

FACTUAL HISTORY

On May 20, 2010 appellant, then a 58-year-old enumerator, filed a traumatic injury claim (Form CA-1) alleging that on May 18, 2010 he sustained injuries while in the performance of duty. On the claim form he alleged that he had fallen over a fence while attempting to avoid an attack by a dog. The reverse of the claim form indicated that appellant was an intermittent employee whose work hours varied, and he stopped working on May 18, 2010. An employing establishment form report indicated that he had begun work on April 26, 2010.

OWCP accepted the claim on August 31, 2010 for left knee sprain, contusions to the face, neck, and scalp, as well as contusions to the left shoulder and upper arm. Appellant underwent left knee surgery on January 21, 2011 to repair a torn medical meniscus. In addition, he underwent left knee total arthroplasty on December 17, 2012.

An OWCP memorandum of telephone call dated August 31, 2010 indicated that the employing establishment reported that appellant's employment term would have ended on July 26, 2010. With respect to his rate of pay, OWCP initially determined on September 14, 2010 that appellant earned \$17.50 per hour, at 4.5 hours per day, 4 days a week, for a weekly pay rate of \$315.00. A wage-loss compensation payment covering the period July 3 to August 25, 2010 reflected a pay rate of \$315.00 per week.

By letter dated September 23, 2010, the employing establishment reported that appellant was a temporary, intermittent enumerator. It indicated that he earned \$17.50 per hour, working an average of 4.5 hours per day, 4 days per week. According to the employing establishment, appellant's annual pay rate should be based on 150 times the average daily wage, or \$227.16 per week. The record also contains an employing establishment form indicating that appellant had worked five weeks before he was injured, earning \$2,130.65 during that time. In response to a request for additional information regarding appellant's work history, the employing establishment submitted documents indicating that appellant had worked from April 6 to 10, 2009, with earnings of \$635.00. For 2010 appellant began work in April and worked intermittent hours. The compensation payment appellant received for the period August 20 to September 11, 2010 was based on a pay rate of \$227.16 per week. There were no additional wage-loss compensation payments at that time.

In a report dated August 23, 2013, Dr. William Payne, a Board-certified orthopedic surgeon, indicated in his history that appellant underwent a total left knee arthroplasty on December 17, 2012. He opined that appellant had a work-related knee injury and the subsequent meniscus degeneration and tears resulted in degenerative arthritis and the need for additional surgery.

With respect to a permanent impairment, appellant submitted a March 19, 2014 report from Dr. Neil Allen, a Board-certified internist. Dr. Allen provided a history and results on examination for the left shoulder and left knee. As to the left knee, he noted that MCL and LCL stress tests were negative for joint laxity, with positive Lachman's grade 2/3. The range of motion for left knee was 120 degrees flexion, -5 degrees extension, with the right knee at 115 degrees flexion and -5 degrees extension. For a left shoulder permanent impairment, Dr. Allen opined that under the sixth edition of the American Medical Association, *Guides to the*

Evaluation of Permanent Impairment (hereinafter A.M.A., *Guides*), appellant had two percent left arm impairment under Table 15-5. He found that appellant had a grade C impairment of two percent, with no adjustment based on grade modifiers. For the left knee, Dr. Allen identified Table 16-3. He reported that the default impairment was 67 percent for a class 4 impairment, which he adjusted to a grade A impairment of 59 percent based on applicable grade modifiers.

OWCP referred the case to an OWCP medical adviser, Dr. Michael Hellman, for review. In a report dated August 11, 2014, Dr. Hellman concurred with Dr. Allen's opinion as to the left shoulder, finding two percent left arm permanent impairment. As to the left knee, he provided a different opinion under Table 16-3. Dr. Hellman found that appellant should be rated for a good result after a total knee replacement, which results in a default impairment of 25 percent. He then adjusted the permanent impairment to a grade A, for 21 percent left leg permanent impairment based on the left knee. Dr. Hellman explained that a grade 2 Lachman's means there was an endpoint which would not be considered a severe instability. He also indicated that all total knee arthroplasty procedures remove the anterior cruciate ligament, that the patella and extensor mechanism are the only anterior buttress for knee stability, and the examination explained in Dr. Allen's notes "reasonably sounds like a normal and stable knee."

According to the medical adviser, he was unable to determine the date of the total knee arthroplasty, but the date of maximum medical improvement (MMI) was one year after the total knee arthroplasty surgery.

By decision dated August 28, 2014, OWCP issued a schedule award for 21 percent left leg, and 2 percent left arm permanent impairment. The period of the award was 66.72 weeks from January 21, 2012. The pay rate was reported as \$227.16 per week.

Appellant, through counsel, requested a hearing before an OWCP hearing representative, which was held on March 9, 2015. At the hearing appellant questioned the pay rate used by OWCP.

By decision dated April 15, 2015, an OWCP hearing representative affirmed the August 28, 2014 schedule award. She found that the weight of the medical evidence was represented by OWCP's medical adviser. In addition, the hearing representative found the pay rate was correct, citing FECA Circular 10-01.

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.² 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

² 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).

adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.³ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁴

With respect to knee impairment, the A.M.A., *Guides* provides a regional grid at Table 16-3.⁵ The Class of Diagnosis (CDX) is determined based on specific diagnosis, and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for Functional History (GMFH, Table 16-6), Physical Examination (GMPE, Table 16-7), and Clinical Studies (GMCS, Table 16-8). The adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).⁶

The regional grid for the shoulder is found at Table 15-5.⁷ An evaluation method similar to that used in Table 16-3 is applicable. For the upper extremities, the adjustment formula is based on Table 15-7 (functional history), Table 15-8 (physical examination), and Table 15-9 (clinical studies).

ANALYSIS -- ISSUE 1

With respect to permanent impairment, the record contains a report dated March 19, 2014 from attending physician, Dr. Allen, and an August 11, 2014 report from Dr. Hellman, an OWCP medical adviser. Both physicians concur with respect to two percent left arm permanent impairment based on the left shoulder contusion. Under Table 15-5, a shoulder contusion is a class 1 impairment with grade C (default) of two percent to the arm.⁸ Dr. Hellman used a GMFH of one, and a GMPE of one, with clinical studies not available.⁹ Applying the formula above, this would result in a net adjustment of -1 (0 + 0 + -1) to grade B, which is a two percent arm impairment. The medical adviser used a GMFH of 2, GMPE of 1, and GMCS of 0, resulting in no adjustment from the grade C impairment, also resulting in two percent impairment. Thus, the Board finds that the medical evidence establishes two percent permanent impairment of the left arm, for which appellant received a schedule award.

As to the permanent impairment to the left leg based on the left knee, Dr. Allen and Dr. Hellman provide differing opinions. In reviewing the reports, the Board finds that Dr. Hellman, an OWCP medical adviser, provided a clear explanation as to his opinion, while Dr. Allen did not provide adequate explanation. Both physicians apply Table 16-3, the knee

³ A. George Lampo, 45 ECAB 441 (1994).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010). See also A.W., Docket No. 13-621 (issued July 22, 2013).

⁵ A.M.A. *Guides* 509-11, Table 16-3.

⁶ The net adjustment is up to +2 (grade E) or -2 (grade A). The adjustment is not a simple addition or subtraction from the default value, as each grade provides its own value.

⁷ A.M.A., *Guides* 401-05, Table 15-5.

⁸ *Id.* at 401. Grade B and D are also two percent, with grade A one percent and grade E three percent.

⁹ Table 15-9 indicates that the grade modifier is 0 if there are no available clinical studies.

regional grid. For a total knee replacement, a “good” result (class 2, moderate problem) has a grade C leg impairment of 25 percent. A “fair” result (class 3, severe problem) has a grade C impairment of 37 percent, and a “poor” result (class 4, very severe problem) is a 67 percent grade C impairment. Dr. Allen applies the “poor” result, but does not provide any explanation as to why this is appropriate. A poor result under Table 16-3 is for “poor position, moderate to severe instability, and/or moderate to severe motion deficit.” The report from Dr. Allen does not refer to the requirements for a class 4 rating or discuss the examination results. For example, the range of motion results provided in the March 19, 2014 report do not indicate moderate-to-severe motion deficit. There is also no discussion explaining why the examination results showed moderate-to-severe instability or poor position.

On the other hand, Dr. Hellman, the OWCP medical adviser, does explain why he would place appellant in class 2 for a good result from total knee replacement. He noted the Lachman’s results and indicated there was no evidence of significant instability. The medical adviser explained that the findings of Dr. Allen indicated that the knee was in a normal and stable condition.

The Board finds that the opinion of Dr. Hellman as to the degree of permanent impairment for the left leg under the A.M.A., *Guides* is entitled to greater weight in this case. Dr. Hellman provided medical rationale to support his opinion, while Dr. Allen did not provide sufficient medical rationale to support an opinion that appellant had a class 4 permanent impairment under Table 16-3. Dr. Hellman, the medical adviser explained that he would adjust the grade C impairment using GMFH of 1 (mild problem), GMPE of 1 (mild problem), and GMCS of 0 (no available clinical studies). This results in a grade A, class 2 permanent impairment of 21 percent to the left leg.¹⁰ The Board thus finds this represents the weight of the medical evidence in this case.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.¹¹

There is, however, a remaining issue with respect to MMI. The period covered by a schedule award commences on the date that the employee reaches MMI from residuals of the employment injury.¹² OWCP’s medical adviser opined that this occurred one year after the total knee replacement surgery, although he reported he did not know the date of the surgery. OWCP used the date of January 21, 2012 as MMI, which is one year after the meniscal surgery, not the total knee replacement surgery. While the record does not contain a surgical report, Dr. Payne indicated the date of total knee arthroplasty surgery was December 17, 2012. On return of the case record, OWCP should make proper findings with respect to the date of MMI in this case.

¹⁰ A.M.A., *Guides* 511, Table 16-3.

¹¹ A claim for an increased permanent impairment based on new medical evidence is not a request for reconsideration and is not subject to reconsideration request time limitations or to the clear evidence of error standards. *R.P.*, Docket No. 10-1123 (issued January 25, 2011).

¹² *Albert Valverde*, 36 ECAB 233, 237 (1984).

LEGAL PRECEDENT -- ISSUE 2

Section 8114(d) of FECA provides:

“Average annual earnings are determined as follows:

(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay--

(A) was fixed, the average annual earnings are the annual rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week, and 260 if employed on the basis of a 5-day week.

(2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection.

(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in federal employment, and of other employees of the United States in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within one year immediately preceding his injury.”

Sections 2.900.4 and 2.900.12 of OWCP procedures provide that, when computing compensation for census workers, when disability did not exceed 90 days, compensation should be paid on a daily basis according to section 8114(c). For enumerators who ordinarily worked

4.5 hours a day, 4 days a week, where disability extended beyond 90 days and the claimant had similar employment during the years prior to the injury, compensation should be paid in accordance with section 8114(d)(1) and (2). Otherwise, it should be based on a weekly basis using the following formula: 150 times the actual daily wage divided by 52. The actual daily wage should be determined by multiplying the hourly pay rate by 4.5 hours.¹³

ANALYSIS -- ISSUE 2

Appellant raised the issue of pay rate at the March 9, 2015 hearing. The pay rate for compensation purposes is determined under 5 U.S.C. § 8114(d). As noted above, 5 U.S.C. § 8114(d)(1) applies if the employee worked in the position during substantially the whole year prior to the injury. That is not applicable in this case, as appellant had only worked since late April 2010 and the injury occurred on May 18, 2010. Moreover, 8114(d)(2) is not applicable, as the position would not have afforded employment for substantially a whole year. The employing establishment indicated that appellant was a temporary employee whose employment would have ended on July 26, 2015.

Since neither 5 U.S.C. § 8114(d)(1) nor (2) would apply, FECA Circular 10-01 indicates that the pay rate is determined by the formula noted in 5 U.S.C. § 8114(d)(3). The hourly wage is multiplied by 4.5 to determine the daily wage, then the daily wage multiplied by 150, and the weekly wage calculated by dividing by 52. Using the information provided by the employing establishment of \$17.50 per hour, this results in a daily wage of \$78.75. The daily wage multiplied by 150 is \$11,812.50, and divided by 52 results in a pay rate of \$227.16 per week. Based on the evidence of record, the Board finds that OWCP properly determined appellant's pay rate in this case.

CONCLUSION

The Board finds the probative evidence does not establish more than 21 percent left leg permanent impairment and 2 percent left arm permanent impairment. As to the date of MMI, additional findings are required. The Board further finds that OWCP properly determined appellant's pay rate for compensation purposes.

¹³ Federal (FECA) Procedure Manual, *supra* note 4 at 2.901.10 (February 2013); *see* sections 2.900.4.c and 2.900.12 (March 2011); *see also* 5 U.S.C. §§ 8114(c), 8114(d)(1).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 15, 2015 is affirmed with respect to the degree of permanent impairment in the left leg and left arm, and with respect to pay rate. It is set aside with respect to the date of MMI and remanded for further development.

Issued: February 12, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board