

FACTUAL HISTORY

On December 3, 2012 appellant, then a 58-year-old electrical equipment repairer, filed a traumatic injury claim (Form CA-1) alleging that he developed severe pain and burning in his neck, shoulders, arms, back, and both legs on November 27, 2012. In a separate statement, he asserted that he was attempting to clear a room on November 27, 2012 and to move a 600-pound generator. The tires on the generator were flat, and when appellant pulled on it, he fell to the floor experiencing severe pain in his neck, shoulders, arms, back, and legs.

The employing establishment provided appellant with an authorization for examination and/or treatment (Form CA-16) on December 4, 2012. Appellant's attending physician, Dr. Samy F. Bishai, an orthopedic surgeon, examined appellant on December 4, 2012 and described appellant's attempt to move the generator on November 27, 2012. He found loss of range of motion in both shoulders and diagnosed herniated lumbar disc with radiculopathy, internal derangement of the shoulders bilaterally, and cervical disc syndrome with radiculopathy.

Appellant underwent a nerve conduction velocity study on December 5, 2012 which demonstrated extended entrapment of the posterior sciatic nerve at L5-S1. He also underwent left shoulder x-rays, which demonstrated lateral downsloping of the acromion.

OWCP requested additional factual and medical information by letter dated December 28, 2012.

By decision dated February 11, 2013, OWCP denied appellant's claim on the basis that he failed to provide medical evidence of a specific diagnosed condition resulting from his accepted employment incident.

On February 4, 2013 the employing establishment indicated that light-duty work was available. Appellant accepted the light-duty position on February 12, 2013. He requested an oral hearing on February 21, 2013 from OWCP's Branch of Hearings and Review.

An OWCP hearing representative, following a preliminary review, issued a decision on May 22, 2013, which set aside and remanded the February 11, 2013 decision for OWCP to refer appellant for a second opinion evaluation.

On June 6, 2013 OWCP referred appellant to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion evaluation. In his July 8, 2013 report, Dr. Dinenberg described appellant's November 27, 2012 employment incident as attempting to move a 600-pound generator and falling down hitting his buttocks on the ground and his left shoulder into a wall. He reviewed a left shoulder magnetic resonance imaging scan which demonstrated acromioclavicular impingement with no gross rotator cuff tear or labral tear, as well as tendinopathy of the subscapularis tendon, and advanced degenerative changes of the acromioclavicular joint. Dr. Dinenberg found forward flexion of the left shoulder to 100 degrees, abduction of 90 degrees with complete supraspinatus and external rotation strength. He reported that appellant had positive impingement sign of the left shoulder and that the acromioclavicular joint on the left was tender to palpation. Dr. Dinenberg also found that appellant had positive cross arm pain. He diagnosed cervical sprain and strain, degenerative disc

disease of the cervical spine, lumbar sprain and strain with right lower extremity radiculopathy, lumbar degenerative disc disease with multiple levels of severe spinal stenosis, degenerative disease of the bilateral hips, and bilateral shoulder impingement.

Dr. Dinenberg responded to OWCP's questions and opined that appellant's left shoulder impingement was connected to his November 27, 2012 employment incident. He noted that appellant struck his left shoulder against a wall as a result of his fall and that this was the etiology of his left shoulder pain. Dr. Dinenberg found that the employment incident resulted in decreased range of motion of the left shoulder and a positive impingement sign. He further determined that appellant's lumbosacral sprain and strain with right lower extremity radiculopathy as well as his cervical sprain and strain were related to appellant's November 27, 2012 work incident. Dr. Dinenberg concluded that appellant was partially disabled and should avoid bending, kneeling, climbing, crawling, or stooping as well as work above shoulder level bilaterally. He provided a lifting, pushing, and pulling restriction of 20 pounds.

By decision dated July 19, 2013, OWCP accepted appellant's claim for left shoulder impingement, cervical strain, and lumbar back sprain with right lower extremity radiculopathy.

Dr. Bishai examined appellant on August 20, 2013 and found tenderness in the left shoulder overlying the anterior, lateral, and posterior aspects of the left shoulder joint. He reported forward elevation of 80 degrees, backward elevation of 10 degrees, abduction of 95 degrees and adduction of 15 degrees with external rotation of 50 degrees, and internal rotation of 20 degrees. On October 16, 2013 Dr. Bishai found that appellant's left shoulder demonstrated decreased abduction of 80 degrees with the remainder of his left shoulder range of motion consistent from August 20, 2013. He examined appellant on November 20, 2013, January 30, February 28, and April 8, 2014 finding that appellant's left shoulder range of motion was consistent with his October 16, 2013 report. In his April 8, 2014 report, Dr. Bishai stated that appellant had reached maximum medical improvement as of that date. He stated that based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*)² appellant was entitled to a schedule award based on loss of range of motion "because the reduced range of motion of this man's shoulder has indeed been the most disabling part of this patient's injury to the left shoulder joint." Dr. Bishai utilized Table 15-34³ of the A.M.A., *Guides* and found that 80 degrees of flexion was 9 percent impairment, that 10 degrees of extension was 2 percent impairment, that 80 degrees of abduction was 6 percent impairment, that 15 degrees of adduction was 1 percent impairment, that 20 degrees of internal rotation was 4 percent impairment, and that 50 degrees of external rotation was 2 percent impairment resulting in 24 percent permanent impairment of the left upper extremity.

Appellant filed a claim for compensation (Form CA-7) requesting a schedule award on May 2, 2014. On the reverse of the form, the employing establishment indicated that his annual salary on November 27, 2012 was \$48,573.62. OWCP's medical adviser reviewed Dr. Bishai's impairment rating on May 13, 2014 and agreed with the method of assessing the impairment and

² A.M.A., *Guides*, 6th ed. (2009).

³ *Id.* at 475, Table 15-34.

the amount of the impairment rating. In a note dated July 29, 2014, he opined that appellant reached maximum medical improvement on April 8, 2014 as found by Dr. Bishai.

OWCP contacted the employing establishment and noted that the employing establishment reported that appellant earned \$23.26 per hour with no premium pays for an annual salary of \$48,543.62 rather than \$48,573.62 as reported on the (Form CA-7). The employing establishment stated that appellant did not stop work until December 4, 2012, that he received continuation of pay from December 4, 2012 to January 6, 2013, and that he returned to work full time on January 7, 2013. On August 11, 2014 it stated that appellant worked a second shift and earned \$23.26 per hour with an additional \$1.74 per hour shift differential resulting in \$25.00 per hour for 80 hours during a two-week period. OWCP determined that his base pay rate was \$23.26 per hour at the time he first stopped work on December 4, 2012 and that he received night differential of 7.5 or \$1.74 per hour resulting in \$69.78 weekly night differential. It further determined that appellant's weekly base rate was \$933.53 added to \$69.78, resulting in \$1,003.31 for his weekly pay rate. OWCP found that he was entitled to 74.88 weeks of compensation due to 24 percent permanent impairment of the right upper extremity, or \$11,824.71.

By decision dated August 14, 2014, OWCP granted appellant a schedule award for 24 percent permanent impairment of his left arm. It determined that he was entitled to 74.88 weeks of compensation at the 75 percent rate or \$752.48 per week. OWCP stated that the effective date of pay rate was December 4, 2012 and that appellant was entitled to \$11,824.72 from April 8 through July 26, 2014 with compensation payments of \$3,009.93 continuing every four weeks through September 14, 2015.

Appellant requested an oral hearing on August 19, 2014. He also requested a lump sum payment of his schedule award. In a letter dated December 1, 2014, OWCP informed appellant that the lump sum value of his schedule award was \$29,480.82. Appellant requested a lump sum payment of his schedule award on December 5, 2014.

Appellant's representative appeared at the oral hearing on March 11, 2015 before an OWCP hearing representative. He argued that OWCP had utilized an incorrect pay rate in calculating appellant's schedule award as no CPIs were included. Appellant testified that he continued to perform his date-of-injury position. Appellant's representative argued that appellant's pay rate should be based on his date of maximum medical improvement, April 8, 2014. In the alternative, he argued that, if based on his date of disability, December 4, 2012, appellant was entitled to CPIs for March 2013, March 2014, and March 2015.

By decision dated May 26, 2015, the hearing representative affirmed OWCP's August 14, 2014 decision, finding that there was no medical evidence supporting more than 24 percent permanent impairment of the left upper extremity and that appellant was not contesting the amount of the schedule award, but instead the rate of pay and CPIs. She found that OWCP utilized the correct pay rate, December 4, 2012, the date disability began, to calculate appellant's schedule award payment.

LEGAL PRECEDENT

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly rate.⁴ Section 8101(4) provides that 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 six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.⁵ OWCP procedures provide that, if the employee did not stop work on the date of injury or immediately afterwards, defined as the next day, the record should indicate the pay rate for the date of injury, and the date disability began. The greater of the two should be used in computing compensation, and if they are the same, the pay rate should be effective on the date disability began.⁶

Section 8146(a) of FECA provides that compensation payable on account of disability or death which occurred more than one year before the effective date of a cost-of-living increase (determined in accordance with the provisions of the section) shall be increased by the percent of the increase.⁷ Legislative history shows that this phrase means compensation payable for an employment-related condition where the entitlement to such compensation occurred more than one year before the effective date of the cost-of-living increase.⁸

In cases of disability, a beneficiary is eligible for cost-of-living adjustments under section 8146(a) where injury-related disability began more than one year prior to the date the cost-of-living adjustment took effect. The employee's use of continuation of pay, as provided by section 8118, or of sick or annual leave during any part of the period of disability does not affect the computation of the one-year period.⁹ The disability need not have been continuous for the whole year before the increase.¹⁰

When an injury does not result in disability but compensation is payable for permanent impairment, a beneficiary is eligible for cost-of-living adjustments under section 8146(a) of FECA where the award for such impairment began more than one year prior to the date the cost-of-living adjustment took effect.¹¹ When there is prior injury-related disability, OWCP

⁴ See 5 U.S.C. §§ 8105-07.

⁵ *Id.* at § 8101(4). *K.B.*, Docket No. 13-569 (issued June 17, 2013).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(3) (August 2012).

⁷ 5 U.S.C. § 8146(a).

⁸ *Franklin L. Armfield*, 29 ECAB 500 (1978) (holding that the claimant was not eligible for a cost-of-living increase, as provided by section 8146(a), unless the date of his entitlement to compensation occurred more than a year before the effective date of the cost-of-living increase).

⁹ 20 C.F.R. § 10.420(a); *supra* note 6, *Computing Compensation*, Chapter 2.901.16(a) (March 2014).

¹⁰ *Id.*

¹¹ 20 C.F.R. § 10.420(b).

procedures indicate that the CPI start date for the schedule award is the effective date of the applicable pay rate.¹²

ANALYSIS

The Board finds that OWCP correctly determined the pay rate used to issue appellant's schedule award. However, the Board further finds that this case is not in posture for a decision reporting CPI adjustments.

Appellant's representative challenged OWCP's use of the date of disability in calculating appellant's schedule award. He alleged that appellant's pay rate should be based on the date of last exposure. The Board finds that OWCP properly determined that appellant's schedule award based on his traumatic injury claim should be based on his date of disability, December 4, 2012.¹³ OWCP procedures provide that a schedule award based on a traumatic injury should have a pay rate date based on the date of injury, the date disability begins or the date of recurrence of disability whichever is greater. Appellant has not alleged a recurrence of disability so the recurrence pay rate is not applicable. The record establishes that his date of injury, November 27, 2012, and his date of disability, December 4, 2012, pay rates are the same. Therefore, the Board finds that the appropriate date for pay rate in this case is December 4, 2012¹⁴ as utilized by OWCP.

Appellant's representative further questioned OWCP's failure to apply CPI adjustments to the December 4, 2012 pay rate used to calculate the August 14, 2014 schedule award. OWCP procedures support that appellant is entitled to any CPI adjustments occurring one year after the December 4, 2012 pay rate date and prior to his date of maximum medical improvement. Thus any CPI adjustments after December 4, 2013 should be included in his pay rate for his April 8, 2014 schedule award.¹⁵

OWCP's calculations for determining appellant's pay rate for the purposes of his schedule award did not include any CPI adjustments. It discussed his yearly salary on November 27, 2012 and weekly salary based on his earnings on December 4, 2012.¹⁶ The May 26, 2015 OWCP decision failed to make findings on CPI adjustments after December 4, 2013.

¹² *Supra* note 6 at Chapter 2.900 Exhibit 1 (August 2012) (Determining Effective Pay Rate Date for Schedule Awards).

¹³ *Id.*, but see *D.D.*, Docket No. 15-193 (issued May 11, 2015) (finding that where an injury is sustained over a period of time, the pay rate for a schedule award on the date of last exposure is appropriate).

¹⁴ *Supra* note 6 states that, if the employee did not stop work on the date of injury or the next day, and the disability began at a later date, the case record should show the pay rate for both the date of injury and the date disability begins. The greater of the two will be used in computing compensation. If they are the same, the pay rate should be effective on the date disability begins.

¹⁵ *Supra* note 6 at Chapter 2.900 Exhibit 1 (August 2012) (Determining Effective Pay Rate Date for Schedule Awards).

¹⁶ The Board notes that these salary amounts are the same.

On remand, OWCP shall issue an appropriate final decision on appellant's entitlement to schedule award compensation with a clear explanation of how it calculated the amount of the award, including the application of CPI adjustments.¹⁷

CONCLUSION

The Board finds that OWCP properly determined the pay rate used to issue appellant's schedule award. The Board further finds, however, that the case is not in posture for a decision as OWCP did not address CPI adjustments in formulating his schedule award.

ORDER

IT IS HEREBY ORDERED THAT the May 26, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further development consistent with this decision of the Board.

Issued: May 6, 2016
Washington, DC

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

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

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

¹⁷ The Board further notes that appellant requested a lump sum settlement of his schedule award in accordance with 5 U.S.C. § 8135 of FECA. OWCP's procedures provide that there is no provision for inclusion of possible future CPIs at the time a lump sum schedule award is calculated. *Supra* note 6, *Computing Compensation* Chapter 2.901.16(a)(6) (March 2014).