

FACTUAL HISTORY

This case was previously before the Board.³ Appellant, a 63-year-old letter carrier, has an accepted traumatic injury claim for left knee sprain and torn medial meniscus. His left knee injury was the result of a March 19, 1982 work-related fall. Appellant underwent left knee surgery in May 1982, and by December 1982 he was cleared to return to his full-time, regular duties.

On December 6, 1984 OWCP granted a schedule award for 10 percent left lower extremity (LLE) impairment. The award covered a period of 28.8 weeks, and was based on a weekly pay rate of \$415.37 as of April 20, 1982.

Appellant later injured his right knee in the performance of duty (claim number xxxxxx681). OWCP accepted his August 5, 1997 traumatic injury for right knee derangement and medial meniscus tear. Following right knee arthroscopic surgery, appellant resumed his regular letter carrier duties in January 1998. He also received schedule awards totaling 33 percent impairment of the right lower extremity.

OWCP combined the 1982 and 1997 lower extremity injuries and designated claim number xxxxxx681 as the master file.⁴

Appellant subsequently developed bilateral knee degenerative joint disease. In November 2009, OWCP expanded appellant's March 19, 1982 traumatic injury claim to include localized secondary arthritis, left lower leg.⁵

On January 11, 2012 OWCP granted an additional schedule award for 40 percent left lower extremity impairment.⁶ It found that appellant reached maximum medical improvement (MMI) on December 1, 1984.⁷ The schedule award covered an 115.2-week period from May 23, 1985 through August 7, 1987. OWCP calculated benefits based on a March 19, 1982 date-of-injury weekly pay rate of \$445.08. By decision dated October 12, 2012, the Branch of Hearings & Review affirmed the January 11, 2012 schedule award.

³ Docket No. 14-0090 (issued August 22, 2014).

⁴ Appellant also suffered a February 7, 2009 work-related injury when he fell from a postal service vehicle and landed on his right side. OWCP accepted the claim for right shoulder contusion, right hip contusion, and aggravation of cervical sprain (right side) (claim number xxxxxx292). Appellant received compensation for temporary total disability through September 1, 2011, at which time he elected to receive benefits from the Office of Personnel Management. His February 7, 2009 injury has also been combined with the two prior lower extremity injuries.

⁵ OWCP similarly expanded appellant's August 5, 1997 traumatic injury claim to include localized primary arthritis, right knee.

⁶ The award was based on the district medical adviser's (DMA) December 19, 2011 rating. He found 50 percent LLE impairment due to primary knee joint arthritis under Table 16-3, Knee Regional Grid (LEI), American Medical Association, *Guides to the Evaluation of Permanent Impairment* 511 (6th ed., 2nd prt. 2009). OWCP reduced the January 11, 2012 award to reflect appellant's December 1984 10 percent LLE award.

⁷ The DMA and appellant's physician concurred with respect to the date appellant reached MMI.

When the case was previously on appeal, the Board upheld OWCP's January 11, 2012 schedule award in all aspects except with regard to appellant's date-of-injury weekly pay rate. The Board noted that prior to this most recent award, OWCP paid all other compensation based on a weekly pay rate of \$415.37. However, the January 11, 2012 schedule award was based on a March 19, 1982 date-of-injury weekly pay rate of \$445.08. The latter pay rate stemmed from the employing establishment's January 9, 2012 representation that appellant earned an annual salary of \$23,144.00 effective March 19, 1982. Under the circumstances, the Board noted that it was unclear which date-of-injury weekly pay rate was the correct pay rate. Accordingly, the Board remanded the case to OWCP for further development as to the conflicting salary information.⁸

On remand, OWCP requested clarification from the employing establishment regarding appellant's March 19, 1982 date-of-injury pay rate. In an October 6, 2014 letter, the employing establishment indicated that appellant earned \$21,599.00 per year as of March 19, 1982. It further indicated that the correct salary information had been reported on appellant's June 4, 1982 Form CA-7.

On November 6, 2014 OWCP issued an amended (*de novo*) schedule award for 40 percent impairment of the left lower extremity. The award covered the same 115.2-week period (May 23, 1985 to August 7, 1987) as in the January 11, 2012 decision, and also noted the same date of MMI (December 1, 1984). Relying on the latest salary information from the employing establishment, OWCP calculated the schedule award based on a March 19, 1982 date-of-injury weekly pay rate of \$415.37. The majority of the schedule award was paid based on the regular ($\frac{2}{3}$) compensation rate. However, for the period July 24 to August 7, 1987, OWCP paid benefits at the augmented rate of ($\frac{3}{4}$). Additionally, OWCP adjusted appellant's weekly compensation rate to reflect applicable cost-of-living adjustments.

LEGAL PRECEDENT

The amount of compensation paid is a function of the injured employee's pay rate.⁹ 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."¹⁰ When a schedule award involves a traumatic injury claim with prior disability, the applicable pay rate is the greatest of the established pay rates.¹¹ However, where there was no prior injury-related disability from work, the date-of-injury pay rate should be used.¹²

⁸ The Board's August 22, 2014 decision is incorporated herein by reference.

⁹ 20 C.F.R. § 10.404(b).

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

¹¹ 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).

¹² *Id.*

ANALYSIS

In the application for review (AB-1), appellant's counsel identified the issues/arguments on appeal as: (1) selection of the date of MMI; and (2) entitlement to Consumer Price Index (CPI) adjustments. As to the date of MMI, the Board previously affirmed OWCP's finding that appellant reached MMI as of December 1, 1984. On appeal, counsel has not offered any additional evidence or argument that would warrant revisiting this issue.¹³ He also did not elaborate on his apparent concern regarding applicable CPI adjustments. The Board notes that the November 6, 2014 decision indicated that OWCP had adjusted appellant's weekly compensation rate to reflect applicable cost-of-living adjustments. Moreover, the record includes a November 6, 2014 "Gross Calculation Detail Report," which reflects OWCP's adjustment(s) based on applicable CPI rates for the period covered under the schedule award (May 23, 1985 to August 7, 1987).

The Board previously remanded this case for clarification of the appropriate March 19, 1982 date-of-injury weekly pay rate. On remand, the employing establishment advised that appellant's annual salary at the time of injury was \$21,599.00, which represented a date-of-injury weekly pay rate of \$415.37. The employing establishment's October 6, 2014 clarification is consistent with previous salary information obtained contemporaneous with the 1982 filing of the current claim. Accordingly, the Board affirms OWCP's reliance on a March 19, 1982 date-of-injury weekly pay rate of \$415.37.

CONCLUSION

OWCP properly determined that appellant's March 19, 1982 date-of-injury weekly pay rate was \$415.37.

¹³ MMI is usually considered to be the date of the evaluation by the attending physician that is accepted as definitive by OWCP. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7b (February 2013). A retroactive determination of the date of MMI is not *per se* erroneous. *Id.* When the medical evidence establishes that the employee did in fact reach maximum improvement by such date, the retroactive determination is proper. *Id.* As noted, the DMA concurred with appellant's physician regarding the date of MMI (December 1984).

ORDER

IT IS HEREBY ORDERED THAT the November 6, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 1, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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