

FACTUAL HISTORY

Appellant, a 62-year-old letter carrier, injured his left knee on March 19, 1982 in a work-related fall.³ He received an initial diagnosis of left knee sprain and was placed on light duty. Appellant continued to work until April 20, 1982. He had a left knee arthroscopy on April 21, 1982, which revealed a torn medial meniscus.⁴ OWCP accepted appellant's claim for left knee sprain and torn medial meniscus. On May 4, 1982 appellant underwent a left knee total medial meniscectomy.⁵ He returned to work in a limited-duty capacity on November 2, 1982 and was cleared to resume full-time, regular duty effective December 2, 1982.⁶

On December 6, 1984 OWCP granted a schedule award for 10 percent left lower extremity impairment. The award covered a period of 28.8 weeks and was based on appellant's April 20, 1982 date-of-disability weekly pay rate of \$415.37.

Appellant sustained another work-related injury on August 5, 1997 when he stepped in a hole while delivering mail (xxxxxx681). OWCP accepted the claim for right knee derangement and medial meniscus tear. Appellant underwent right knee arthroscopic surgery in September 1997 and resumed his regular letter carrier duties on January 26, 1998. In January 1999, he received a schedule award for 10 percent impairment of the right lower extremity.⁷ Appellant was later diagnosed with bilateral knee degenerative joint disease (DJD).⁸

A January 12, 2009 left knee magnetic resonance imaging (MRI) scan revealed, *inter alia*, severe osteoarthritis of the medial compartment and mild osteoarthritis of the lateral compartment.

On February 7, 2009 appellant fell from his delivery vehicle and landed on his right side (xxxxxx292). He injured his neck, right shoulder and right hip. The current record includes limited information regarding appellant's February 7, 2009 employment injury.⁹

³ Appellant tripped and fell going up stairs and banged his left knee against a concrete step.

⁴ The procedure was performed by Dr. Mark M. Berenson, a Board-certified orthopedic surgeon.

⁵ Dr. Berenson performed an open arthrotomy and removed the entire medial meniscus.

⁶ Appellant received continuation of pay from April 20 through June 3, 1982. OWCP paid wage-loss compensation from June 4 through November 1, 1982. Benefits were calculated based on an April 20, 1982 date-of-disability weekly pay rate of \$415.37. Appellant's reported annual base salary as of April 20, 1982 was \$21,599.00.

⁷ The left and right lower extremity claims have been doubled, and the March 19, 1982 injury has been designated the master file (xxxxxx832).

⁸ After an almost six-year lapse in treatment, appellant returned to Dr. Berenson in September 2004 with complaints of bilateral lower extremity pain. In December 2004, Dr. Berenson diagnosed bilateral DJD of the knees.

⁹ The complete record associated with appellant's February 7, 2009 traumatic injury claim is not available for review by the Board. The current record includes a July 22, 2009 OWCP-directed examination from Dr. Stanley Hom, a Board-certified orthopedic surgeon. OWCP obtained the second opinion report under claim number xxxxxx292.

In a report dated September 8, 2009, Dr. Berenson requested that appellant's March 19, 1982 traumatic injury claim be expanded to include primary knee joint arthritis and permanent aggravation of arthritis. He had treated appellant for knee problems since 1982, including May 1982 surgery where he removed the entire left medial meniscus. Dr. Berenson stated that appellant resumed work as a letter carrier and, in September 2004, he returned with complaints of left knee pain. He subsequently diagnosed DJD, and began treating appellant with cortisone injections in December 2004. Dr. Berenson treated appellant through 2008. Appellant fell at work in January 2009, which aggravated his underlying DJD. Dr. Berenson further noted that a contemporaneous MRI scan revealed severe osteoarthritis. He administered additional cortisone injections in January and February 2009 and treated appellant on a regular basis. Dr. Berenson noted having reviewed the duties and requirements of appellant's letter carrier position which he had performed since 1982. He explained that the 1982 surgical removal of appellant's entire meniscus was acceptable treatment at the time. However, the procedure can lead to further knee problems, including the development of degenerative arthritis. Dr. Berenson stated that appellant's injury and subsequent surgery precipitated the development of left knee primary joint arthritis and years of hard work exacerbated his condition. He also noted that appellant's preexisting osteoarthritis was aggravated and made worse by the type of work he performed as a letter carrier, which included lifting motions, constant carrying of mail weighing up to 35 pounds, and going up and down stairs.

In a November 7, 2009 report, Dr. Barry Levine, a district medical adviser, noted that appellant tore his meniscus in 1982 and had a total medial meniscectomy on May 4, 1982 *via* open arthrotomy. Appellant continued to work as a letter carrier and in 2004 he developed left knee pain, which was diagnosed as degenerative arthritis. Dr. Levine indicated that an MRI scan revealed severe degenerative osteoarthritis and appellant was treated with Synvisc and cortisone injections. He explained that the natural history of a total meniscectomy often leads to severe osteoarthritis. Dr. Levine further explained that appellant's procedure was performed 27 years ago, "giving ample time for osteoarthritis to develop." Consequently, he recommended that the diagnosis be added as causally related to the underlying accepted condition.

On November 25, 2009 OWCP advised appellant that his March 19, 1982 traumatic injury claim was accepted for localized secondary arthritis, left lower leg.¹⁰

On May 12, 2011 appellant filed a claim (Form CA-7) for an increased schedule award with respect to his March 19, 1982 left knee injury. The claim was accompanied by an April 27, 2011 impairment rating by Dr. Byron V. Hartunian, a Board-certified orthopedic surgeon,¹¹ who found a combined 62 percent left lower extremity impairment based on primary knee joint arthritis (50 percent), patellofemoral arthritis (18 percent) and medial collateral ligament laxity (8 percent). Dr. Hartunian based his rating on the sixth edition of the American Medical

¹⁰ OWCP would later expand appellant's August 5, 1997 right knee traumatic injury claim to include localized primary arthritis, right knee. Appellant also received an additional schedule award for right lower extremity permanent impairment.

¹¹ Dr. Hartunian examined appellant on November 23, 2010.

Association, *Guides to the Evaluation of Permanent Impairment* (2008).¹² He determined that appellant reached maximum medical improvement (MMI) in December 1984.

In a report dated December 19, 2011, Dr. Christopher R. Brigham, a medical adviser rated 50 percent left lower extremity impairment based on class 4 primary knee joint arthritis under Table 16-3, Knee Regional Grid (LEI), A.M.A., *Guides* 511 (6th ed. 2008). He disagreed with Dr. Hartunian's inclusion of impairment due to patellofemoral arthritis (18 percent) and medial collateral ligament laxity (8 percent).¹³ Additionally, Dr. Brigham noted that it was "probable" that appellant reached MMI in December 1984.

On January 11, 2012 appellant received a schedule award for an additional 40 percent left lower extremity impairment.¹⁴ OWCP found he reached MMI on December 1, 1984. The award covered a period of 115.2 weeks from May 23, 1985 through August 7, 1987.¹⁵ OWCP relied on a March 19, 1982 date-of-injury weekly pay rate of \$445.08.¹⁶

In a July 18, 2012 affidavit, appellant indicated that he last worked on February 9, 2009. He was reportedly unable to return to his letter carrier position as a result of a work-related fall where he injured his right hip, neck and shoulder. Appellant also indicated that he retired on September 1, 2011. His current employment status and his claimed last date of exposure have neither been confirmed nor refuted by the employing establishment.

By decision dated October 12, 2012, the Branch of Hearings & Review affirmed the January 11, 2012 schedule award for an additional 40 percent left leg impairment. The hearing representative found that OWCP properly relied on appellant's March 19, 1982 date-of-injury pay rate in calculating schedule award benefits.

LEGAL PRECEDENT

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent

¹² See Table 16-3, Knee Regional Grid (LEI), A.M.A., *Guides* 509-11 (6th ed. 2008).

¹³ Dr. Hartunian identified three knee-related impairments, but the DMA explained that only one diagnosis could be considered per region. See section 16.2a, A.M.A., *Guides* 499 (6th ed. 2008). Because primary knee joint arthritis represented the most impairing condition/diagnosis under Table 16-3, Knee Regional Grid (LEI), A.M.A., *Guides* 511 (6th ed. 2008), the DMA rated appellant solely on that diagnosis.

¹⁴ Although appellant received a current rating of 50 percent LLE impairment, OWCP reduced the schedule award by 10 percent to reflect his December 1984 LLE award.

¹⁵ The current award commenced a day after the expiration (May 22, 1985) of the previous schedule award. Benefits were initially paid based on the 66 2/3 percent compensation rate. However, OWCP subsequently adjusted appellant's compensation to reflect entitlement to the augmented rate of 75 percent effective July 24, 1987. See 20 C.F.R. § 10.404(b).

¹⁶ OWCP calculated appellant's weekly pay rate (\$445.08) based on a date-of-injury annual salary of \$23,144.00. This latest pay rate information was obtained from the employing establishment on January 9, 2012. As noted, appellant's December 1984 schedule award was based on a weekly pay rate of \$415.37 effective April 20, 1982.

intervening cause attributable to employee's own intentional misconduct.¹⁷ Thus, a subsequent injury, be it an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.¹⁸

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.¹⁹ FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.²⁰ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).²¹

In assessing eligibility for a schedule award, the medical evidence must show that the impairment has reached a permanent and fixed state, which is generally referred to as MMI.²² Assuming MMI has been attained, the date of MMI is usually considered to be the date of the evaluation by the attending physician that is accepted as definitive by OWCP.²³ Schedule awards begin on the date of MMI, unless circumstances show that a later date should be used.²⁴ A retroactive determination of the date of MMI is not *per se* erroneous.²⁵ When the medical evidence establishes that the employee did in fact reach maximum improvement by such date, the determination is proper.²⁶

The amount of compensation paid is a function of the injured employee's pay rate.²⁷ Monthly pay for compensation purposes 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

¹⁷ *Mary Poller*, 55 ECAB 483, 487 (2004); 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* 10-1 (2006).

¹⁸ *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139, 141 n.7 (2001).

¹⁹ For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

²⁰ 20 C.F.R. § 10.404.

²¹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

²² *Id.* at Chapter 2.808.5b(1).

²³ *Id.* at Chapter 2.808.7b.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ 20 C.F.R. § 10.404(b).

recurs, whichever is greater.”²⁸ When a schedule award involves a traumatic injury claim with prior disability, the applicable pay rate is the greatest of the established pay rates, date of injury, disability or recurrence.²⁹ Where there was no prior injury-related disability from work, the date of injury pay rate should be used.³⁰

Somewhat different rules apply to schedule awards involving occupational disease claims, particularly where the claimant remains exposed to the injurious work factors that caused the accepted injury. Where there is prior disability and the claimant is working full duty and still exposed to injurious work factors at the time of the rating examination, then the pay rate is the greatest of the three dates. In this scenario, date of injury is considered to be the date of last exposure, which would be the date of the impairment rating examination.³¹ Another scenario is where the claimant is either not working or working limited-duty at the time of the rating examination and there was prior disability. Under this situation, the applicable pay rate is the greatest of the three dates.³² Where there is no prior disability, the effective pay rate is the date of injury rate, which is the last date the claimant was exposed to causal employment factors in full-duty capacity or the date of the rating examination, if still exposed.³³

ANALYSIS

Appellant does not contest OWCP’s decision to award an additional 40 percent left leg impairment based on Dr. Brigham’s December 19, 2011 report. The only issue raised on appeal is whether OWCP properly relied on a March 19, 1982 date-of-injury weekly pay rate of \$445.08. The Board finds that the case is not in posture for decision.

Counsel argued that OWCP should have relied upon the pay rate in effect on February 9, 2009; appellant’s date of last exposure. He claimed that OWCP’s November 25, 2009 acceptance of the claim to include localized secondary arthritis of the left lower leg constituted acceptance of a new occupational disease. Counsel also argued that appellant’s May 12, 2011 claim for a schedule award (Form CA-7) should have been treated as a new occupational disease claim. He argued for a more recent date of MMI.³⁴ In response, the Director argued that OWCP properly relied on the date-of-injury pay rate because the claim involved a traumatic injury and

²⁸ 5 U.S.C. § 8101(4); see 20 C.F.R. § 10.5(s); see *Samuel C. Miller*, 55 ECAB 119, 120 (2003).

²⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900, Exhibit 1 -- Determining Effective Pay Rate Date for Schedule Awards (September 2011).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ OWCP found appellant’s left knee condition reached MMI on December 1, 1984, which is consistent with Dr. Hartunian’s finding. The date of MMI is a medical determination. See *supra* note 23. The subsequent development of osteoarthritis resulted in a deterioration of appellant’s left knee condition, not an improvement. In this instance, counsel argued contrary to the finding of appellant’s own physician, and also failed to identify an alternative MMI date otherwise supported by the medical evidence of record.

there was no indication that a greater pay rate would apply. The Director also noted that appellant had not filed a new occupational disease claim (Form CA-2).

The record establishes that appellant injured his left knee in a work-related fall on March 19, 1982. This was a traumatic injury caused by a specific event or incident that occurred within a single workday or shift.³⁵ Counsel does not dispute that the initial injury was traumatic in nature. He argued, based on Dr. Berenson's September 8, 2009 report, that the subsequent development of left knee arthritis was in part due to appellant's continued occupational exposure. Thus, counsel characterized the development of arthritis as a "consequential occupational disease."

As the Director correctly noted, appellant did not file a new occupational disease claim (Form CA-2). Also, the May 12, 2011 schedule award claim (Form CA-7) specifically referenced the March 19, 1982 left knee traumatic injury claim. Had appellant filed a new occupational disease claim, he would have been required to satisfy all the necessary elements of such a claim, including the submission of a factual statement identifying employment factors that allegedly caused or contributed to the claimed disease or condition.³⁶ Dr. Berenson reviewed a description of appellant's letter carrier duties and responsibilities, but neither appellant nor the employing establishment provided factual information that might otherwise support Dr. Berenson's description of appellant's letter carrier duties. Moreover, OWCP has not made any specific findings regarding appellant's post-March 1982 occupational exposure. The latest statement of accepted facts (SOAF), dated December 15, 2011, does not include a description of appellant's duties consistent with Dr. Berenson's September 8, 2009 findings. The SOAF noted that the claim had been expanded to include localized secondary osteoarthritis of the left lower leg, but it did not attribute appellant's arthritis to continued occupational exposure.

OWCP expanded the claim based on Dr. Levine's November 7, 2009 report. Dr. Levine explained that the natural history of a total meniscectomy often leads to severe osteoarthritis. He explained that appellant's left knee procedure was performed 27 years ago, "giving ample time for osteoarthritis to develop." Although Dr. Levine noted that appellant continued to work as a letter carrier, unlike Dr. Berenson he did not specifically find that appellant's ongoing employment contributed to the development of left knee osteoarthritis. OWCP accepted localized secondary osteoarthritis of the left lower leg as a consequence of appellant's March 19, 1982 traumatic injury and subsequent surgery.

The current schedule award is based on an underlying traumatic injury, counsel's argument for a February 9, 2009 date of last exposure pay rate is without merit. This is not an occupational disease claim, therefore, the pay rate is not the date of last exposure.³⁷ Appellant

³⁵ See 20 C.F.R. § 10.5(ee). Such condition must be caused by external force, including stress or strain, which is identifiable to time and place of occurrence and member or function of the body affected. *Id.*

³⁶ To establish that an injury was sustained in the performance of duty, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

³⁷ See *supra* note 29.

injured his left knee on March 19, 1982, and continued to work in a light-duty capacity until April 20, 1982. He received 45 days' continuation of pay, and effective June 4, 1982, OWCP paid wage-loss compensation for temporary total disability. OWCP based compensation payments on appellant's date-of-injury pay rate. Appellant continued to receive wage-loss compensation for temporary total disability through November 1, 1982. He returned to work in a limited-duty capacity on November 2, 1982, and within a month's time he was cleared to resume full-time, regular duty. When OWCP subsequently granted a schedule award in December 1984, it similarly relied upon appellant's date-of-injury pay rate. There is no evidence that appellant has since sustained a recurrence of disability due to his March 19, 1982 accepted injury. As such, a date-of-recurrence pay rate is inapplicable.

The January 11, 2012 schedule award was properly based on a March 19, 1982 date-of-injury weekly pay. The Board notes, however, that the employing establishment provided conflicting information regarding appellant's weekly salary. Prior to the latest schedule award, OWCP paid compensation based on a weekly pay rate of \$415.37. This figure was based on the employing establishment's representation that appellant earned an annual base salary of \$21,599.00 as of March 19 and April 20, 1982.³⁸ In January 2012, the employing establishment advised that appellant earned an annual base salary of \$23,144.00 effective March 19, 1982. OWCP relied upon this latest information in calculating a date-of-injury weekly pay rate of \$445.08. It is unclear from the record which is the correct salary for pay purposes. Accordingly, the case shall be remanded to OWCP to develop the salary information. Accordingly, the case shall be remanded for further development. After OWCP has developed the record to the extent it deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that appellant's rate of pay was properly based on his date of injury. The case is remanded for development as to conflicting salary information.

³⁸ The employing establishment also previously indicated that appellant's annual base salary increased to \$21,766.00 effective May 15, 1982.

ORDER

IT IS HEREBY ORDERED THAT the October 12, 2012 decision of the Office of Workers' Compensation Programs be affirmed in part and set aside in part. The case is remanded for further consideration consistent with this decision.

Issued: August 22, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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