

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

E.S., Appellant)	
)	
and)	Docket No. 16-1248
)	Issued: May 15, 2017
DEPARTMENT OF THE NAVY,)	
CHARLESTON NAVAL SHIPYARD,)	
Charleston, SC, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 25, 2016 appellant filed a timely appeal from a January 6, 2016 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 properly denied concurrent compensation for wage loss and a schedule award.

FACTUAL HISTORY

OWCP accepted that on March 26, 1986 appellant, then a 30-year-old shipfitter, filed a traumatic injury claim (Form CA-1) alleging a left knee contusion/sprain and a partial meniscal tear as a result of a fall onto a bulkhead while in the performance of duty.

¹ 5 U.S.C. § 8101 *et seq.*

On February 13, 1987 OWCP issued a schedule award for four percent permanent impairment of appellant's left lower extremity. It placed appellant on the periodic roll for disability effective June 16, 2002 and continued to receive payments on the periodic rolls.

On February 17, 2015 appellant requested a lump-sum schedule award for permanent impairment of his right lower extremity.

In a report dated March 12, 2015, Dr. Walter Blessing, a Board-certified surgeon, noted that he had amputated appellant's lower right leg on September 24, 2014 due to necrotic tissue and infection as a result of a badly ulcerated and infected right foot. He noted that maximum medical improvement was achieved in January 2015. Dr. Blessing noted that appellant had no preexisting conditions of the right foot or lower right leg prior to a fall on September 13, 2014. He opined that the fall had occurred due to appellant's previously-injured left knee collapsing while appellant was climbing steps. Dr. Blessing noted that an amputation of the right foot and below the knee of the right leg caused 100 percent permanent impairment.

By decision dated May 11, 2015, OWCP expanded the accepted conditions to include an ulcer, contusion, and osteomyelitis of the right foot.

OWCP forwarded Dr. Blessing's report to a district medical adviser (DMA) for review. In a May 21, 2015 report, the DMA noted that table 16-16 of the sixth edition American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) provided for 50 to 100 percent permanent impairment for amputation below the knee depending upon the location of the amputation. The DMA rated appellant's permanent impairment at 70 percent.

By letter dated June 2, 2015, OWCP informed appellant that it had determined permanent impairment of 70 percent for the right lower extremity. It noted that, because he was currently receiving periodic compensation payments, it was removing his request for a schedule award from its tracking system as of that date.

In a record of a telephone conversation on June 2, 2015, an OWCP representative explained to appellant that schedule awards could not be paid concurrently with his compensation for wage loss. Appellant contended, on the other hand, that the "National Office" had told him that a schedule award could be paid concurrently.

By letter dated June 5, 2015, appellant sent OWCP a copy of 5 U.S.C. § 8107. (R: 6/8/2015) He claimed that this section of the statute provided that he could receive compensation for wage loss and a schedule award concurrently. Alesia Rogers, who claimed assisting appellant witness, wrote a postscript to the letter claiming that an OWCP representative had informed appellant that section 8107 "overrides any policy or district interpretation; therefore, the scheduled awards for the foot and the leg should be paid."

In a record of a telephone conversation on June 8, 2015, an OWCP representative explained to appellant that 5 U.S.C. § 8108 prohibited concurrent payments of schedule awards and wage-loss compensation. Appellant replied by recalling the details of his case history and medical procedures.

In a record of a telephone conversation on June 10, 2015, an OWCP representative explained that the procedure manual prohibited concurrent payments of schedule awards and

wage-loss compensation. Appellant replied by referencing a federal court decision that he felt supported his position, stating that the foot and leg were two separate body parts. OWCP's representative explained that federal courts do not have jurisdiction over determinations of FECA entitlement and that, in this case, the foot and leg were both considered part of the lower extremities, not separate body parts. He further explained that consequential injuries were considered to be part of the same claim, rather than a separate claim. Appellant requested written correspondence explaining OWCP's position.

By letter dated June 11, 2015, OWCP cited the FECA procedure manual in order to explain why schedule awards and wage-loss compensation were not payable concurrently, but were payable consecutively.

On September 29, 2015 appellant responded, arguing that because his original work injury was to his left knee and leg, his claim for a schedule award should be payable concurrently with wage-loss compensation, as the request for a schedule award related to his right foot and leg.

In a notice of proposed decision dated November 4, 2015, OWCP found that FECA, the FECA procedure manual, and Board precedent explicitly barred claimants from receiving a schedule award concurrently with wage-loss compensation. It afforded appellant 30 days to submit additional argument or evidence.

Appellant replied on November 24, 2015. He reiterated his argument that a schedule award was payable concurrently with wage-loss compensation because his right leg had been amputated, while his original claim had been accepted for an injury to the left foot and leg.

By decision dated January 6, 2016, OWCP finalized its proposed decision denying appellant concurrent payment of a schedule award for his right leg amputation and wage-loss compensation under the same claim number.

LEGAL PRECEDENT

Pursuant to FECA,² the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.³

Section 8107 of FECA⁴ authorizes the payment of schedule awards for the loss or loss of use, of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment.⁵

² *Id.*

³ *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

Disability is not synonymous with physical impairment, which may or may not cause incapacity to earn wages.⁶ An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used in FECA and is not entitled to compensation for loss of wage-earning capacity.⁷ When, however, the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁸ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn, not upon actual wages lost.⁹

A schedule award is payable consecutively but not concurrently, with an award for wage loss for the same injury.¹⁰ A schedule award for one injury may be paid concurrently with compensation for wage loss paid for another injury, as long as the two injuries do not involve the same part of the body.¹¹

ANALYSIS

On February 17, 2015 appellant requested a schedule award for his right lower extremity. In his March 12, 2015 report, Dr. Blessing noted that he had amputated appellant's lower right leg on September 24, 2014 due to necrotic tissue and infection as a result of a badly ulcerated and infected right foot. He noted that appellant had no preexisting conditions in the right foot or lower right leg prior to a fall on September 13, 2014, and that the fall had occurred due to appellant's previously-injured left knee collapsing while appellant was climbing steps. On May 11, 2015 OWCP accepted the right leg conditions as consequential injuries to the accepted left leg injury under OWCP No. xxxxxx645. By letter dated June 2, 2015, OWCP informed appellant that, although he established 70 percent permanent impairment to the right lower extremity, as due to the accepted condition, as was currently receiving periodic compensation payments under OWCP File No. xxxxxx645 it was removing his request for a schedule award from its tracking system as of that date.

Appellant alleged that he was entitled to receive schedule award benefits and wage-loss benefits simultaneously because his schedule award was for an injury to the left lower extremity, while his schedule award claim was for injury to his right lower extremity. By decision dated

⁶ See *Fred Foster*, 1 ECAB 21 at 24-25 (1947) (finding that FECA provides for the payment of compensation in disability cases upon the basis of the impairment in the employee's capacity to earn wages and not upon physical impairment as such).

⁷ See *Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained an impairment of his legs because of work-related thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury).

⁸ *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

⁹ *George W. Coleman*, 38 ECAB 782 (1987).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.4.(a)(3) (February 2013).

¹¹ *Id.* at Chapter 2.808.4(a)(5). See *Michael J. Biggs*, 54 ECAB 595, 596-97 (2003).

January 6, 2016, OWCP denied appellant's concurrent payment of a schedule award for his right leg amputation and wage-loss compensation under the OWCP No.

Simultaneous receipt of schedule award and wage-loss compensation is barred while consecutive payment of benefits is permitted.¹²

The Board has previously held, in a factually similar case involving consequential injury and the current payment of wage-loss and schedule award benefits, *L.S.*,¹³ where the claimant had sustained injury to his right knee and right shoulder. He received schedule awards for permanent impairment to his right leg and right arm. The claimant subsequently submitted a claim for wage-loss compensation for a consequential left knee condition. However, the period claimed overlapped with the period of the schedule award paid for the right knee and shoulder. The Board found that such award of benefits was prohibited as a dual benefit for the same injury as it was well established under section 8116(a) that the claimant could not receive schedule award compensation concurrently with wage-loss compensation benefits arising from the same injury.¹⁴

Appellant argues that the injuries to his left and right legs were entirely separate incidents and that, as such, simultaneous compensation for wage loss and a schedule award were appropriate. The Board notes that in the case of *Charles R. Hollowell*,¹⁵ the Board found that to constitute the kind of intervening cause which will break the chain of causation of an earlier injury, the second incident must be competent to cause the disabling condition without reference to the earlier injury, and, moreover, there must be evidence to sustain a finding that such second incident did cause the condition. The Board noted that if the result of the second incident could not have developed without the presence of damage from the primary employment-related incident, that primary incident is not exonerated.

In the case before the Board, Dr. Blessing noted that appellant had no preexisting conditions of the right foot or lower right leg prior to a fall on September 13, 2014, and opined that the fall had occurred due to appellant's previously-injured left knee collapsing while appellant was climbing steps. The primary incident therefore caused the second incident and injury. The second incident did not stand alone. As such, OWCP properly accepted appellant's right leg conditions as consequential to the left leg injury. Dr. Blessing's opinion clearly opined that the latter injurious incident to the right leg occurred due to his accepted left leg condition.

The Board finds that OWCP properly denied concurrent compensation for wage loss and a schedule award, as the consequential injury to appellant's right knee for which he sought a schedule award was in fact as a result of the same injury for which he was already in receipt of wage-loss compensation.

¹² *Supra* note 10.

¹³ Docket No. 08-1270 (issued July 2, 2009).

¹⁴ *Id.*; see also *Dale Mackelprang*, 55 ECAB 174 (2003); Donna Y, Harris, Docket No. 00-686 (issued July 15, 2002).

¹⁵ 8 ECAB 352 (1955).

CONCLUSION

OWCP properly denied concurrent compensation for wage loss and a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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