

FACTUAL HISTORY

On August 5, 1997 appellant, then a 45-year-old letter carrier, injured his right knee when he stepped in a hole while delivering mail.³ OWCP accepted his traumatic injury claim for right knee derangement with a torn medial meniscus.⁴ As of the date of injury, appellant was earning a base pay rate of \$708.80 a week.

On September 2, 1997 appellant underwent surgery of the right knee with a partial arthroscopic meniscectomy for repair of tears to the medial and lateral menisci and debridement of the medial joint space. He received wage-loss compensation while recuperating from surgery. Appellant resumed his regular letter carrier duties in January 1998.

On January 20, 1999 OWCP granted a schedule award for 10 percent impairment of the right lower extremity (RLE) under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (1993).⁵ The award covered the period August 7, 1998 through February 24, 1999 or 28.8 weeks of compensation. OWCP calculated appellant's schedule award based on his August 5, 1997 date-of-injury weekly pay rate of \$708.80.

As of December 2004 appellant was diagnosed with degenerative joint disease to both knees.

On February 7, 2009 appellant sustained a second traumatic injury to his right lower extremity when he fell from his delivery vehicle, landing on his right side. This claim was filed under OWCP File No. xxxxxx292. The record on appeal does not include information regarding appellant's February 7, 2009 right hip employment injury.⁶ Appellant's pay rate at the time of this traumatic injury is not of record. He retired effective February 9, 2009.

³ As a teenager, appellant had surgery on his right knee as a result of a high school football injury. An August 16, 1997 right knee magnetic resonance imaging (MRI) scan revealed evidence of a prior medial meniscectomy, as well as focal degenerative disease.

⁴ Appellant also has an accepted claim for a work-related left knee injury sustained on March 19, 1982 (File No. xxxxxx832). OWCP initially accepted the claim for left knee sprain and torn medial meniscus. After undergoing a left medial meniscectomy in May 1982, appellant was released to resume full-time, regular duty effective November 24, 1982. OWCP subsequently expanded his March 1982 left knee traumatic injury claim to include localized secondary arthritis, left lower leg. Appellant's left and right lower extremity claims have been doubled and the March 1982 injury was designated as the master File No. xxxxxx832.

⁵ The 10 percent right leg schedule award was based on appellant having undergone partial medial and lateral meniscectomy. See Table 64, A.M.A., *Guides* 85 (4th ed. 1993).

⁶ The record on appeal includes a July 22, 2009, OWCP-directed examination by Dr. Stanley Hom, a Board-certified orthopedic surgeon, under claim File No. xxxxxx292. Dr. Hom noted that appellant was injured at work on February 7, 2009 when he exited the back of a half-ton mail truck and fell approximately four feet onto the right side of his body. The diagnoses included right hip trochanteric bursitis, which was attributed to the February 7, 2009 employment injury.

In a report dated August 31, 2009, Dr. Mark M. Berenson, an attending Board-certified orthopedic surgeon, noted treating appellant since 1997. He noted that diagnostic testing revealed severe degenerative joint arthritis of the knees. Dr. Berenson stated:

“Based on a reasonable degree of medical certainty, [appellant’s] severe primary knee joint arthritis is work related as a result of accepted work injury of August 5, 1997 and also has been aggravated, accelerated and exacerbated by [his] continuing to go to work as a letter carrier on the arthritic knee.”

On January 8, 2010 Dr. Barry W. Levine, a district medical adviser, recommended that OWCP accept appellant’s claim for permanent aggravation of osteoarthritis arthritis in the right knee due to his work-related injury. He found that the injuries to both knees were sufficient to result in the development of bilateral osteoarthritis.

On March 16, 2010 OWCP accepted that appellant’s August 5, 1997 traumatic injury resulted in primary arthritis to the right knee.

On May 10, 2011 appellant filed a claim for an additional schedule award with respect to his August 5, 1997 right knee injury. He submitted the April 27, 2011 report from Dr. Byron V. Hartunian, a Board-certified orthopedic surgeon, who rated 52 percent right lower extremity impairment. Dr. Hartunian’s rating of impairment to the right knee included a combination of primary knee joint arthritis (20 percent), patellofemoral arthritis (18 percent) and medial collateral ligament laxity (8 percent). He stated that his impairment rating included all three knee joint conditions; even though they pertained to the same anatomical region, because one diagnosis did not adequately characterize the impact of the impairments on appellant’s activities of daily living. Dr. Hartunian stated that the primary knee joint arthritis impacted activities involving standing while the patella-femoral arthritis impacted sitting and kneeling. In turn, the medial collateral ligament laxity manifested itself in unstable twisting, turning, pivoting, walking on uneven surfaces the incline ambulation. Dr. Hartunian also rated impairment due to right hip arthritis of 20 percent. He noted that appellant injured his right hip on February 7, 2009 when he fell off a truck at work. Dr. Hartunian stated that her right knee x-ray showed narrowing of the femorotibial space medially with two millimeter (mm) cartilage interval. An x-ray of the right hip showed moderate degenerative changes with bone spurs. Dr. Hartunian stated that appellant reached maximum medical improvement with regards to his right knee in December 1997 after recovering from arthroscopic surgery.

In a report dated December 19, 2011, Christopher R. Brigham, a Board-certified orthopedic surgeon and OWCP medical adviser, rated 16 percent impairment for class 2 primary knee joint arthritis (2 mm cartilage interval) under Table 16-3, Knee Regional Grid, A.M.A., *Guides* 511 (6th ed. 2008).⁷ He based the 16 percent rating on assigning a grade 1 modifier for functional history rather than the grade 3 modifier as found by Dr. Hartunian. Dr. Brigham noted that for class 3, the individual would require routine use of gait aids, such as crutches or canes; while the record did not support that appellant used such assistive devices. Further, he did

⁷ See Section 16.2a, A.M.A., *Guides* 499 (6th ed. 2008). Dr. Brigham identified primary knee joint arthritis as the most impairing condition/diagnosis under Table 16-3, Knee Regional Grid, A.M.A., *Guides* 511 (6th ed. 2008) and excluded Dr. Hartunian’s additional ratings for patellofemoral arthritis and medial collateral ligament laxity.

not rate impairment for patella-femoral arthritis or medial ligament laxity. Dr. Brigham stated that, while Dr. Hartunian provided rationale for including all impairments for appellant's right knee, this was not consistent with page 499 of the A.M.A., *Guides*, which provides that in selection of the optimal diagnosis, when more than one diagnosis can be used, the highest causally related impairment rating should be used.

Dr. Brigham agreed with the 20 percent impairment provided by Dr. Hartunian for class 2 hip arthritis under Table 16-4, Hip Regional Grid (LEI), A.M.A., *Guides* 514 (6th ed. 2008). The 20 percent right hip and 16 percent right knee impairments combined represented 33 percent total right leg impairment. As appellant previously received a schedule awarded for 10 percent impairment based on his right knee condition, it was subtracted from the current 33 percent rating to total 23 percent impairment.

On January 11, 2012 OWCP granted appellant a schedule award for an additional 23 percent right leg impairment. The award covered a period of 66.24 weeks beginning February 25, 1999. OWCP relied on an August 5, 1997 date-of-injury weekly pay rate of \$708.80.⁸

By decision dated October 12, 2012, the Branch of Hearings and Review affirmed the January 11, 2012 schedule award for 23 percent right leg impairment. OWCP's hearing representative found that the August 5, 1997 date-of-injury pay rate was proper in calculating schedule award benefits.

LEGAL PRECEDENT

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.⁹ 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.¹⁰ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).¹¹

When determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included.¹² Impairment ratings for schedule awards include those

⁸ Benefits were initially paid based on the 66⅔ percent compensation rate. However, OWCP subsequently adjusted appellant's compensation payments to reflect his entitlement to the augmented rate of 75 percent. *See* 20 C.F.R. § 10.404(b).

⁹ For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

¹⁰ 20 C.F.R. § 10.404.

¹¹ *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 and Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

¹² *Carol A. Smart*, 57 ECAB 340, 343 (2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

conditions accepted by OWCP as job related, and any preexisting permanent impairment of the same member or function.¹³ If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate.¹⁴ There are no provisions for apportionment under FECA.¹⁵ When the prior impairment is due to a previous work-related injury and a schedule award has been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.¹⁶

The amount of compensation paid is a function of the injured employee's pay rate.¹⁷ 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 recurs ..., whichever is greater."¹⁸ When a schedule award involves a traumatic injury claim with prior disability, the applicable pay rate is the greatest of the established pay rates.¹⁹ Where there was no prior injury-related disability from work, the date-of-injury pay rate should be used.²⁰

ANALYSIS

The Board finds that the case is not in posture for decision as it is premature to address the applicable pay rate.

On appeal, appellant has not contested the 33 percent impairment rating to his right lower extremity. The schedule award issued on January 11, 2012 was based on Dr. Brigham's December 10, 2011 report which rating impairment to the right knee of 16 percent was based on primary knee joint arthritis (2 mm cartilage interval) combined with 20 percent impairment to the right hip. Appellant previously received a schedule award for 10 percent right leg impairment due to his August 5, 1997 knee injury which resulted in torn medial and lateral menisci, for which surgery was performed.

The January 11, 2012 schedule award was issued for an additional 23 percent right leg impairment. In awarding compensation, OWCP relied on appellant's August 5, 1997 right knee date-of-injury weekly pay rate of \$708.80. On appeal, counsel argued that the award should have been based on the pay rate in effect as of February 9, 2009, the date appellant retired from

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5d.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at Chapter 2.808.7a(1); 20 C.F.R. § 10.404(c).

¹⁷ *Id.* at § 10.404(b).

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

¹⁹ 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).

²⁰ *Id.*

his employment and which he contended should be considered appellant's date of last exposure. The question as to the applicable pay rate in this case is complicated by the fact that the January 11, 2012 schedule award included an impairment rating for appellant's right hip condition which is the subject of his claim under File No. xxxxxx292, based on his February 7, 2009 fall from a delivery vehicle. As noted, the record currently on appeal does not contain appellant's pay rate information at the time of this traumatic injury. The situation in this case is similar to that in *D.G.*,²¹ in which the employee sustained an injury to her low back on March 24, 2003 and a second traumatic injury to her back on October 9, 2003. As in the current appeal, the record before the Board in *D.G.*, did not include the employee's pay rate at the time of the second injury. For this reason, the case was remanded to OWCP for a determination of the greater pay rate between her March 24 and October 9, 2003 employment injuries for purposes of her schedule award.²² In the present appeal, the Board finds that the January 11, 2012 schedule award should be set aside and the case remanded to OWCP for further development on the issue of the proper pay rate.

In this regard, the Board notes that OWCP has combined several of appellant's lower extremity claims; but the record associated with his February 7, 2009 right hip injury (File No. xxxxxx292) has not been consolidated with the file presently on appeal. The right hip claim, accepted by OWCP, is relevant to rating impairment to the same region, the right leg. The present record does not include sufficient information for the Board to make a fully informed decision. Accordingly, the case shall be remanded for further development to be followed by a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision as to the applicable pay rate.

²¹ Docket No. 08-626 (issued July 16, 2008).

²² The October 12, 2012 decision of OWCP's hearing representative did not address this aspect of the case in consideration of the applicable pay rate.

ORDER

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

Issued: September 18, 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