



## ISSUES

The issues are: (1) whether appellant met his burden of proof to establish more than eight percent permanent impairment of the right eye; and (2) whether OWCP used the proper pay rate in calculating appellant's schedule award.

On appeal appellant asserts that he was entitled to a schedule award pay rate based on the pay rate in effect at the time he retired in 2012.

## FACTUAL HISTORY

On May 23, 2001 appellant, then a 41-year-old letter carrier, injured the right side of his head and right eye when he walked into an open camper tailgate while delivering mail that day. He did not stop work. OWCP accepted right cornea abrasion and right contusion of face, scalp, and neck due to the May 23, 2001 employment injury.

Appellant continued letter carrier duties until August 19, 2010 when someone shot at his postal vehicle. He stopped work that day and did not return. The August 19, 2010 injury was accepted by OWCP.<sup>3</sup> Appellant was separated from the employing establishment on February 6, 2012.

Under the instant claim, on October 30, 2014 appellant filed a schedule award claim (Form CA-7). He submitted a report dated August 19, 2014 in which Dr. Jerry L. Franz, who practices pain medicine, advised that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),<sup>4</sup> under section 12-2 and Table 12-2, appellant had a right eye functional visual acuity score of 92. Dr. Franz then calculated appellant's impairment for visual acuity under Table 12-4, finding a class 1 eight percent visual impairment rating of the right eye. He indicated that appellant was at maximum medical improvement (MMI).

On December 1, 2014 Dr. Michael M. Katz, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical record including Dr. Franz's report. He advised that, since Dr. Franz was not a practicing ophthalmologist and his report did not include visual field testing results, a second opinion evaluation should be obtained from a Board-certified ophthalmologist for an impairment evaluation.

In August 2015 OWCP referred appellant to Dr. David I. Tasker, a Board-certified ophthalmologist, for a second opinion evaluation including an impairment rating. In a September 22, 2015 report, Dr. Tasker advised that appellant had developed glaucoma in both eyes, however, this condition was not related to the May 23, 2001 employment injury. Best corrected vision in each eye was 20/50 which, Dr. Tasker opined, was secondary to pronounced

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<sup>3</sup> The instant claim was adjudicated by OWCP under File No. xxxxxx368, and the 2010 injury under File No. xxxxxx395. Appellant has a separate appeal, Docket No. 17-1098, that is pending before the Board with regard to File No. xxxxxx395. File No. xxxxxx395 is not before the Board on the present appeal.

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

cataract formation and glaucoma effects. He concluded that it was impossible to perform an impairment evaluation on eyes that had developed significant visual loss from glaucoma.

On October 8, 2015 Dr. Katz, OWCP's medical adviser, again reviewed the record, including Dr. Tasker's report. He indicated that, upon review of Dr. Tasker's report, the entirety of appellant's visual issues at present would appear to stem from nonemployment-related glaucoma and cataract formation, and that, a further complicating factor was that the impairment rating was being performed approximately 14 years following the date of injury. Dr. Katz concluded that, out of fairness to the injured worker, Dr. Franz's conclusion of eight percent right eye impairment should be awarded, with August 19, 2014 as the date of MMI.

A pay rate memorandum in the record indicates that the date-of-injury (May 23, 2001) pay rate was used, with a base pay rate of \$39,692.00 per year. This yielded a weekly pay rate of \$763.31.

By decision dated August 1, 2016, OWCP granted appellant a schedule award for eight percent permanent impairment of the right eye, for 12.08 weeks of compensation, to run from August 19 to November 16, 2014. The pay rate utilized by OWCP was based on a weekly rate of \$763.31, with augmented (3/4) weekly compensation of \$572.68. The date of MMI was listed as August 19, 2014.

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

It is the claimant's burden of proof to establish that he sustained a permanent impairment of a scheduled member or function as a result of any employment injury.<sup>5</sup>

The schedule award provision of FECA<sup>6</sup> and its implementing federal regulations<sup>7</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from 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 ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>8</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>9</sup>

Section 8107(c)(19) of FECA provides that "[t]he degree of loss of vision or hearing under this schedule is determined without regard to correction."<sup>10</sup> The sixth edition of the

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<sup>5</sup> See *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> *Id.* at § 10.404(a).

<sup>9</sup> 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).

<sup>10</sup> 5 U.S.C. § 8107(c)(19).

A.M.A., *Guides* indicates that the evaluation of visual impairment is based on the functional vision score (FVS), which is the combination of an assessment of visual acuity, the ability of the eye to perceive details, necessary for activities such as reading and an assessment of visual field, the ability of the eye to detect objects in the periphery of the visual environment, which relates to orientation and mobility.<sup>11</sup> The A.M.A., *Guides* also allows for individual adjustments for other functional deficits, such as contrast and glare sensitivity, color vision defects and binocularity, stereopsis, suppression and diplopia, only if these deficits are not reflected in a visual acuity or visual field loss.<sup>12</sup> The A.M.A., *Guides*, however, specifically limits adjustment of the impairment rating for these deficits to cases which are well documented and states, “The adjustment should be limited to an increase in the impairment rating of the visual system (reduction of the FVS) by, at most, 15 points.”<sup>13</sup>

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

The Board finds this case is not in posture for decision regarding the extent of permanent impairment of appellant’s right eye.

The medical evidence relevant to appellant’s right eye impairment includes the August 19, 2014 report in which Dr. Franz, who practices pain medicine, advised that under section 12-2 and Table 12-2 of the A.M.A., *Guides*, appellant had a right eye functional visual acuity score of 92. Dr. Franz then calculated appellant’s impairment for visual acuity under Table 12-4, finding a class 1 eight percent visual impairment rating of the right eye. He indicated that appellant was at MMI.

Dr. Katz, an OWCP medical adviser, reviewed the medical record including Dr. Franz’s report. He advised that, since Dr. Franz was not a practicing ophthalmologist and his report did not include visual field testing results, a second opinion and impairment evaluation should be obtained from a Board-certified ophthalmologist.

In August 2015, OWCP referred appellant to Dr. Tasker, a Board-certified ophthalmologist, for a second opinion evaluation. In a September 22, 2015 report, Dr. Tasker advised that appellant had developed glaucoma in both eyes that was not related to the May 23, 2001 employment injury. Best corrected vision in each eye was 20/50 which, Dr. Tasker opined, was secondary to pronounced cataract formation and glaucoma effects. Due to his current condition, he concluded that it was impossible to perform an impairment evaluation on eyes that had developed significant visual loss from glaucoma.

Dr. Katz, OWCP’s medical adviser, again reviewed the record on October 8, 2015. He indicated that, upon review of Dr. Tasker’s report, the entirety of appellant’s visual issues at present would appear to stem from nonemployment-related glaucoma and cataract formation, and that a further complicating factor was that the impairment rating was being performed

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<sup>11</sup> A.M.A., *Guides*, *supra* note 4 at 282, 285

<sup>12</sup> *Id.* at 305.

<sup>13</sup> *Id.*

approximately 14 years after the date of injury. Dr. Katz indicated that, “out of fairness” to the injured worker, Dr. Franz’s conclusion of eight percent right eye permanent impairment should be awarded, with August 19, 2014 the date of MMI.

The Board concludes that, due to lack of definiteness of the medical opinions regarding the extent of appellant’s right eye permanent impairment related to the May 23, 2001 employment injury, the case must be remanded to OWCP for further development of the medical evidence. On remand, OWCP should obtain an additional report from its medical adviser which contains an explanation of greater rationale that includes citation to Chapter 12 of the A.M.A., *Guides*.<sup>14</sup> The Board has long held that only preexisting and not subsequently-acquired conditions are to be included in schedule award determinations.<sup>15</sup>

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done. As OWCP undertook development of the evidence by referring appellant to Dr. Tasker, it has the duty to secure an appropriate report addressing the relevant issues.<sup>16</sup>

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

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly rate.<sup>17</sup> 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.<sup>18</sup> The compensation rate for schedule awards is the same as compensation for wage loss.<sup>19</sup>

Section 2.900.5.a(3) of OWCP procedures provides 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.<sup>20</sup>

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<sup>14</sup> *Id.* at 281-319.

<sup>15</sup> See *Peter C. Belkind*, 56 ECAB 580 (2005).

<sup>16</sup> *Id.*

<sup>17</sup> See 5 U.S.C. §§ 8105-8107.

<sup>18</sup> *Id.* at § 8101(4).

<sup>19</sup> See 20 C.F.R. § 10.404(b); *K.H.*, 59 ECAB 495 (2008).

<sup>20</sup> *Supra* note 9 at Chapter 2.900.5.a(3) (September 2011).

Section 8146a 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.<sup>21</sup> 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.<sup>22</sup>

In cases of disability, a beneficiary is eligible for cost-of-living adjustments under section 8146a 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.<sup>23</sup> The disability need not have been continuous for the whole year before the increase.<sup>24</sup>

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.<sup>25</sup> When there is prior injury-related disability, OWCP procedures indicate that the consumer price index (CPI) start date for the schedule award is the effective date of the applicable pay rate.<sup>26</sup>

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

The Board has found this case is not in posture for decision regarding the extent of appellant's right eye permanent impairment, however, the Board finds that OWCP properly determined that appellant's schedule award for his May 23, 2001 employment injury should be based on his date of injury pay rate.<sup>27</sup> OWCP procedures provide that a schedule award based on a traumatic injury should have a pay rate based on the date of injury, the date disability begins, or the date of recurrence of disability, whichever is greater.<sup>28</sup> Appellant challenged OWCP's use of the date of injury, May 23, 2001, in calculating his schedule award. He alleged that his pay rate should have been based on his date of retirement in 2012. The record in this case does not

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<sup>21</sup> 5 U.S.C. § 8146(a).

<sup>22</sup> *Franklin L. Armfield*, 29 ECAB 500 (1978) (claimant 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).

<sup>23</sup> 20 C.F.R. § 10.420(a).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at § 10.420(b).

<sup>26</sup> Federal (FECA) Procedure Manual, *supra* note 20 at Chapter 2.900 Exhibit 1, *Determining Effective Pay Rate Date for Schedule Awards* (August 2012).

<sup>27</sup> *Id.*

<sup>28</sup> *See supra* note 20.

indicate that appellant had disability due to the May 23, 2001 employment injury. Appellant filed no claims for compensation other than the October 30, 2014 schedule award claim. There is no evidence that he received compensation other than for the schedule award under this claim. The Board therefore concludes that the appropriate date OWCP used as the pay rate for compensation purposes in this case was the date of injury, May 23, 2001.

The Board notes, however, that OWCP regulations provide that appellant is entitled to any CPI adjustments that occurred one year after the May 23, 2001 pay rate date and prior to his date of MMI on August 1, 2016.<sup>29</sup> Thus, any CPI adjustments after May 23, 2002 (one year following the date of injury) should be included in a schedule award pay rate.<sup>30</sup>

OWCP's calculations for determining appellant's pay rate for the purposes of his August 1, 2016 schedule award did not include any CPI adjustments. Thus, on remand, once OWCP determines the permanent impairment rating for appellant's right eye and recalculates the schedule award, OWCP should determine the proper CPI adjustment. Following this and other development deemed necessary, OWCP shall issue a *de novo* schedule award decision that includes a clear explanation of how it calculated the extent of right eye permanent impairment and the amount of the schedule award based on his date-of-injury pay rate, to include the application of CPI adjustments.<sup>31</sup>

### **CONCLUSION**

The Board finds this case is not in posture for decision regarding the extent of appellant's right eye permanent impairment. While OWCP properly determined the pay rate to be used for a schedule award, as it did not apply CPI adjustments in formulating the schedule award, any schedule award issued following remand should include appropriate CPI adjustments..

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<sup>29</sup> *Supra* note 25.

<sup>30</sup> *Id.*; see *K.G.*, Docket No. 15-1476 (issued May 6, 2016).

<sup>31</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 1, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 28, 2017  
Washington, DC

Christopher J. Godfrey, 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