensation rolls. In a July 13, 2004 decision, an OWCP hearing representative found that the medical evidence established that the injury to appellant's left knee on August 31, 2001 caused him to put increased weight on his right knee which precipitated or accelerated preexisting patellofemoral syndrome of the right knee.

<sup>3</sup> Docket No. 10-1735 (issued May 2, 2011).

weekly night differential, for a total weekly pay rate of \$811.54. His monetary compensation was based on this weekly pay rate.<sup>4</sup>

On June 27, 2012 appellant was granted schedule awards for 34 percent right lower extremity impairment and 34 percent left lower extremity impairment, or a total of 195.84 weeks, to run from July 12, 2011 to April 12, 2015. The effective date for pay rate computation purposes was that of June 19, 2002, or \$811.54. Appellant received compensation at the 75 percent augmented rate. His first schedule award payment covered the period July 12, 2011 to April 7, 2012, and he thereafter received periodic payments. A compensation worksheet of record provided pay rate information regarding cost-of-living increases from the date disability began on June 19, 2002 to March 1, 2012. It indicated that four weeks of compensation at the augmented rate, effective March 1, 2012, was \$3,070.00.

On July 6, 2012 appellant, through his attorney, requested reconsideration. He did not challenge the percentage of impairment granted but asserted that the rate of pay be adjusted, arguing that appellant was entitled to a recurrent rate of pay in effect on January 11, 2010 when he underwent the authorized bilateral total knee replacement. On July 16, 2012 the employing establishment noted that appellant did not work in any capacity for one year prior to January 11, 2010.

In a merit decision dated September 27, 2012, OWCP denied modification of the June 27, 2012 schedule award decision. It found that there was no evidence to support that he had returned to work at any point following his work stoppage on June 19, 2002, at the time of his initial left knee surgery.

### **LEGAL PRECEDENT**

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly rate.<sup>5</sup> Section 8101(4) provides that “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 more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.<sup>6</sup> The compensation rate for schedule awards is the same as compensation for wage loss.<sup>7</sup> OWCP procedures provide that, if the employee did not stop work on the date of injury or immediately afterwards, defined as the next day, the record should indicate the pay rate for the date of injury and the date disability began. The greater of the two should be used in

---

<sup>4</sup> Appellant was initially paid compensation at the unaugmented rate. This was corrected in April 2004. Appellant received appropriate retroactive compensation.

<sup>5</sup> See 5 U.S.C. §§ 8105-8107.

<sup>6</sup> *Id.* at § 8101(4).

<sup>7</sup> See 20 C.F.R. § 10.404(b); *K.H.*, 59 ECAB 495 (2008).

computing compensation, and if they are the same, the pay rate should be effective on the date disability began.<sup>8</sup>

Where an employee has a recurrence of disability more than six months after resuming regular, full-time employment with the employing establishment, under section 8101(4) of FECA, the employee is entitled to have his or her compensation increased based on his or her pay at the time of this first recurrence of disability.<sup>9</sup>

### ANALYSIS

The Board finds that OWCP properly determined appellant's pay rate for schedule award computation purposes. Appellant did not challenge the impairment rating of his lower extremities but questioned the rate of pay used to calculate his award, contending that OWCP should have used the date of his second surgical procedure on January 11, 2010 as a recurrent rate of pay. He, a distribution and window mark-up clerk, sustained an employment injury on August 31, 2001. Appellant did not stop work until June 19, 2002, when he had left knee arthroscopic surgery. Thereafter, he did not return to work. Appellant was placed on the periodic compensation rolls until monetary compensation was terminated effective August 3, 2009. He took an early-out incentive settlement of \$15,000.00 and retired on October 31, 2009.

The rate of pay for schedule award purposes is the highest rate that satisfies the terms of section 8104(4) of FECA, *i.e.*, the date of injury, the date disability begins, or the date of recurrent disability.<sup>10</sup> FECA requires that the employee must return to regular full-time employment for more than six months before a pay rate based on recurrence of disability is appropriate.<sup>11</sup> A recurrent pay rate applies only if the work stoppage began more than six months after a return to regular full-time employment.<sup>12</sup> As noted by the employing establishment, appellant did not return to regular employment after he stopped work on June 19, 2002. The Board finds that OWCP properly determined that the appropriate rate of pay for schedule award compensation purposes was his rate of pay on June 19, 2002, the date disability began, or \$811.54. It properly calculated the June 27, 2012 schedule award based on this rate of pay.

---

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(3) (September 2011).

<sup>9</sup> 5 U.S.C. § 8101(4); *see Jon L. Hoagland*, 57 ECAB 635 (2006).

<sup>10</sup> *Id.* at § 8101(4); *see Patricia K. Cummings*, 53 ECAB 623 (2002).

<sup>11</sup> *Id.* at § 8101(4); *see C.M.*, Docket No. 08-1119 (issued May 13, 2009); Federal (FECA) Procedure Manual, *supra* note 8, at Chapter 2.900.5(a)(4) (September 2011).

<sup>12</sup> *Id.*

**CONCLUSION**

The Board finds that OWCP used the proper rate of pay in calculating appellant's June 27, 2012 schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 27, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 17, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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