

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

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**R.M., Appellant**

**and**

**DEPARTMENT OF THE NAVY, FLEET  
FORCES COMMAND - SHIPYARDS, NAVAL  
SHIPYARD, Norfolk VA, Employer**

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**Docket No. 16-0532  
Issued: August 9, 2017**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 19, 2016 appellant filed a timely appeal from a July 28, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

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<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. 20 C.F.R. § 501.3(e)-(f). The 180<sup>th</sup> day from July 28, 2015, the date of OWCP's last decision, was January 24, 2016. As this fell on a Sunday, the appeal would have been due the following business day which was Monday, January 25, 2016. Since using January 28, 2016, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is January 19, 2016, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUES**

The issues are: (1) whether appellant has established more than 59 percent permanent impairment of his right lower extremity, for which he previously received schedule awards; (2) whether OWCP used the proper pay rate in calculating appellant's schedule award pursuant to 5 U.S.C. § 8101(4); and (3) whether appellant has established that his schedule award should be paid at the augmented rate.

On appeal appellant contends that his schedule award should be paid at the 75 percent augmented pay rate and his weekly pay rate should be greater.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 6, 1991 appellant, then a 39-year-old woodworker, injured his right knee while in the performance of duty. OWCP accepted his claim for contusion of right knee, tear of medial meniscus right knee, chondromalacia patellae, and post-traumatic arthritis of the right knee. It paid appellant compensation on the supplemental roll from March 3, 1998 until August 9, 1999. Appellant received Office of Personnel Management disability retirement benefits as of September 4, 1999.

Appellant underwent authorized right knee arthroscopies on April 7, 1992 and March 3, 1997, as well as an authorized total right knee arthroplasty on March 25, 2013.

By decision dated November 24, 1992, OWCP issued appellant a schedule award for seven percent permanent impairment of his right leg for the period May 26 to October 14, 1992. The award ran from May 26 to October 14, 1992 and it was paid at the augmented compensation rate of 75 percent.

When appellant filed claims for compensation (Forms CA-7) on January 7, 1997 and April 30, 1998, he listed his three children as dependents. His youngest child was born on July 20, 1981. Additionally, when appellant filed a claim for a schedule award on April 22, 2009, he listed his wife as a dependent.

On August 2, 2012 OWCP issued a schedule award for a total of 26 percent impairment of the right lower extremity. The date of maximum medical improvement (MMI) was listed as March 3, 1998 and the award ran from March 3, 1998 to August 9, 1999 for a period of 74.88 weeks. The effective date of the pay rate was listed as August 13, 1996 and the award was based on the augmented compensation rate of 75 percent. Appellant subsequently appealed that decision to the Board.

In a May 10, 2013 decision, the Board affirmed OWCP's determination in part, finding that appellant had no more than 26 percent permanent impairment of the right lower extremity.

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<sup>3</sup> Docket No. 13-0285 (issued May 10, 2013).

The Board, however, set aside the determination in part as the schedule award should have commenced on June 28, 2012. The Board remanded the case for OWCP to determine whether he was entitled to receive an increased pay rate due to the change.<sup>4</sup>

On remand, in a November 21, 2013 decision, OWCP issued an amended schedule award for 26 percent permanent impairment of the right lower extremity, which corrected the period of the award to run from June 28, 2012 to December 4, 2013, resulting in an increased monetary award. This award was paid based on the basic compensation rate of 66 2/3 percent and the effective date of pay rate was listed as March 3, 1997.

On May 12, 2014 appellant filed a claim for an increased schedule award (Form CA-7). He left blank the section of the form where he was asked to list his dependents. By letter dated May 23, 2014, OWCP informed appellant that the evidence of record was insufficient to support his claim because there was no narrative report outlining his current condition and discussing whether he had any permanent impairment as a result of his work-related condition. Appellant was provided 30 days to submit this information. No new evidence was timely submitted.

By decision dated July 8, 2014, OWCP denied appellant's claim for an increased schedule award, finding that the evidence of record was insufficient to demonstrate impairment greater than the 26 percent permanent impairment previously awarded.

On February 18, 2015 appellant requested reconsideration. In support thereof, he submitted a December 10, 2014 report wherein Dr. Jon H. Swenson, a Board-certified orthopedic surgeon, indicated that pursuant to Table 16-3 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6<sup>th</sup> ed. 2009), a diagnosis of status post right total knee arthroplasty fell within class 3, with a default impairment value of 37 percent.<sup>5</sup> Dr. Swenson then applied grade modifiers as follows: Functional History (GMFH) grade modifier of 1, a Physical Examination (GMPE) grade modifier of 2, and Clinical Studies (GMCS) grade modifier of 0, which he determined yielded a total adjustment of negative 6, or an impairment rating of 31 percent (grade A) of the right lower extremity.

On May 14, 2015 OWCP requested that an OWCP medical adviser review Dr. Swenson's report. In a June 3, 2015 report, the medical adviser concluded that appellant was entitled to a greater award. He noted that, in a September 16, 2014 report, Dr. Swenson indicated that appellant had right knee range of motion of 10 to 102 degrees, that there was good position of the components and good alignment, and that there was slight lucency about the tibial baseplate. The medical adviser noted that Table 16-23 of the A.M.A., *Guides* allowed a total of 30 percent permanent impairment for the described range of motion. He noted that the loss of range of motion would result in 10 percent impairment for flexion to 102 degrees, and 20 percent impairment for flexion contracture to 10 degrees.<sup>6</sup> The medical adviser then noted that the Knee Regional Guide, found at Table 16-3 indicated moderate-to-severe motion impairment would be

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<sup>4</sup> Docket No. 13-0285 (issued May 10, 2013).

<sup>5</sup> A.M.A., *Guides* 511.

<sup>6</sup> *Id.* at 529, Table 16-23.

classified in a class 4 category for the diagnosis of right knee replacement.<sup>7</sup> Then using the grade modifiers as set forth by Dr. Swenson, he concluded that a class 4, grade A impairment equated to 59 percent right lower extremity permanent impairment. The medical adviser noted that as appellant was previously issued awards based on 26 percent permanent impairment of the right lower extremity, this would allow an additional 33 percent permanent impairment for the right lower extremity. He noted that the date of MMI was December 10, 2014, the date of Dr. Swenson's report.

By decision dated June 4, 2015, OWCP vacated the July 8, 2014 decision and noted that appellant's case was now approved for an additional 33 percent permanent impairment of the right lower extremity. The date of MMI was found to be December 10, 2014.

By letter to appellant dated June 18, 2015, OWCP noted that it could not proceed with the claim because the employing establishment portion of the Form CA-7 claim was not completed. It specifically instructed him to ask the employing establishment to indicate his pay rate effective December 10, 2014. This letter did not list a date by which this information should be provided to OWCP. In a telephone note dated July 16, 2015, the claims examiner indicated that appellant informed him that the employing establishment would be sending additional pay information.

In a July 28, 2015 decision, OWCP issued a schedule award for an additional 33 percent permanent impairment of the right lower extremity. It found that the date of MMI was December 10, 2014 and determined that the award ran from December 10, 2014 to October 5, 2016. The effective date of rate of pay was listed as March 3, 1997 and the award was based on the basic compensation rate of 66 2/3 percent.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of FECA<sup>8</sup> and its implementing regulations<sup>9</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to insure equal justice under the law to all claimants, good administrative practice necessitates the use of single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>10</sup> The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.<sup>11</sup>

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<sup>7</sup> *Id.* at 511.

<sup>8</sup> 5 U.S.C. § 8107.

<sup>9</sup> 20 C.F.R. § 10.404.

<sup>10</sup> *Id.*

<sup>11</sup> 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 2.808.5a (February 2013).

The sixth edition requires identifying the impairment Class of Diagnosis (CDX) for the diagnosed condition, which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.<sup>12</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>13</sup>

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.<sup>14</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted appellant's claim for contusion of the right knee, tear of medial meniscus right knee, chondromalacia patellae, post-traumatic arthritis of the right knee, as well as a total knee replacement. It previously paid schedule awards totaling 26 percent permanent impairment of the right lower extremity. In a July 28, 2015 decision, OWCP issued a schedule award for an additional 33 percent permanent impairment of the right lower extremity.

Dr. Swenson applied the A.M.A., *Guides*, and determined that appellant was entitled to 31 percent permanent impairment of the right lower extremity. OWCP's medical adviser determined that appellant actually sustained 59 percent permanent impairment of his right lower extremity. He noted that pursuant to Table 16-3 appellant had undergone a total knee replacement and had a severe impairment class 4, based upon his loss of range of motion of the right knee. The medical adviser then used the grade modifiers as set by Dr. Swenson and determined that appellant had a grade A, class 4 impairment, which equaled 59 percent permanent impairment of the right lower extremity under Table 16-3 of the A.M.A., *Guides*. He correctly noted that as appellant had already received 26 percent permanent impairment of the right lower extremity, an additional award should be issued for 33 percent permanent impairment of the right lower extremity. The calculations of the medical adviser are supported by the A.M.A., *Guides*, and the medical evidence of record. Appellant has not submitted evidence of greater impairment.

The Board, therefore, finds that appellant has not established more than 59 percent permanent impairment of the right lower extremity.

### **LEGAL PRECEDENT -- ISSUE 2**

Under 5 U.S.C. § 8101(4), monthly pay means the monthly pay at the time of injury, 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

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<sup>12</sup> A.M.A., *Guides* 494-531.

<sup>13</sup> See *supra* note 11 at Chapter 2.808.6(f) (February 2013).

<sup>14</sup> See *id.*

full-time employment with the United States, whichever is greater. For a schedule award, the rate of pay is the highest rate which satisfies the terms of 5 U.S.C. § 8101(4).<sup>15</sup>

When an employee has a recurrence of disability more than six months after resuming regular, full-time employment with the employing establishment, under section 8101(4) of FECA, the employee is entitled to have his compensation increased based on his pay at the time of the recurrence of disability.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that the case not in posture as to the effective pay rate. As stated *supra*, section 8101(4) of FECA defines monthly pay for purposes of computing compensation as follows: 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.<sup>17</sup> Despite appellant's requests and the Board's directive in its May 10, 2013 decision, OWCP did not address the effective pay rate date in its July 28, 2015 decision. It made an attempt to obtain further information when it wrote him on June 18, 2015 and instructed him to have the employing establishment provide information with regard to his pay rate. The letter did not list a due date for submission of the evidence. A report of a telephone call indicates that on July 16, 2015, appellant informed the claims examiner that the employing establishment would be sending the information.

However, in the July 28, 2015 remand decision, OWCP listed the effective date of pay rate as March 3, 1997, without further explanation of how it selected that date pursuant to section 8101(4) of FECA. Section 10.126 of OWCP's regulations provides that a decision of OWCP shall contain findings of fact and a statement of reasons.<sup>18</sup> A final decision of OWCP must also include findings of fact and provide a correct description of the basis for the decision so that the parties of interest will have a clear understanding of the precise defect of the claim and the kind of evidence which would tend to overcome it.<sup>19</sup> The Board finds that OWCP failed to set forth proper findings and provide analysis in its decision as required under section 10.126 of OWCP's regulations.

The Board finds that the pay rate used in determining appellant's additional schedule award is not properly explained. On remand OWCP shall further develop the evidence as to the appropriate rate of pay, and issue a *de novo* decision.

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<sup>15</sup> *R.P.*, Docket No. 15-1291 (issued September 21, 2016).

<sup>16</sup> *J.R.*, Docket No. 14-1728 (issued June 17, 2015).

<sup>17</sup> 20 C.F.R. § 8101(4).

<sup>18</sup> *Id.* at § 10.126.

<sup>19</sup> *Hubert Jones, Jr.*, 57 ECAB 467 (2006); *Paul M. Colosi*, 56 ECAB 294 (2005).

### **LEGAL PRECEDENT -- ISSUE 3**

Compensation for impairment is computed based on the employee's effective pay rate and whether he or she has any eligible dependents.<sup>20</sup> Compensation will be paid at 66 2/3 percent or 75 percent of the effective pay when the employee has at least one dependent.<sup>21</sup> For purposes of entitlement to augmented compensation, a dependent includes: (1) a wife or husband; (2) an unmarried child under 18 years of age; (3) an unmarried child over 18 who is incapable of self-support; (4) a student, until he/she reaches 23 years of age or completes four years of school beyond the high school level; and (5) a wholly dependent parent.<sup>22</sup>

The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents, the employee is entitled to have his basic compensation augmented at the rate of 8 1/3 percent for a total of 75 percent of monthly pay.<sup>23</sup>

A wife is considered an employee's dependent if she is a member of the same household, is receiving regular contributions from the employee for her support, or if the employee has been ordered by a court to contribute to her support.<sup>24</sup> In determining dependency under FECA, the decisive test is whether the person for whom benefits are claimed as a dependent of the employee, in fact, looked to and relied in whole or in part, upon the contributions given by the employee as a means of maintaining or helping to maintain a customary standard of living.<sup>25</sup>

### **ANALYSIS -- ISSUE 3**

In its July 28, 2015 decision issuing an increased schedule award, OWCP indicated that appellant was to be paid at the basic compensation rate of 66 2/3 percent. On appeal appellant contends that he should be paid based on the augmented rate of 75 percent as he had a dependent.

The Board finds that the case is not in posture with regard to appellant's compensation rate. Appellant's youngest child was born on July 20, 1981, and would have turned 18 on July 20, 1999. There is also no evidence of record that any of appellant's children were under the age of 23 and still in school, or that appellant had an unmarried child over age 18 who is incapable of self-support. Accordingly, the record does not establish that he had any children who would qualify as dependents under FECA.

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<sup>20</sup> See 5 U.S.C. §§ 8107 and 8110; 20 C.F.R. § 10.404(c).

<sup>21</sup> *Id.* at § 10.404(b); *supra* note 11 at Chapter 2.808.7(f) (February 2013).

<sup>22</sup> 20 C.F.R. § 10.405(a).

<sup>23</sup> 5 U.S.C. § 8110(a); *id.* at § 10.405(a) and (b).

<sup>24</sup> *Id.* at § 8110(a)(2).

<sup>25</sup> See *W.A.*, Docket No. 13-0544 (issued July 2, 2013); see also *Nancy J. Masterson*, 52 ECAB 507 (2001); *Helyn E. Girmann*, 11 ECAB 557 (1960).

However, the record does support that appellant may have had a wife who qualifies as a dependent under FECA. The Board notes that when he filed a Form CA-7 claim for a schedule award on April 22, 2009, he listed his wife as a dependent. When appellant filed a claim for an increased schedule award on May 12, 2014, he did not complete the section of the claim form regarding dependents.

OWCP procedures provide that an indication on a claim form, such as a Form CA-1 (notice of traumatic injury) or Form CA-7 (claim for compensation), is usually sufficient to verify marital status, since both forms require certification of the information provided *via* the claimant's signature and have warnings pertaining to false statements. If evidence to the contrary is present, however, the claims examiner should develop the issue further and may request documentary evidence such as a marriage certificate. If necessary, the employing establishment may assist in verifying marital status in the initial stages of the claim.<sup>26</sup>

The Board, therefore, finds the case must be remanded for OWCP to further develop the factual evidence with regard to whether appellant had any eligible dependents. If appellant had an eligible dependent, he would have been entitled to compensation at the augmented rate of 75 percent.

### **CONCLUSION**

The Board finds that appellant has not established more than 59 percent permanent impairment of his right lower extremity for which he previously received schedule awards. However, the case is not in posture for decision as to the effective pay rate and compensation rate.

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<sup>26</sup> *Supra* note 11 at Part 2 -- Claims, *Compensation Rate*, Chapter 2.901.12 (February 2013).



**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 28, 2015 is affirmed in part and set aside in part. The case is remanded for further consideration consistent with this opinion.

Issued: August 9, 2017  
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