

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

_____)	
R.M., Appellant)	
)	
and)	Docket No. 19-0463
)	Issued: March 1, 2021
DEPARTMENT OF JUSTICE, U.S. MARSHALS)	
SERVICE, Del Rio, TX, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On December 27, 2018 appellant, through counsel, filed a timely appeal from a November 27, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant received proper schedule award compensation for permanent impairment of his upper extremities.

FACTUAL HISTORY

On September 25, 2009 appellant, then a 54-year-old deputy marshal, filed a traumatic injury claim (Form CA-1) alleging that on November 1, 2008 he was working out in his garage and assisting a coworker with a weight workout when he sustained a neck injury while in the performance of duty. He reported that he lost all strength in his left arm while doing barbell curls and dropped the weight. OWCP accepted appellant's claim for brachial neuritis or radiculitis (not specified), cervicalgia, and closed dislocation of cervical vertebra. Appellant stopped work on March 18, 2010 and, on that date, he underwent OWCP-authorized surgery which included fusion procedures between the C4-5 and C5-6 disc levels. OWCP paid him wage-loss compensation on the supplemental rolls for disability from work commencing March 18, 2010. On October 19, 2010 appellant filed a schedule award claim (Form CA-7).

By decision dated August 18, 2011, OWCP granted appellant a schedule award for seven percent permanent impairment of his left upper extremity. The award ran for 21.84 weeks from February 25 through July 27, 2011³ and was based on the August 11, 2011 calculations of Dr. Michael M. Katz, a Board-certified orthopedic surgeon, who served as a district medical adviser (DMA) for OWCP.⁴ The award indicated that appellant would receive \$40,797.78 in compensation for the period of the award, and payment records in the case record show that on August 19, 2011 appellant did, in fact, receive \$40,797.78 in compensation in a single electronic deposit into his bank account.

On August 28, 2017 appellant filed a claim for an increased schedule award (Form CA-7).

By decision dated September 18, 2017, OWCP granted appellant a schedule award for 8 percent permanent impairment of his right upper extremity and an additional 15 percent permanent impairment of his left upper extremity, for a total of 22 percent permanent impairment of his left upper extremity. In the decision, it identified the schedule award as running for 71.76 weeks from October 3, 2016 through February 20, 2018.⁵ The award was based on the July 15, 2017

³ The award listed appellant's weekly pay rate as \$2,934.44 (effective date of March 18, 2010) and his adjusted weekly pay rate as \$2,200.83. The latter figure was calculated by multiplying \$2,934.44 times 75 percent to reflect the compensation rate for a claimant, such as appellant, having at least one dependent. See 5 U.S.C. § 8110(b); 20 C.F.R. § 10.404(c).

⁴ Dr. Katz applied the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)(6th ed. 2009), to the July 1, 2011 physical examination findings of Dr. Sofia Weigel, a Board-certified physical medicine and rehabilitation physician who served as an OWCP referral physician. Dr. Weigel determined that appellant reached maximum medical improvement (MMI) on February 25, 2011.

⁵ The award listed appellant's weekly pay rate as \$2,934.44 and his adjusted weekly pay rate as \$2,200.80 (a figure which OWCP identified as the 75 percent rate for a claimant with at least one dependent).

calculations of Dr. James W. Butler, a Board-certified occupational medicine physician who served as a DMA.⁶ The award indicated that appellant would receive \$95,825.61 for the period October 6, 2016 through September 16, 2017 and that his continuing payments each 28 days thereafter would initially be in the amount of \$7,775.56. Payment records in the case record show that on September 22, 2017 appellant received an electronic deposit of \$95,825.61 (for the period October 6, 2016 through September 16, 2017) and he later received other payments (for the remaining period of September 17, 2017 through February 20, 2018), such that his total payments for the schedule award equaled \$139,407.44.⁷

In September 25, 2017 and March 8, 2018 letters, counsel indicated, “The rate of compensation should be \$2,200.83, not \$2,200.80 ($\$2,934.44 \times 75\% = \$2,200.83$). The first check is short. 49 3/7 weeks of compensation equals \$108,765.02, not \$95,825.61.” In an April 27, 2018 letter, counsel provided a calculation for monies he believed were due from the September 18, 2017 schedule award: “As stated previously, this is a simple matter of math. $\$2,200.83 \times 71.76$ [weeks] = \$157,931.56.” Counsel asserted that appellant only received \$131,631.88 for the September 18, 2017 schedule award.

On August 29, 2018 appellant, through counsel, requested reconsideration of the September 18, 2017 schedule award decision. In the attached August 27, 2018 letter, appellant indicated with regard to the August 18, 2011 schedule award: “Weekly pay: $\$2,934.44 \times$ compensation rate 75 percent = \$2,200.83. Number of weeks of compensation: 21.84. $\$2,200.83 \times 21.84 = \$48,066.12$. The amount that I received was \$40,797.78.” Appellant asserted that he was “just showing that there is an error in [OWCP’s] math.” In the August 27, 2018 e-mail, appellant indicated with regard to the September 18, 2017 schedule award: “ $\$2,934.44 \times 75 = \$2,200.83$ (They calculated \$2,200.80). OWCP figured 71.76 weeks of compensation. $\$2,200.83 \times 71.76$ [weeks] = \$157,931.56.”⁸

By decision dated November 27, 2018, OWCP denied modification of its September 18, 2017 decision. It noted that it was not revisiting its prior determination that appellant had 8 percent permanent impairment of his right upper extremity and 22 percent permanent impairment of his left upper extremity. OWCP denied that he received inappropriate schedule award compensation for the established permanent impairment of his upper extremities. It acknowledged that \$2,200.83 was the appropriate adjusted weekly pay for calculating the amount of schedule award

⁶ Dr. Butler applied the standards of the sixth edition of the A.M.A., *Guides* to the October 6, 2016 physical examination findings of Dr. Stephen Wilson, a Board-certified physical medicine and rehabilitation physician. In the September 18, 2017 award, OWCP listed the date of MMI as October 6, 2016. Payment records shows that, despite the decision identifying the period of the schedule award as October 3, 2016 through February 20, 2018, OWCP actually paid schedule award compensation for the period October 6, 2016 through February 20, 2018.

⁷ Appellant later received an electronic deposit in the amount of \$7,775.56 for each of the following periods: September 17 through October 14, 2017, October 15 through November 11, 2017, November 12 through December 9, 2017, and December 10, 2017 through January 6, 2018. He also received a \$7,884.20 electronic deposit for the period January 7 through February 3, 2018, and a \$4,595.39 electronic deposit for the period February 4 through 20, 2018.

⁸ Appellant asserted that he only received \$131,631.88 for the September 18, 2017 schedule award.

compensation under the August 18, 2011 and September 18, 2017 schedule awards.⁹ In the “discussion of evidence” section, OWCP referenced counsel’s April 27, 2018 letter, noting that counsel “indicated that there are math errors regarding the Schedule Award Payment.” It noted that it did not see any mathematic errors regarding the payment of schedule award compensation and indicated, “As per Procedure Manual [Chapter] 2.901.14, the computer system applied maximum compensation to the payments.” OWCP then referenced the documents received on August 29, 2018, provided a description of appellant’s calculations, and again noted that it did not see any mathematic errors regarding the payment of schedule award compensation. It indicated, “As per Procedure Manual [Chapter] 2.901.14, the computer system applied maximum compensation to the payments.”¹⁰

LEGAL PRECEDENT

The schedule award provisions of FECA¹¹ and its implementing regulations¹² 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 to all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.¹³ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁴

Section 8107(c)(1) of FECA provides that 312 weeks of compensation shall be paid for 100 percent loss of the arm,¹⁵ and the implementing regulation provides that compensation for proportionate periods of time is payable for partial loss.¹⁶ Chapter 2.808.7c of OWCP’s procedures provides the following example to illustrate a schedule award calculation for a claimant paid at the 75 percent compensation rate: “10 percent (the actual percentage of impairment) x 244 weeks

⁹ OWCP indicated that, in the September 18, 2017 schedule award decision, it inadvertently listed appellant’s adjusted weekly pay as \$2,200.80, rather than the proper figure of \$2,200.83 for a claimant, such as appellant, who was entitled to receive compensation at the 75 percent rate. It asserted that it used the \$2,200.83 figure when calculating the amount of compensation due under that schedule award.

¹⁰ OWCP quoted extensive text from Chapter 2.901.14.

¹¹ 5 U.S.C. § 8107.

¹² 20 C.F.R. § 10.404.

¹³ *Id.* See also *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁵ 5 U.S.C. § 8107(c)(1).

¹⁶ 20 C.F.R. § 10.404.

(100 percent loss of use of the hand) = 24.4 weeks. 24.4 weeks x \$400.00 (weekly pay rate) x 75 percent (compensation rate) = \$7,320.00.”¹⁷

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 a GS-15 employee.¹⁸ 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.”¹⁹ OWCP’s procedures provide that the maximum compensation rates for disability compensation also apply to schedule award compensation.²⁰ The computerized compensation management application is utilized to automatically calculate the maximum compensation rate when payments are entered.²¹

ANALYSIS

The Board finds that appellant received proper schedule award compensation for permanent impairment of his upper extremities.

The Board notes that many of the key facts in this case are not in dispute. Appellant has not challenged OWCP’s determinations regarding the rate of permanent impairment in his upper extremities and the number of weeks of compensation due for such impairment. In an August 18, 2011 schedule award, OWCP found that he had seven percent permanent impairment of his left upper extremity and that he was entitled to 21.84 weeks of compensation.²² In a September 18, 2017 schedule award, it found that appellant had 23 percent additional permanent impairment (15 percent for his left upper extremity and 8 percent for his right upper extremity), and that he was entitled to an additional 71.76 weeks of compensation.²³ There is no dispute regarding the weekly pay rate on which the schedule award payments were based, \$2,934.44. It has been accepted that multiplying the \$2,934.44 weekly pay rate figure by 75 percent (reflecting appellant’s

¹⁷ Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.808.7c (February 2013).

¹⁸ 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).

¹⁹ 20 C.F.R. § 10.406(a). *See also* Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.901.14 and Exhibit 2 (Maximum Compensation Rates) (February 2013). Exhibit 2, associated with Chapter 2.901.14, delineates figures for maximum compensation rates to be paid during various periods.

²⁰ *See id.* *See also* Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.808.7g (February 2013); *G.J.*, Docket No. 18-1292 (issued March 13, 2019).

²¹ *See* Federal (FECA) Procedure Manual, *supra* note 19 at Chapter 2.901.14e (February 2013).

²² Section 8107(c)(1) of FECA provides that 312 weeks of compensation shall be paid for 100 percent loss of the arm, and the implementing regulation provides that compensation for proportionate periods of time is payable for partial loss. *See supra* notes 15 and 16.

²³ *See id.*

compensation rate for having at least one dependent) yields the figure of \$2,200.83 for adjusted weekly compensation.²⁴

Appellant argued that he only received \$40,797.78 in connection with the August 18, 2011 schedule award, but should have received \$48,066.13 as calculated by multiplying the weekly pay (\$2,200.83) times the number of weeks of compensation awarded through that schedule award (21.84).²⁵ He further argued that he only received \$131,631.88 in connection with the September 18, 2017 schedule award, but should have received \$157,931.56 as calculated by multiplying the weekly pay (\$2,200.83) times the number of weeks of compensation awarded through that schedule award (71.76).²⁶

The Board notes that the above-detailed calculations demonstrate an understanding of the general manner in which schedule award payments are calculated.²⁷ However, appellant's argument regarding his entitlement to schedule award compensation fails to take into account a vital aspect of the process which applies under the facts of his case. As explained by OWCP in its November 27, 2018 decision, the relevant precedent imposes maximum compensation payment limits for schedule awards and these maximum payment limits do, in fact, apply to appellant's schedule award payments.

The Board notes that the monthly rate of compensation for schedule award compensation may not be more than 75 percent of the monthly pay of the maximum rate of pay for a GS-15 employee.²⁸ The only statutory exception for which the maximum compensation rate may be exceeded is if the employee has disability which 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.²⁹ The evidence of record does not support such an exception in this case. The Board finds that the amount of compensation appellant received accurately reflects the maximum compensation payment limits. Per its own procedures, OWCP properly utilized the computerized compensation management application which automatically calculates the maximum compensation rate when payments are entered.³⁰

The Board notes that for the entire period of the August 18, 2011 schedule award, February 25 through July 27, 2011, the maximum schedule award compensation appellant was

²⁴ See *supra* note 3. In its September 18, 2017 schedule award decision, OWCP inadvertently listed appellant's actual weekly pay as \$2,200.80, rather than the proper figure of \$2,200.83. However, payment records demonstrate that it utilized the \$2,200.83 figure when calculating the amount of compensation due appellant under that schedule award.

²⁵ Appellant did, in fact, receive \$40,797.78 in connection with the August 18, 2011 schedule award.

²⁶ Appellant actually received \$139,407.44 in connection with the September 18, 2017 schedule award.

²⁷ See *supra* note 17.

²⁸ See *supra* notes 18 through 20.

²⁹ See *supra* note 18.

³⁰ See *supra* note 21.

entitled to receive each 28 days was \$7,472.12.³¹ Appellant was entitled to receive 21.84 weeks of compensation for this schedule award and multiplying this figure by 7 yields an entitlement to 152.88 days of compensation, a figure which is equivalent to 5.46 compensation periods lasting 28 days each. Multiplying \$7,472.12 times 5.46 yields a total of \$40,797.78, *i.e.*, the amount appellant actually received for his August 18, 2011 schedule award. Therefore, OWCP paid appellant appropriate schedule award compensation for the period February 25 through July 27, 2011.

As noted above, it is undisputed that appellant was entitled to receive 71.76 weeks of compensation in connection with his September 18, 2017 schedule award. On the face of the September 18, 2017 schedule award, inadvertently listed an improper period for the running of the award, October 3, 2016 through February 20, 2018. The award actually commenced on October 6, 2016 as appellant reached MMI on that date, and OWCP utilized the proper period of October 6, 2016 through February 20, 2018 (71.76 weeks or 502.32 days) in its compensation calculations.³²

To compensate him for a portion of the September 18, 2017 schedule award, appellant received a \$95,825.61 electronic deposit covering the period October 6, 2016 through September 16, 2017. For the period October 6, 2016 through January 7, 2017, *i.e.*, a portion of the period covered by the \$95,825.61 electronic deposit, the maximum schedule award compensation appellant was entitled to receive each 28 days was \$7,698.68.³³ The period October 6, 2016 through January 7, 2017 contains 94 days. Converting this 94-day period to the number of 28-day periods and multiplying the resultant figure times \$7,698.68 yields a total of \$25,845.57.

For the period January 8 through September 16, 2017, *i.e.*, the remaining portion of the period covered by the \$95,825.61 electronic deposit, the maximum schedule award compensation appellant was entitled to receive each 28 days was \$7,775.56.³⁴ The period January 8 through September 16, 2017 contains 252 days. Converting this 252-day period to the number of 28-day periods and multiplying the resultant figure times \$7,775.56 yields a total of \$69,980.04. Adding the \$25,845.57 and \$69,980.04 figures equals \$95,825.61, the amount of the electronic deposit

³¹ Exhibit 2, associated with Chapter 2.901.14 of the Procedure Manual, delineates figures for maximum compensation rates to be paid during various periods. Exhibit 2 lists the maximum compensation rate for the period January 1 through December 31, 2011 as \$1,868.03. Multiplying this figure times 4 yields a 28-day figure for maximum compensation of \$7,472.12. Exhibit 2 inadvertently lists the sum of this calculation as \$7,472.13. *See supra* note 19.

³² The period covered by a schedule award typically commences on the date that the employee reaches MMI from the residuals of the employment injury. MMI means that the physical condition of the injured member of the body has stabilized and will not improve further. *See S.K.*, Docket No. 20-0422 (issued December 2, 2020).

³³ Exhibit 2 of Chapter 2.901.14 of the procedure manual lists the maximum compensation rate for the period January 10, 2016 through January 7, 2017 as \$1,924.67. Multiplying this figure times 4 yields a 28-day figure for maximum compensation of \$7,698.68. Exhibit 2 inadvertently lists the sum of this calculation as \$7,698.69. *See supra* note 19.

³⁴ Exhibit 2 of Chapter 2.901.14 of the procedure manual lists the maximum compensation rate for the period January 8, 2017 through January 6, 2018 as \$1,943.89. Multiplying this figure times 4 yields a 28-day figure for maximum compensation of \$7,775.56. Exhibit 2 inadvertently lists the sum of this calculation as \$7,775.54. *See supra* note 19.

appellant received for the period October 6, 2016 through September 16, 2017. Therefore, OWCP paid appellant appropriate schedule award compensation for this period.

For the period of the September 18, 2017 schedule award running from September 17, 2017 through January 6, 2018, appellant received four \$7,775.56 electronic deposits, each of which covered a 28-day period. Because the maximum schedule award compensation appellant was entitled to receive for each 28-day period contained within the period September 17, 2017 through January 6, 2018 was \$7,775.56, OWCP paid him an appropriate amount of schedule award compensation for this period.

For the period of the September 18, 2017 schedule award running from January 7 through February 3, 2018, appellant received a \$7,884.20 electronic deposit which covered this 28-day period. Because the maximum schedule award compensation appellant was entitled to receive for the 28-day period January 7 through February 3, 2018 was \$7,884.16, OWCP paid him a sufficient amount of schedule award compensation for this period.³⁵

For the period of the September 18, 2017 schedule award running from February 4 through 20, 2018, appellant received a \$4,595.39 electronic deposit. The period from February 4 through 20, 2018 constitutes the last 16.32 days of the September 18, 2017 schedule award (which totaled 502.32 days) and the maximum schedule award compensation appellant was entitled to receive each 28 days was \$7,884.16.³⁶ Converting this 16.32-day period to the number of 28-day periods and multiplying the resultant figure times \$7,884.16 yields a total of \$4,595.39. Therefore, OWCP paid appellant appropriate schedule award compensation for this period.

The Board notes that the total amount of compensation appellant received in connection with the September 18, 2017 schedule award was \$139,407.44. Combining this figure with the \$40,797.78 he received in connection with the August 18, 2011 schedule award yields a figure for total schedule award compensation of \$180,205.22. For the above-detailed reasons, appellant received proper schedule award compensation for permanent impairment of his upper extremities.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant received proper schedule award compensation for permanent impairment of his upper extremities.

³⁵ Exhibit 2 of Chapter 2.901.14 of the procedure manual lists the maximum compensation rate for the period commencing January 7, 2018 as \$1,971.04. Multiplying this figure times 4 yields a 28-day figure for maximum compensation of \$7,884.16. *See supra* note 19.

³⁶ The Board notes that appellant had a partial day of entitlement to schedule award compensation for February 20, 2018 (32 percent of the day), rather than the full day.

ORDER

IT IS HEREBY ORDERED THAT the November 27, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board