

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

F.P., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
McGUIRE AIR FORCE BASE, Burlington, NJ,
Employer**

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**Docket No. 07-2315
Issued: April 18, 2008**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 11, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 31, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office utilized the correct pay rate in issuing appellant's schedule award payment.

FACTUAL HISTORY

On December 9, 1998 appellant, then a 58-year-old civil engineering technician, filed a traumatic injury claim (Form CA-1) alleging that on December 3, 1998 he fell down stairs at work and injured his left leg. The Office accepted his claim for left knee strain and tearing of the posterior horn and body of the medial meniscus. The Office authorized arthroscopic surgery which was performed on February 1, 1999. Appellant stopped work on December 3, 1998 and

returned to work four hours per day, limited duty on March 15, 1999, and returned to full-time limited-duty work on April 5, 1999. The CA-1 form noted that appellant worked from 7:30 a.m. until 4:15 p.m., five days a week, with Saturday and Sunday off. Appellant's pay rate on the date of injury, December 3, 1998, was \$38,077.00 per year. He retired effective July 1, 2005.

Appellant submitted reports from Dr. James P. Taitsman, a Board-certified orthopedist, dated December 8, 1998, who noted that appellant injured his left knee at work when he fell down steps. Dr. Taitsman diagnosed strain of the left knee and possible meniscal tear. On January 7, 1999 he noted that a magnetic resonance imaging (MRI) scan of the left knee revealed a posterior horn tear of the medial meniscus and degenerative changes and he recommended arthroscopic surgery. On February 1, 1999 Dr. Taitsman performed arthroscopic surgery of the left knee with medial and lateral meniscectomy and excision of the plica; he diagnosed medial and lateral meniscal tear and degenerative joint disease of the left knee plica. In reports dated February 4 and May 14, 1999, he noted that appellant was progressing well postoperatively with good range of motion of the left knee.

On September 29, 2006 appellant claimed a schedule award. He submitted a June 5, 2006 report from Dr. David Weiss, an osteopath, who noted that appellant reached maximum medical improvement on June 5, 2006. Dr. Weiss noted that examination of the left knee revealed gastrocnemius circumference measuring 41.5 centimeters on the right and 43 centimeters on the left and quadriceps circumference measuring 53.5 centimeters on the right and 52 centimeters on the left. He diagnosed post-traumatic internal derangement to the left knee with tear of the medial and lateral meniscus, post-traumatic chondromalacia patella to the left knee, aggravation of preexisting left knee pathology, post-traumatic osteoarthritis to the left knee with medial joint narrowing, status post arthroscopic surgery with partial medial meniscectomy to the left knee, status post lateral meniscus debridement to the left knee, status post lateral meniscus debridement of the left knee, status post chondroplasty to the left knee. Dr. Weiss noted that based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,¹ (A.M.A., *Guides*) that appellant would receive 8 percent impairment for left thigh atrophy,² 8 percent impairment for left calf atrophy³ and a 3 percent for pain-related impairment,⁴ for a total left leg impairment of 18 percent.

In a report dated November 25, 2006, an Office medical adviser opined that appellant had 15 percent impairment of the left leg under the A.M.A., *Guides*. The medical adviser opined that appellant had impairment of 6 percent for left thigh atrophy,⁵ 6 percent for left calf atrophy⁶ and

¹ A.M.A., *Guides* (5th ed. 2001).

² *Id.* at 530, Table 17-6.

³ *Id.*

⁴ *Id.* at 574, Figure 18-1.

⁵ *Id.* at 530, Table 17-6.

⁶ *Id.*

3 percent for pain,⁷ for a total left lower extremity impairment of 15 percent. The medical adviser noted that appellant reached maximum medical improvement on June 5, 2006.

In correspondence dated December 14, 19, 2006 and January 17, 2007, appellant asserted that the proper pay rate for an occupational disease claim was the date of the last exposure to the employment factors which caused or aggravated the claimed condition. He submitted a notification of personnel action indicating that he retired on July 1, 2005 and asserted that his weekly pay rate for schedule award purposes should be based on his pay rate at the time of his retirement, which was the date of last exposure, rather than the original date of injury of December 3, 1998. Appellant submitted a January 4, 1998 notification of personnel action which indicated that his salary was \$38,077.00 per year. The notification further indicated that a pay adjustment was granted effective January 4, 1998 and appellant's salary increased to \$39,096.00 per year or \$751.85 per week. Also submitted was a notification of personnel action dated July 1, 2005, which noted that appellant voluntarily retired effective July 1, 2005 and his salary was \$56,706.00 per year.

The Office determined that a conflict of medical opinion existed between Dr. Weiss, appellant's treating physician, and the Office medical adviser, regarding the degree of permanent partial impairment of the left lower extremity due to his work-related injury.

To resolve the conflict, on April 13, 2007, the Office referred appellant to a referee physician, Dr. Ronald L. Gerson, a Board-certified orthopedic surgeon. In a June 12, 2007 report, Dr. Gerson noted a history of appellant's work-related injury and diagnosed internal derangement of the left knee with tears of the menisci and aggravation of the underlying arthritic condition and opined that this diagnosis was causally related to the December 3, 1998 work injury. He provided several methods for calculating appellant's schedule award; however, the range of motion deficit of the left knee provided the greatest impairment rating. Dr. Gerson noted findings upon physical examination on the left of flexion contracture of 10 degrees for 20 percent impairment and 5 degrees of varus deformity for 20 percent impairment. Dr. Gerson opined that using the Combined Values Chart, page 604 of the A.M.A. *Guides*, appellant would be entitled to a 36 percent impairment of the left lower extremity.

In a report dated July 20, 2007, an Office medical adviser reviewed Dr. Gerson's report and calculated that appellant sustained 40 percent permanent impairment of the left leg. He advised that he based appellant's impairment rating on the loss of range of motion because this calculation produced the greatest impairment rating. The Office medical adviser calculated range of motion for flexion of 125 degrees for a 0 percent impairment, flexion contracture of 10 degrees for a 20 percent impairment, and 5 degrees of varus deformity for a 20 percent impairment. He opined that Dr. Gerson improperly combined these figures using the Combined Values Chart as the A.M.A. *Guides* instruct the examiner to add these figures.⁸

⁷ *Id.* at 574, Figure 18-1.

⁸ *See id.* at 533, 17.2f, Range of Motion.

In an August 31, 2007 decision, the Office granted appellant a schedule award for 40 percent permanent impairment of the left leg. The period of the award was from May 14, 1999 to July 28, 2001 for a total of 124.80 weeks of compensation based on his weekly rate of pay of \$563.89 as of December 3, 1998, the date of injury and the date disability commenced. The Office noted that the weekly pay rate was calculated as \$751.85 per week multiplied by the augmented, three-quarters, compensation rate for a weekly pay rate of \$563.89.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act⁹ provides that compensation for a schedule award shall be based on the employee's monthly pay.¹⁰ Section 8105(a) of the Act provides: If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.¹¹

Section 8101(4) of the Act defines monthly pay for purposes of computing compensation benefits as follows: 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.¹² The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).¹³ Office regulations provide that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition resulting from a previous injury or illness without a new or intervening injury.¹⁴

The Board has held that where an injury is sustained over a period of time, the date of injury is the date of last exposure to those work factors causing injury.¹⁵ In schedule award claims, the issue is the permanent impairment sustained resulting from such injury. Under the

⁹ 5 U.S.C. §§ 8101-8193; *see also R.S.*, 58 ECAB ____ (Docket No. 06-1346, issued February 16, 2007).

¹⁰ 5 U.S.C. § 8107.

¹¹ 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

¹² 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

¹³ *Robert A. Flint*, 57 ECAB ____ (Docket No. 05-1106, issued February 7, 2006).

¹⁴ 20 C.F.R. § 10.5(x).

¹⁵ 20 C.F.R. § 10.5 defines the terms "traumatic injury" and "occupational disease or illness." "Traumatic injury" is defined by section 10.5(ee) as "a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force including stress or strain which is identifiable as to time and place of occurrence and member or function of the body affected." "Occupational disease or illness" is defined by 20 C.F.R. § 10.5(q) as "a condition produced by the work environment over a period longer than a single workday or shift."

Act, the possibility of a future injury does not constitute an injury.¹⁶ In schedule award claims where the injury is sustained over a period of time, the Board has recognized that the claim covers all exposures which occurred up to the filing of the claim.¹⁷

The Office's implementing regulations¹⁸ provide that the pay rate for compensation purposes means the employee's pay, as determined under 5 U.S.C. § 8114.¹⁹

Section 8114(d) of the Act²⁰ provides:

“Average annual earnings are determined as follows:

(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --

(A) was fixed, the average annual earnings are the annual rate of pay.”

ANALYSIS

The Office accepted appellant's traumatic injury claim for a left knee strain and tearing of the posterior horn and body of the medical meniscus which occurred on December 3, 1998 when appellant fell down stairs at work.²¹ Appellant sustained a traumatic injury and stopped work on December 3, 1998 and returned to work on March 15, 1999. There is no evidence that appellant sustained a recurrence of disability. Appellant's pay rate on the date of injury, December 3, 1998, was \$39,096.00 per year or \$751.85 per week. He received a fixed annual rate of pay, for a position that provided employment for the whole year preceding the injury.²² The Office calculated his pay rate on August 31, 2007 as \$563.89 per week based on the date of injury which is the same as the date disability began, December 3, 1998.

The Board finds that appellant's pay rate for schedule award purposes is no more than \$563.89, his pay rate at the time of his December 3, 1998 work injury and which is also the date disability began. Pursuant to section 8101(4) of the Act appellant's monthly pay for purposes of

¹⁶ *Id.*

¹⁷ See *Patricia K. Cummings*, *supra* note 12.

¹⁸ 20 C.F.R. § 10.5(s).

¹⁹ 5 U.S.C. § 8114.

²⁰ *Id.*

²¹ The Board notes that appellant did not dispute the nature and degree of permanent impairment of the left lower extremity and therefore it was not addressed in this decision.

²² 5 U.S.C. § 8114.

computing compensation benefits is 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, whichever is greater.²³ In this instance, appellant's claim was accepted for a traumatic injury which occurred on December 3, 1998 and he stopped work on December 3, 1998 and did not file a recurrence of disability. The Office calculated his pay rate on August 31, 2007 as \$563.89 per week (\$751.85 x .75 augmented compensation rate = \$563.89) based on information on the CA-1 provided by the employing establishment and a notification of personnel action dated January 4, 1998. The Office based appellant's August 31, 2007 schedule award on the December 3, 1998 date of injury pay rate which was also the date disability commenced.²⁴ The Board finds that the Office properly calculated appellant's pay rate for the purposes of his August 31, 2007 schedule award for a left knee strain.

Appellant contended that since his claim was an occupational disease, the Office should have based the schedule award on his pay rate as of his last date of exposure to the employment factors which caused or aggravated his condition, which would be his date of retirement, July 1, 2005. He asserted that consistent with the holding in *Patricia K. Cummings*,²⁵ the "date of injury" should be his retirement (date of last exposure).

The Board has noted in occupational disease cases such as *Patricia K. Cummings*,²⁶ *Sherron A. Roberts*²⁷ and *Jack R. Lindgren*,²⁸ where an injury is sustained over a period of time, the date of injury is the date of last exposure to those work factors causing injury or if there is continuing exposure, the date of injury is the date of the medical report upon which the Office relies in determining permanent impairment.²⁹ However, in this case, there is no evidence that appellant sustained an injury over a period of time or that there was continuing exposure; rather, the evidence supports that appellant sustained a traumatic injury on December 3, 1998, when he fell down stairs. Therefore, the determination of the date of last exposure or continuing exposure as set forth in *Patricia K. Cummings* would not be applicable in appellant's case. The Board finds that the Office properly calculated appellant's pay rate on August 31, 2007 as \$563.89 per

²³ 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition.

²⁴ The Board notes that although the CA-1 notes that appellant's injury occurred on December 3, 1998 and he stopped work on December 7, 1998, the factual evidence supports that appellant stopped work on December 3, 1998 and sought medical attention that day.

²⁵ *Supra* note 12.

²⁶ *Id.*

²⁷ 47 ECAB 617 (1996).

²⁸ 35 ECAB 676 (1984).

²⁹ See also *R.S.*, *supra* note 9; *Patricia K. Cummings*, *supra* note 12; *Barbara A. Dunnivant*, 48 ECAB 517 (1997) (where the Board found that the date of injury is the date of last exposure to work factors causing the injury or if there is continuing exposure, the date of injury is the date of the medical report upon which the Office relies in determining permanent impairment).

week based on the date of injury which is the same as the date disability began, December 3, 1998.

On appeal, appellant asserts that he is entitled to cost-of-living increases up to the date following the approval of his schedule award in August 2007. The Board finds that the Office properly determined that the compensation rate should not be adjusted for cost-of-living increases.

The Act provides for cost-of-living adjustments.³⁰ Section 8146a(a) 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 shall be increased by the percentage of the increase.³¹ On August 31, 2007 the Office granted appellant a schedule award for 40 percent permanent impairment of the left lower extremity and the period of the award was from May 14, 1999 to July 28, 2001 for a total of 124.80 weeks of compensation based on his weekly pay rate of \$563.89 as of December 3, 1998. In this case, appellant was not entitled to cost-of-living increases in 1998 and succeeding years through 2007 because the evidence does not show that he had injury-related disability for more than a year prior to the effective date of the respective increase for those years.³²

CONCLUSION

The Board finds that the Office properly calculated appellant's pay rate for the purposes of his schedule award as \$563.89.

³⁰ 5 U.S.C. § 8146(a); see 20 C.F.R. § 10.420(b).

³¹ *Id.*

³² See *Anthony M. Kowal*, 49 ECAB 222 (1997); *David M. Chillemi*, Docket No. 95-2546 (issued August 14, 1997). See also *Thomas Donaghue*, 39 ECAB 336 (1988) (the legislative history of section 8146a(a) makes it clear that the intent was to have cost-of-living increases apply only in situations where an employee has already been receiving compensation for more than one year prior to the effective date of the increase).

ORDER

IT IS HEREBY ORDERED THAT the August 31, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board