

**United States Department of Labor
Employees' Compensation Appeals Board**

R.M., Appellant)	
)	
and)	Docket No. 15-0461
)	Issued: March 22, 2016
DEPARTMENT OF JUSTICE, U.S. MARSHALS)	
SERVICE, Del Rio, TX, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Alan J. Shapiro, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 24, 2014 appellant, through counsel, filed a timely appeal of a September 2, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP used the proper pay rate when paying appellant's schedule award.

On appeal counsel argues that the decision is contrary to law and fact.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On February 14, 1990 appellant, then a 34-year-old deputy marshal, filed a traumatic injury claim (Form CA-1) alleging that on February 13, 1990 he injured his right knee while jogging in preparation for a fitness examination. OWCP accepted the claim for right knee dislocation.² Appellant did not stop working.

On May 31, 1990 appellant underwent a right partial lateral medial meniscectomy surgery. OWCP paid him wage-loss compensation at the augmented rate of 75 percent based on a weekly pay rate of \$651.44 in effect at the time of his May 30, 1990 work stoppage. Appellant returned to full-duty work on June 11, 1990.

On March 7, 2002 OWCP granted appellant a scheduled award for 10 percent permanent impairment of his right lower extremity under file number xxxxxx192. The pay rate used by OWCP was \$651.44, the pay rate at the time of appellant's May 30, 1990 work stoppage.

On August 12, 2004 appellant filed a traumatic injury claim alleging that on August 11, 2004 he injured his left knee when his heel got caught in the ground and his knee went the wrong way. OWCP accepted the claim for left knee lateral torn meniscus.³ Appellant did not stop work, but returned to full-duty work on October 7, 2004.

On January 19, 2005 appellant filed a traumatic injury claim alleging that on January 17, 2005 he injured his right knee while jogging when he stepped in a hole and fell on his right side. OWCP accepted the claim for right knee meniscus lateral cartilage tear, right lower leg osteoarthritis and displaced lumbar intervertebral disc.⁴ Appellant did not stop work, but returned to full-duty work on February 1, 2006.

On December 5, 2007 appellant filed a traumatic injury claim alleging that on December 3, 2007 he injured his left knee at the gym while doing leg extensions. OWCP accepted the claim for left knee lateral collateral ligament sprain, left medial meniscus tear and left lower leg localized primary osteoarthritis.⁵ Appellant continued to work light duty, but returned to full-duty work on April 7, 2008. The facts and circumstances surrounding the prior appeal are incorporated by reference. The relevant facts are set forth below.

On March 16, 2009 OWCP combined file number xxxxxx072, xxxxxx417 and xxxxxx087 with claim file number xxxxxx192. It advised that the master file number would be xxxxxx192.

² OWCP assigned file number xxxxxx192.

³ OWCP assigned file number xxxxxx087.

⁴ OWCP assigned file number xxxxxx072.

⁵ OWCP assigned file number xxxxxx417.

The Board, in an October 2, 2012 under OWCP File No. xxxxxx072, affirmed OWCP's decisions dated November 9 and December 5, 2011 denying appellant's request for a merit review on the denial of his request for an additional schedule award for appellant's right lower extremity.⁶

By decision dated February 26, 2013, OWCP granted appellant a 26 percent left leg permanent impairment and an additional 16 percent right leg impairment. The period of the award was for 120.96 weeks and ran from January 17, 2013 through May 13, 2015. OWCP calculated appellant's effective pay rate based on his pay as of May 30, 1990, which was \$651.44.

By letter dated March 1, 2013, counsel requested that OWCP provide the information used to calculate the weekly pay rate used in the February 26, 2013 schedule award. He noted that appellant believed the pay rate used was incorrect.

On April 24, 2013 OWCP informed counsel that the schedule award determination had been issued in another claim and that if appellant disagreed he could appeal the decision.

On May 9, 2013 appellant agreed to receive a lump-sum settlement for his February 26, 2013 schedule award. The form noted that he agreed to the following term:

“[T]hat payment of such lump sum will represent full and final settlement of [appellant's] schedule award for the period noted above in connection with my injury of February 13, 1990 and that no further monetary compenstion benefits will be extended to me for the duration of the schedule award.”

In a letter dated May 14, 2013, appellant's counsel stated that they believed the pay rate used was incorrect as it was too low. He again requested the basis for determining the pay rate as he believed OWCP should have used a 2007 pay rate.

In the second appeal under OWCP File No. xxxxxx072, the Board in a June 4, 2013 decision affirmed OWCP's December 11, 2012 decision denying reconsideration on the denial of appellant's claim for an additional schedule award for his right lower extremity as he failed to submit any medical evidence in support of his request.⁷

In a letter dated June 11, 2013, appellant's counsel requested reconsideration on the issue of pay rate. He noted that pay rate was not an issue in the appeal before the Board so OWCP was not precluded from providing the requested information on how the pay rate was determined. Counsel asked why OWCP used a 1990 employment injury pay rate instead of the 2005 employment injury pay rate.

In a June 14, 2013 letter, OWCP indicated that the pay rate used in the February 26, 2013 schedule award determination was May 30, 1990 with an annual salary of \$33,657.00. It noted

⁶ Docket No. 12-683 (issued October 2, 2012).

⁷ Docket No. 13-531 (issued June 19, 2013).

that the pay rate was based on the date disability began as verified by the employing establishment.

On June 18, 2013 appellant, through counsel, appealed the February 26, 2013 schedule award to the Board. The Board assigned Docket No. 13-1548.

By letter to OWCP dated July 8, 2013, counsel argued that the pay rate for appellant's most recent claim file number xxxxxx417 should have been used instead of the pay rate for the original injury of February 23, 1990 under file number xxxxxx192. He asked why the pay rate for the most recent injury and claim had not been used.

By letter dated July 24, 2013, OWCP informed appellant's counsel that it used the pay rate as of May 30, 1990 instead of December 3, 2007 as no compensation had been paid under appellant's recent OWCP claims. It noted that the case records were maintained separately and that the correct pay rate was used.

By decision dated March 12, 2014, the Board affirmed the February 26, 2013 schedule award decision.⁸ The Board found that appellant had no greater than a 26 percent left lower extremity impairment and a 26 percent right lower extremity impairment, for which he received schedule awards.

On July 1, 2014 appellant's counsel requested reconsideration on the pay rate used in calculating appellant's February 26, 2013 schedule award determination. He argued that OWCP should have used appellant's pay rate for the December 3, 2007 employment injury, when he sustained another injury, rather than the pay rate of May 30, 1990, the date used for the first injury of February 13, 1990. In support of his request, counsel submitted W2 forms for 2005, 2007, and 2010.

By decision dated September 2, 2014, OWCP denied modification. It found that the correct pay rate had been used in calculating the February 26, 2013 schedule award.

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

⁸ Docket No. 13-1548 (issued March 12, 2014).

⁹ 20 C.F.R. § 10.404(b)

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

prior disability, the applicable pay rate is the greatest of the established pay rates.¹¹ Where there was no prior injury-related disability from work, the date-of-injury pay rate should be used.¹²

ANALYSIS

In the most recent appeal, the Board affirmed OWCP's February 26, 2013 decision granting appellant a schedule award for 26 percent left lower extremity permanent impairment and an additional 16 percent right lower extremity impairment. Appellant does not challenge the underlying schedule award, but contends that OWCP should have used his pay rate as of December 3, 2007, the date of his most recent traumatic injury under file number xxxxxx417 instead of May 30, 1990, the date of disability under file number xxxxxx192 that was used by OWCP to calculate his pay rate.

As noted above, the February 26, 2013 schedule award was issued for a 26 percent left leg permanent impairment and an additional 16 percent right leg impairment. In awarding compensation, OWCP relied on appellant's May 30, 1990 right knee dislocation date of disability weekly pay rate of \$651.44. Counsel argued before OWCP that the award should have been based on the pay rate in effect as of December 3, 2007, the date appellant sustained the most recent traumatic injury of his left knee, or January 17, 2005, the date of appellant's second accepted right knee injury. While appellant has submitted copies of W2 forms regarding his salary, the record currently on appeal does not contain appellant's pay rate information from the employing establishment pertaining to his August 11, 2004 accepted left knee injury, his January 17, 2005 accepted right knee injury, or his December 3, 2007 accepted left knee injury.

The situation in this case is similar to that in *D.G.*,¹³ 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 his subsequent injuries. For this reason, the Board remanded the case 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.

Pay rate for compensation purposes is defined in section 8101(4) of FECA as the monthly pay at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work with the United States, whichever is greater.¹⁴ OWCP's procedures state that the effective pay rate for schedule awards for traumatic injuries without prior disability is determined by the date-of-injury date and for traumatic injury claims with prior disability it is based on the date of injury, date disability began, or date of recurrence, whichever is greatest.¹⁵ Appellant sustained new traumatic injuries on August 11,

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.*

¹³ Docket No. 08-626 (issued July 16, 2008).

¹⁴ 5 U.S.C. § 8101(4); *see M.B.*, Docket No. 09-176 (issued September 23, 2009).

¹⁵ *See supra* note 11.

2004, January 17, 2005 and December 3, 2007. As he has not sustained a recurrence of disability, he is entitled to the greater of the pay rates between May 30, 1990 the date disability began for his February 13, 1990 employment injury and his August 11, 2004, January 17, 2005 or December 3, 2007 employment injuries. The Board had long held that rate of pay for schedule award purposes is the highest rate that satisfies the terms of section 8104(4).¹⁶ As the record contains no information regarding appellant's pay rate as of his August 11, 2004, January 17, 2005, or December 3, 2007 employment injuries, the case must therefore be remanded. On remand OWCP should request the appropriate pay rate information from the employing establishment and determine the greater of the pay rates for schedule award purposes.¹⁷ Accordingly, the case shall be remanded for further development to be followed by a *de novo* decision.

CONCLUSION

The Board finds that this decision is not in posture for decision as to the proper pay rate for appellant's schedule award and that further development of the evidence is required on this issue.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 2, 2014 is set aside and the case remanded for further proceedings consistent with the above opinion.¹⁸

Issued: March 22, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁶ R.S., 58 ECAB 362 (2007).

¹⁷ See *D.H.*, Docket No. 07-427 (issued January 7, 2008).

¹⁸ James A. Haynes, Alternate Judge, participated in the preparation of this decision but was no longer a member of the Board effective November 16, 2015.