

on October 12, 1995 for a left shoulder injury while lifting a tray of mail. The second claim was an occupational disease claim filed on December 10, 2002 alleging that appellant's modified duties aggravated her right arm and left shoulder conditions. The Board will discuss the traumatic injury claim first.

OWCP, under the claim for traumatic injury on October 12, 1995 accepted a left shoulder sprain and aggravation of cervical degenerative disc disease (File No. xxxxxx464). In a decision dated December 23, 1999, OWCP issued a schedule award for a five percent left arm permanent impairment. The period of the award was 15.60 weeks from September 8, 1999 and the pay rate for compensation purposes was \$654.44 per week.

The record indicates that appellant retired from federal employment in January 2005. With respect to the traumatic injury file, on December 7, 2005 OWCP received a September 1, 2005 report from Dr. David Weiss, an osteopath. The history provided by Dr. Weiss referred to a work-related injury on October 12, 1995. Dr. Weiss provided results on examination and an opinion as to the degree of permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

In a report dated July 18, 2011, Dr. Weiss provided an "updated" opinion as to permanent impairment under the sixth edition of the A.M.A., *Guides* based on the September 1, 2005 examination. He opined that appellant had a six percent right arm impairment for entrapment neuropathy of the right ulnar elbow nerve and sensory deficit of the C6 nerve root. For the left arm, Dr. Weiss found 18 percent impairment, based on sensory deficit of the C5 nerve root, and motor strength deficit of the left supraspinatus and left deltoid.

The case was referred to an OWCP medical adviser for review. In a report dated January 25, 2012, the medical adviser opined that appellant had 6 percent right arm impairment, and a 17 percent left arm impairment. The medical adviser used the Combined Values Chart to combine the left arm impairments, while Dr. Weiss had added the sensory and motor deficit impairments.

By decision dated January 30, 2012, OWCP issued a schedule award for a 6 percent right arm impairment and an additional 17 percent for the left arm. The period of the award was 71.76 weeks from September 1, 2005, with a pay rate of \$654.44 per week.

With respect to the second claim, appellant had worked in a modified letter carrier position following the traumatic injury and on December 10, 2002 appellant filed an occupational disease claim (Form CA-2) alleging that her duties in the modified position had exacerbated her arm and shoulder conditions (File No. xxxxxx288). OWCP accepted this claim for aggravation of cervical degenerative disc disease.

By decision dated March 10, 2004, OWCP denied any additional conditions with respect to the occupational claim, including progressive neuropathies in the median, ulnar and radial nerves, proximal brachial plexopathies or any permanent nerve damage. In an order dated September 25, 2005, the Board remanded the case, finding the case record transmitted to the Board was incomplete.² OWCP issued a March 17, 2006 decision again finding no additional

² Docket No. 05-898 (issued September 25, 2005).

employment-related conditions. By decision dated August 2, 2006, the Board set aside the March 17, 2006 decision, finding the evidence was sufficient to warrant further development.³ On April 12, 2010 OWCP accepted the claim for the additional conditions of bilateral lesion of the ulnar nerve, and nerve root and plexus disorder.

Pursuant to the occupational claim, appellant resubmitted the July 18, 2011 report from Dr. Weiss. OWCP prepared a statement of accepted facts (SOAF) with respect to the occupational claim, with no mention of the October 12, 1995 injury. By report dated April 20, 2012, the medical adviser indicated that appellant's permanent impairment was 6 percent for the right arm and 17 percent for the left arm. The medical adviser noted "both case numbers have impairments based on the same evaluation."

In a letter dated March 1, 2012, appellant, through her representative, requested reconsideration of the January 30, 2012 schedule award. Appellant stated that she was not contesting the percentage of impairment awarded, but the pay rate used by OWCP. By decision dated April 9, 2012, OWCP denied modification of the January 30, 2012 schedule award pay rate issue.

By decision dated April 25, 2012, issued pursuant to the occupational claim, OWCP found appellant was not entitled to an additional schedule award.

The Board reviewed the January 30 and April 9 and 25, 2012 OWCP decisions. In a decision dated January 2, 2013, the Board found that OWCP had not explained how they determined the pay rate for the January 30, 2012 schedule award.⁴ It was unclear what date OWCP had used to determine the pay rate or any explanation as to how 5 U.S.C. § 8101(4) was applied.

By decision dated April 9, 2013, issued pursuant to the occupational claim, OWCP found appellant was not entitled to an additional schedule award. Appellant requested a hearing before an OWCP hearing representative, which was held on August 22, 2013. By decision dated October 28, 2013, the hearing representative found appellant was not entitled to more than a 6 percent right arm or 17 percent left arm permanent impairment.

With respect to the April 9, 2013 decision, appellant requested a hearing before an OWCP hearing representative, which was held on August 29, 2013. By decision dated December 18, 2013, the hearing representative affirmed the April 9, 2013 decision. The hearing representative concluded, "The claimant did not receive compensation under the 2002 injury claim and there were no claims for wage loss due to related disability under the subsidiary case as a basis for compensation entitlement of a schedule award. I find that [OWCP] properly determined that the claimant was entitled to the schedule award based on the date[-]of[-]injury weekly pay rate under the master claim, \$654.44, effective the date of injury, October 12, 1995."

³ Docket No. 06-1070 (issued August 2, 2006).

⁴ Docket No. 12-1516 (issued January 2, 2013).

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁵ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁷

ANALYSIS -- ISSUE 1

The Board notes that, with respect to the schedule award issued January 30, 2012, appellant has not offered any arguments contesting the determination as to a 6 percent right arm and 17 percent left arm permanent impairment. She indicated in a March 1, 2012 reconsideration request that she was not contesting the percentage of impairment determination. Appellant has argued the pay rate was incorrect and this issue will be discussed below.

Since appellant did appeal the October 28, 2013 decision, the Board will note that the impairment determinations were based on the sixth edition of the A.M.A., *Guides*. While the attending physician, Dr. Weiss had found an 18 percent left arm impairment, OWCP's medical adviser had properly combined the motor and sensory impairments,⁸ resulting in a 17 percent left arm impairment. There is also no dispute about the six percent right arm impairment. The Board finds no evidence of a greater impairment in this case.

LEGAL PRECEDENT -- ISSUE 2

Under 5 U.S.C. § 8101(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 more than 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater....”

In applying section 8101(4), the statute requires OWCP to determine monthly pay by determining the date of 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

⁵ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁶ A. George Lampo, 45 ECAB 441 (1994).

⁷ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁸ See A.M.A., *Guides* 430. Sensory and motor impairments are combined, using the Combined Values Chart, to determine the upper extremity impairment.

the highest rate which satisfies the terms of section 8101(4).⁹ Where an injury is sustained over a period of time, the date of injury is the date of last exposure to the employment factors causing the injury.¹⁰

ANALYSIS -- ISSUE 2

The Board previously remanded the case to OWCP to properly determine the pay rate for compensation purposes with respect to the January 30, 2012 schedule award. OWCP has not, however, properly resolved the issue. The hearing representative made a finding that the pay rate should be based on the pay as of October 12, 1995, the date of the original traumatic injury claim. A review of the evidence of record does not support such a finding. The hearing representative appears to base her finding on the conclusion that appellant did not receive wage-loss compensation from the 2002 injury. The Board notes that the record indicates that appellant received wage-loss compensation for only two days: October 28, 2003 and December 15, 2004. Both of these dates occur after the filing of the 2002 claim, and OWCP's administrative decision to associate the compensation with the 1995 injury is of little relevance to the issue.

There are two claims for injury in this case. If the later injury contributed to the schedule award, then that is properly considered the date of injury.¹¹ The question in this case is whether the January 30, 2012 schedule award was solely based on the traumatic injury, or whether it included the accepted occupational injuries. In this regard Dr. Weiss does not clarify the issue, as he referred in his history only to the October 12, 1995 injury. OWCP's medical adviser, however, did review the occupational injuries. The April 20, 2012 report appears to consider both the claims in determining the degree of permanent impairment, although he was not specifically asked to address the issue.

The issue is a medical issue and therefore the case will be remanded to OWCP. The medical adviser should be asked to address the question of whether the occupational injuries contributed to the determination of permanent impairment established in the January 30, 2012 schedule award. If there was a contribution, then the date of injury becomes the date of injury for the occupational claim, and must be determined in accord with established principles. The case will be remanded for a proper determination as to the pay rate applicable for the January 30, 2012 schedule award. After such development as is deemed necessary, OWCP should issue an appropriate decision.

CONCLUSION

The Board finds the record does not establish more than a 17 percent left arm and 6 percent right arm permanent impairment. With respect to the pay rate, the case will be remanded for additional development.

⁹ *Robert A. Flint*, 57 ECAB 369, 374 (2006).

¹⁰ *See Barbara A. Dunnivant*, 48 ECAB 517 (1997).

¹¹ *See Garnet Kelsoe*, Docket No. 99-2239 (issued September 27, 2000) (OWCP improperly used a prior right shoulder injury as the date of injury for a schedule award, when there was a later left shoulder injury).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 28, 2013 is affirmed. The December 18, 2013 decision is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: October 8, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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