



## **FACTUAL HISTORY**

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

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 in the performance of duty while jogging in preparation for a fitness examination. OWCP accepted this claim for right knee dislocation.<sup>4</sup>

Appellant filed another traumatic injury claim (Form CA-1) on August 12, 2004 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 this claim for left knee lateral torn meniscus.<sup>5</sup>

On January 19, 2005 appellant filed a traumatic injury claim (Form CA-1) 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 this claim for right knee meniscus lateral cartilage tear, right lower leg osteoarthritis, and displaced lumbar intervertebral disc.<sup>6</sup>

On December 5, 2007 appellant filed a traumatic injury claim (Form CA-1) 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.<sup>7</sup>

By letter dated March 16, 2009, OWCP informed appellant that it was combining File Nos. xxxxxx072, xxxxxx417, xxxxxx087, and xxxxxx192, with File No. xxxxxx192 designated the master file.

On December 14, 2012 appellant filed a claim for a schedule award (Form CA-7). By decision dated February 26, 2013, OWCP granted appellant schedule awards for 26 percent permanent impairment of left leg and 16 percent permanent impairment of right leg. The period of the awards was for 120.96 weeks and ran from January 17, 2013 through May 13, 2015.

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<sup>3</sup> Docket No. 12-0683 (issued October 2, 2012); Docket No. 13-0531 (issued June 19, 2013); Docket No. 13-1548 (issued March 12, 2014); Docket No. 15-0461 (issued March 22, 2016).

<sup>4</sup> This claim was assigned OWCP File No. xxxxxx192.

<sup>5</sup> This claim was assigned OWCP File No. xxxxxx087.

<sup>6</sup> OWCP assigned File No. xxxxxx072. Appellant filed appeals with the Board regarding the denial of his claim for a schedule award under this OWCP file number. By decision dated October 2, 2012, the Board affirmed OWCP's decisions dated November 9 and December 5, 2011, denying appellant's request for a merit review regarding the denial of his request for a schedule award. (Docket No. 12-0683, issued October 2, 2012). On June 4, 2013, in the second appeal, the Board affirmed OWCP's December 11, 2012 decision denying reconsideration. Docket No. 13-0531 (issued June 19, 2013).

<sup>7</sup> OWCP assigned OWCP File No. xxxxxx417.

OWCP noted that the effective date of the pay rate used for payment of the schedule awards was May 30, 1990.

Appellant appealed to the Board on June 18, 2013. By decision dated March 12, 2014, the Board affirmed the February 26, 2013 schedule award decision.

On July 1, 2014 counsel requested reconsideration regarding the pay rate used in calculating appellant's February 26, 2013 schedule award. He argued that OWCP should have used appellant's pay rate for the December 3, 2007 left knee employment injury, rather than the pay rate of May 30, 1990, the date of appellant's right knee initial injury. In support of his request, counsel submitted W2 forms for 2005, 2007, and 2010. By decision dated September 2, 2014, OWCP denied modification of its prior decision. It found that the correct pay rate had been used in calculating the February 26, 2013 schedule awards.

On December 24, 2014 appellant appealed to the Board from OWCP's September 2, 2014 decision.

By decision dated March 22, 2016, the Board found that the case was not in posture for a decision as to the proper pay rate for appellant's February 26, 2013 schedule award.<sup>8</sup> It noted that this case was similar to *D.G.*<sup>9</sup> 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. The Board further noted that 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.<sup>10</sup> The Board explained that appellant had not sustained recurrence of disability, but had sustained new traumatic injuries on August 11, 2004, January 17, 2005, and December 3, 2007. As the record contained no information regarding appellant's pay rate as of the date of his August 11, 2004, January 17, 2005, or December 3, 2007 employment injuries (and the date disability began following these injuries), the case was remanded for OWCP to request the appropriate pay rate information from the employing establishment and determine the greater of the pay rates for schedule award purposes.

In an e-mail dated April 29, 2016, the employing establishment provided information regarding appellant's salary from August 11, 2004 to December 3, 2007. It advised OWCP that pay records for May 30, 1990 were unavailable as their records only went back to April 19, 1992. Appellant's annual salary including availability pay was \$104,643.00 (\$83,715.00 + \$20,928.00) as of August 11, 2004, \$108,050.00 (\$86,440.00 + \$21,610.00) as of January 17, 2005, and \$116,265.00 (\$93,012.00 + \$23,253.00) as of December 3, 2007.

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<sup>8</sup> Docket No. 15-0461 (issued March 22, 2016).

<sup>9</sup> Docket No. 08-0626 (issued July 16, 2008).

<sup>10</sup> 5 U.S.C. § 8101(4); *see M.B.*, Docket No. 09-0176 (issued September 23, 2009).

By decision dated June 27, 2016, OWCP found that an incorrect pay rate was used in calculating appellant's schedule award. It found that he was entitled to the pay rate from the December 3, 2007 employment injury as he did not sustain a recurrence of disability. OWCP thus affirmed in part and modified and vacated in part the February 26, 2013 schedule award determination.

In a June 28, 2016 initial payment memorandum, OWCP noted the period of compensation as January 17, 2013 to May 13, 2015, total weekly pay rate of \$2,237.59, and computation rate of three-quarters. The total weekly pay rate was based on a base pay rate of \$1,790.42 per week, yearly pay rate of \$93,102.00, and availability pay of \$447.17. On August 2, 2016 counsel requested the fiscal worksheets used in calculating the amount OWCP owed appellant. He contended that OWCP did not include the cost-of-living increase and that the pay rate calculation "did not add up."

By correspondence dated March 29, 2017, counsel again requested a decision confirming that the schedule award was properly calculated based on a proper pay rate.

In a letter dated and received May 17, 2017, appellant, through counsel, requested reconsideration of the pay rate issue. He asserted that appellant's annual salary as of 2007 was \$116,000.00 without submitting any supporting documentation.

By decision dated June 29, 2017, OWCP denied modification of its prior decision. It noted that appellant had been paid an additional \$109,261.90, which was based on modification of the pay rate used in calculating the additional 16 percent right lower extremity permanent impairment and the 26 percent left lower extremity permanent impairment. OWCP noted that the additional payment was based on the difference between \$89,575.26, the amount he had been paid based on the May 30, 1990 pay rate, and \$198,837.26, the amount he should have been paid based on the correct 2007 pay rate. This resulted in a difference of \$109,261.90, which he was paid. OWCP noted that there was no evidence supporting that his annual pay rate was higher than \$116,265.00, the amount used to calculate the 2007 pay rate.

### **LEGAL PRECEDENT**

The amount of compensation paid is a function of the injured employee's pay rate.<sup>11</sup> 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.<sup>12</sup> When a schedule award involves a traumatic injury claim with prior disability, the applicable pay rate is the greatest of the established pay rates.<sup>13</sup> Where there was no prior injury-related disability from work, the date-of-injury pay rate should be used.<sup>14</sup>

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<sup>11</sup> 20 C.F.R. § 10.404(b).

<sup>12</sup> 5 U.S.C. § 8101(4); *see id.* at § 10.5(s); *Samuel C. Miller*, 55 ECAB 119 (2003).

<sup>13</sup> 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).

<sup>14</sup> *Id.*

## ANALYSIS

On February 26, 2013 OWCP granted appellant a schedule award for 16 percent right lower extremity permanent impairment and 26 percent left lower extremity permanent impairment based on an effective pay rate of May 9, 1990 and cost-of-living adjustment. By decision dated March 26, 2016, the Board remanded the case to OWCP to obtain information from the employing establishment regarding appellant's pay rates following each of his accepted injuries. OWCP, in a June 27, 2016 decision, modified the pay rate used in the calculation of the February 26, 2013 schedule awards. It found that appellant was entitled to be paid his schedule awards for his left and right lower extremities based on his December 3, 2007 date-of-injury pay rate, the highest possible pay rate.

As previously noted, for compensation purposes in determining pay rate 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 should be used.<sup>15</sup> The Board finds that appellant's right lower extremity injuries were sustained on February 13, 1990 and January 17, 2005 and his left lower extremity injuries were sustained on August 11, 2004 and December 3, 2007.

OWCP prepared a fiscal/pay rate memorandum on June 28, 2016 in which it explained the calculation for the period of compensation as January 17, 2013 to May 13, 2015. It based the total weekly pay rate on a base pay rate of \$1,790.42 per week, yearly pay rate of \$93,102.00, and availability pay of \$447.17, based upon the December 3, 2007 pay rate.

OWCP has explained that pay rate on December 3, 2007 (\$93,012.00 annual/availability pay \$23,253.00 annual = \$116,265.00) was the highest pay rate for any of the possible dates in question. It therefore paid appellant's schedule award for both his right and left lower extremities based upon this pay rate. Counsel argued to OWCP that the correct pay rate should be \$116,000.00, failing to recognize that OWCP already determined a higher pay rate of \$116,265.00, based upon the December 3, 2007 date of injury. There is no evidence of record that appellant's schedule awards should have been paid at a higher pay rate.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

## CONCLUSION

The Board finds that OWCP properly determined appellant's pay rate in calculating his right and left lower extremity schedule award.

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<sup>15</sup> *Supra* note 12.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 29, 2016 is affirmed.

Issued: July 6, 2018  
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