

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

G.J., Appellant)	
)	
and)	Docket No. 18-1292
)	Issued: March 13, 2019
)	
DEPARTMENT OF STATE, AMERICAN)	
EMBASSY KABUL, Kabul, Afghanistan,)	
Employer)	
)	

Appearances:
Denise Prado, for the appellant¹
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 June 14, 2018 appellant, through his representative, filed a timely appeal from a May 23, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.³

ISSUE

The issue is whether OWCP determined the proper pay rate when calculating appellant's May 23, 2018 schedule award.

FACTUAL HISTORY

On December 4, 2011 appellant, then a 53-year-old district support team leader, filed a traumatic injury claim (Form CA-1) alleging that on December 2, 2011 he sustained bilateral knee injuries as a result of a bomb blast from a vehicle-borne improvised explosive device (IED). He stopped work on December 2, 2011. After a period of intermittent work absences from December 23, 2011 through August 9, 2013, appellant returned to the United States. He underwent bilateral total knee arthroplasties on August 22, 2013,⁴ and resigned from the employing establishment effective September 5, 2013.

On September 30, 2013 OWCP accepted that appellant sustained a contusion of the left knee and left lower leg. It subsequently expanded its acceptance of the claim to include bilateral knee arthritis, bilateral secondary osteoarthritis of left knee, post-traumatic stress disorder (PTSD), major depressive disorder, a postoperative infection of the left knee, septic arthritis of the left knee, and a left quadriceps tendon rupture.

On December 18, 2017 appellant filed a claim for a schedule award (Form CA-7).⁵ In support of his claim, he submitted a narrative report dated November 11, 2017 by Dr. Nathan Momberger, an attending Board-certified orthopedic surgeon, and an impairment evaluation dated December 4, 2017 by Dr. John W. Ellis, an attending Board-certified family practitioner, who found that appellant had attained MMI.

In a report dated January 17, 2018, Dr. Michael M. Katz, an OWCP district medical adviser and Board-certified orthopedic surgeon, reviewed the medical record. He found that appellant had attained MMI as of December 4, 2017, the date of Dr. Ellis' examination. Referring to the diagnosis-based lower extremity impairment criteria of the sixth edition of the American Medical

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the May 23, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

⁴ Prior to the injury, on August 15, 2011, appellant had undergone bilateral arthroscopic partial medial meniscectomies.

⁵ Appellant had filed a prior schedule award claim on February 22, 2016, but the claim was found to be not in posture for development as the record indicated that he had not yet attained maximum medical improvement (MMI).

Association, *Guides to the Evaluation of Permanent Impairment*,⁶ Dr. Katz calculated 63 percent permanent impairment of the left lower extremity.

In a memorandum dated February 7, 2018, OWCP noted that appellant's base pay rate as of December 23, 2011, the date his disability began, was \$136,134.00 per year or \$2,617.96 per week. Appellant also received Sunday premium pay of \$130.50 for two weeks each year, equal to \$261.00 per year or \$5.02 per week; availability pay of \$916.27 per week or \$47,646.00 per year; and other hazard pay of \$916.27 per week or \$47,646.00 per year. OWCP totaled these amounts to equal a weekly pay rate of \$4,581.00. It noted that appellant would be paid schedule award compensation at the two-thirds rate as he had no dependents.

By decision dated February 7, 2018, OWCP granted appellant a schedule award for 63 percent permanent impairment of the left lower extremity. The period of the award, 181.44 weeks, ran for the period from December 4, 2017 to May 27, 2021. OWCP based the award on appellant's weekly pay rate as of December 23, 2011 of \$4,581.00 multiplied by the 66 2/3 rate for a claimant with no dependents, equaling \$3,054.00. However, his weekly compensation rate was limited to \$1,971.05, the maximum compensation rate (MAX), with continuing payments each four weeks of \$7,884.20.

On February 22, 2018 appellant, through counsel, requested reconsideration. He submitted an updated claim for compensation (Form CA-7) listing his wife as an eligible dependent. Appellant requested that OWCP adjust his schedule award compensation rate from 66 2/3 percent to 75 percent.

By decision dated May 23, 2018, OWCP affirmed its February 7, 2018 schedule award decision, as modified. It found that appellant was entitled to receive monetary compensation at the 75 percent augmented rate as of March 4, 2018, as his wife was an eligible dependent. OWCP further found, however, that the increase in his compensation rate did not change his schedule award payments as the \$1,971.05 weekly payment was already at the MAX rate for the year 2018. It explained that multiplying appellant's weekly wage of \$4,581.00 by either the 66 2/3 percent or 75 percent compensation rate yielded an amount greater than the MAX weekly compensation rate of \$1,971.05.

LEGAL PRECEDENT

The amount of compensation paid is a function of the injured employee's pay rate.⁷ 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.⁸ When a schedule award involves a traumatic injury claim with prior

⁶ A.M.A., *Guides* (6th ed. 2009).

⁷ 20 C.F.R. § 10.404(b).

⁸ 5 U.S.C. § 8101(4); 20 C.F.R. § 10.5(s); *R.M.*, Docket No. 17-1759 (issued July 6, 2018); *Samuel C. Miller*, 55 ECAB 119 (2003).

disability, the applicable pay rate is the greatest of the established pay rates.⁹ Where there was no prior injury-related disability from work, the date-of-injury pay rate should be used.¹⁰

Under OWCP's procedures, elements in pay rate include Sunday premium, night differential, and hazard pay.¹¹ However, its procedures also provide that elements excluded from pay rate calculations include additional pay or post allowance authorized outside the United States and its possessions because of differential in cost of living or other special circumstances.¹²

Section 8112 of FECA provides that the monthly rate of compensation for disability, including augmented compensation for eligible dependents, may not be more than 75 percent of the monthly pay of the maximum rate of pay for GS-15.¹³ OWCP's implementing regulation provides that "[c]ompensation for total or partial disability may not exceed 75 percent of the basic monthly pay of the highest step of grade 15 of the General Schedule."¹⁴ OWCP's procedures provide that the MAX applies to schedule awards.¹⁵

ANALYSIS

The Board finds that OWCP determined the proper pay rate when calculating appellant's May 23, 2018 schedule award.

OWCP granted appellant a schedule award for 63 percent permanent impairment of the left lower extremity based on an effective pay rate of December 23, 2011, which included Sunday premium pay, availability pay, and hazard pay.

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.¹⁶ The Board finds that appellant's left lower extremity injury occurred on December 2, 2011 and that disability began on

⁹ 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).

¹⁰ *Id.*

¹¹ See Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.900.7a(2) (March 2011). See also *L.G.*, Docket No. 17-0699 (issued August 9, 2018).

¹² Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.900.6b.

¹³ 5 U.S.C. § 8112(a). The only situation in which the maximum compensation rate may be exceeded is if the employee's disability was "a result of an assault which occurs during an assassination or attempted assassination of a Federal official described under section 351(a) or 1751(a) of Title 18, and was sustained in the performance of duty." 5 U.S.C. § 8112(b).

¹⁴ 20 C.F.R. § 10.406(a). See also Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.901.14, *Maximum Compensation (MAX), Exhibit 2, Maximum Compensation Rates* (February 2013).

¹⁵ Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.808.7(g), *Schedule Award Payments, Minimum (MIN) and Maximum (MAX) Rates* (June 2013).

¹⁶ *Supra* note 7.

December 23, 2011. OWCP therefore selected the appropriate date that disability began in calculating appellant's schedule award.¹⁷

The maximum allowable compensation for the year 2018 may not exceed 75 percent of the basic monthly pay of the highest step of grade 15 of the General Schedule.¹⁸ The only statutory exception for which the maximum compensation rate may be exceeded is if the employee's disability was a result of an assault which occurs during an assassination or attempted assassination of a federal official described under section 351(a) or 1751(a) of Title 18, and was sustained in the performance of duty. The evidence of record does not support such an exception in this case. Accordingly, the maximum allowable weekly rate under FECA for 2018 is \$1,971.05. As multiplying appellant's weekly pay rate of \$4,581.00 by the 75 percent rate for a claimant with eligible dependents would result in weekly payments of \$3,435.75, an amount greater than the \$1,971.05 MAX rate as set forth in OWCP's procedures,¹⁹ OWCP properly authorized continuing compensation at the MAX rate.

On appeal appellant's representative does not dispute the percentage of permanent impairment awarded or the effective date of disability. Rather, she contends that the MAX rate should not apply to schedule awards noting 20 C.F.R. § 10.406(a) applies only to total or partial disability claims, not schedule award claims. However, a schedule award is compensation for permanent disability based upon permanent impairment paid for the loss, or loss of use, of a member or function of the body as set forth in 5 U.S.C. § 8107(a).²⁰ Therefore, the representative's contentions are found to lack merit. Furthermore, as explained above, OWCP's procedures clearly provide that the MAX compensation rate applies to schedule awards.²¹

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP determined the proper pay rate when calculating appellant's May 23, 2018 schedule award.

¹⁷ *Id.*

¹⁸ 20 C.F.R. § 10.406(a).

¹⁹ Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.901.14.

²⁰ Section 8107 (a) provides in part: "(a) If there is permanent disability involving the loss, or loss of use, of a member or function of the body or involving disfigurement, the employee is entitled to basic compensation for the disability, as provided by the schedule in subsection (c) of this section, at the rate of 66 2/3 percent of his monthly pay." Subsection (c) is the compensation schedule for schedule award purposes.

²¹ *Supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 2019
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