United States Department of Labor
Employees' Compensation Appeals Board

L.G., Appellant	)	
and	)	**Docket No. 17-0699**
	)	**Issued: August 9, 2018**
PANAMA CANAL COMMISSION, LOCKS DIVISION, Panama City, Panama, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 3, 2017 appellant filed a timely appeal from a November 21, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish more than 21 percent permanent impairment of his left lower extremity for which he previously received a schedule award; and (2) whether OWCP determined the proper pay rate when calculating appellant's schedule award compensation.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 30, 2011 appellant, then a 64-year-old retired senior lock master/lock operations foreman,[2] filed an occupational disease claim (Form CA-2) alleging that he sustained avascular bone necrosis of his left femur due to participating in decompression dives while working as a diver in the Panama Canal. He indicated that he first became aware of his claimed condition and its relationship to his federal employment on April 6, 2011.

Appellant submitted the findings of October 6, 2010 x-ray testing of his left hip which contained an impression of moderate-to-severe avascular necrosis. In an April 6, 2011 report, Dr. David A. Petersen, an attending Board-certified orthopedic surgeon, indicated that appellant was status post decompression surgery[3] and posited that the avascular necrosis of his left hip (including his left femoral head) was caused by the decompression injuries he sustained while working as a diver for the employing establishment.

On April 3, 2012 OWCP accepted appellant's claim for left avascular necrosis and it later expanded the accepted conditions to include left osteoporosis and aseptic necrosis of the head and neck of his left femur.

On April 25, 2012 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to his accepted employment conditions.

Appellant submitted a May 14, 2012 report from Dr. Petersen who provided findings of the physical examination he conducted on that date. In an August 8, 2012 report, Dr. Petersen opined that appellant had reached maximum medical improvement (MMI) as of May 14, 2012 and indicated that he had "at least a 20 percent impairment rating because of the avascular necrosis."

In September 2012, OWCP referred the case record, including Dr. Petersen's May 14 and August 8, 2012 reports, to Dr. Nabil F. Angley, a Board-certified orthopedic surgeon serving as an OWCP medical adviser. It requested that Dr. Angley provide a permanent impairment rating for appellant's left lower extremity under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] On October 4, 2012 Dr. Angley advised that Dr. Petersen's reports could not serve as a basis for a permanent impairment rating and he recommended that appellant be referred to an appropriate specialist for examination and provision of a permanent impairment rating.

In December 2012, OWCP referred appellant for a second opinion examination to Dr. William Dinenberg, a Board-certified orthopedic surgeon. It requested that he provide a permanent impairment rating for appellant's left lower extremity under the sixth edition of the A.M.A., *Guides*.

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[2] Appellant retired from the employing establishment, effective December 31, 1998. Before working as a senior lock master/lock operations foreman, he participated in almost 500 dives while working as a diver for the employing establishment from March 1972 to February 9, 1987.

[3] The record contains a document describing preoperative instructions, signed by appellant on November 10, 2010, which mentions surgery to be performed on November 15, 2010. However, the record does not contain a copy of left hip surgery performed in 2010.

[4] A.M.A., *Guides* (6th ed. 2009).

In a February 13, 2013 report, Dr. Dinenberg discussed the treatment appellant received for his left hip condition, including core decompression surgery of the left hip on November 15, 2010. He reported that, during the February 8, 2013 physical examination, appellant ambulated with an antalgic gait and had left hip atrophy relative to his right hip, but did not have tenderness over the greater trochanter of his left hip. Dr. Dinenberg applied the diagnosis-based impairment (DBI) method for rating permanent impairment under Table 16-4 (Hip Regional Grid) beginning on page 512 of the sixth edition of the A.M.A., *Guides*. He found that appellant's severe left avascular necrosis condition fell under class 3 and warranted a default value of 30 percent for permanent impairment of his left lower extremity. Under Table 16-6 through Table 16-8 on pages 516 through 520, Dr. Dinenberg calculated a functional history grade modifier of 2, physical examination grade modifier of 3, and clinical studies grade modifier of 3. Application of the net adjustment formula required movement one space to the left of the default value on Table 16-4 and, therefore, the total permanent impairment of appellant's left lower extremity was 28 percent.[5]

In a March 15, 2013 letter, appellant asserted that his pay rate for any schedule award compensation he might receive should include the tropical differential pay he received while he was working in Panama. He alleged that this pay component was calculated by multiplying 15 percent times his base pay. Appellant asserted that when he retired effective December 31, 1998 he was earning base pay of $24.91 per hour and tropical differential pay of $3.74 per hour ($24.91 per hour times 15 percent), which equaled $28.65 per hour. He referenced his receipt of other forms of premium pay, including Sunday premium pay and hazard pay, and asserted that his total pay per hour when he retired on December 31, 1998 was $30.27.

Appellant submitted several documents he felt were relevant to the determination of his pay rate, including his work schedule (displayed in calendar style) from December 1998, the last month he worked for the employing establishment.[6]

A March 8, 1987 notification of personnel action (SF-50 form) indicates that effective March 1, 1987 appellant earned "Total Comp" $17.97 per hour which included "Diff 1" pay of $2.34 per hour. The document contains the handwritten notation "tropical differential" with respect to the $2.34 figure and the handwritten notation "plus night differential, plus Sundays and holidays, plus hazard pay" with respect to the $17.97 figure.

A December 29, 1998 document entitled "retirement information" and produced by the Office of Personnel Management (OPM) indicates that, on January 4, 1998, appellant had an hourly salary of $28.65 and an annual salary of $59,792.55.

In a May 22, 2013 letter, OWCP requested that the employing establishment provide information about appellant's pay, including any premium pay he earned, with the specific type

[5] Dr. Dinenberg determined that the date of MMI was February 8, 2013, the date of the physical examination he conducted.

[6] The calendar contains various numbers in the date squares of the calendar ostensibly denoting different work shifts. Appellant submitted a December 3, 2001 letter, produced in connection with a prior compensation claim, in which he advised OWCP that for 34 years he had a schedule whereby, in rotating succession, he worked the second shift of the day (8:00 a.m. to 4:00 p.m.) for one week, the third shift of the day (4:00 p.m. to 12:00 a.m.) for one week, and the first shift of the day (12:00 a.m. to 8:00 a.m.) for one week.

and amount for each type of pay. It advised that the information was needed because appellant had filed a schedule award claim. The record does not contain any response to this letter.

In late-May 2013, OWCP referred the case to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser. It requested that Dr. Slutsky review the case record, including Dr. Dinenberg's February 13, 2013 report, and provide a permanent impairment rating for appellant's left lower extremity under the sixth edition of the A.M.A., *Guides*.

In a June 21, 2013 report, Dr. Slutsky discussed the examination findings obtained by Dr. Dinenberg and also determined that appellant had 28 percent permanent impairment of his left lower extremity under the sixth edition of the A.M.A., *Guides*. Contrary to Dr. Dinenberg, he found that the clinical studies grade modifier was not applicable, but his calculation of the net adjustment formula without a clinical studies grade modifier still equaled 28 percent permanent impairment of the left lower extremity.[7]

Appellant submitted a SF-50 form with the effective date of December 31, 1998, which contains a "Total Comp" figure of $28.65 per hour, a basic pay figure of $24.91 per hour, and a "Diff 1" figure of $3.74 per hour. An undated OPM document indicates that on December 31, 1998 appellant had "base pay" of $28.65 per hour.

The record contains several documents, including memoranda and work sheets, which OWCP produced to calculate appellant's pay rate for paying schedule award compensation.

In an undated document entitled "pay rate memo[randum]," OWCP noted that appellant worked as a diver until February 9, 1987, which it identified as the date of last exposure to the implicated employment factors and hence the date of injury. It advised that appellant then worked as a lock master/lock operations foreman until his retirement from the employing establishment effective December 31, 1998. Appellant did not lose time for the accepted condition prior to his retirement, but he underwent surgery on November 15, 2010 which was necessitated by the accepted condition. OWCP determined that, therefore, appellant's pay rate would be set at the date disability with reference to his last federal pay rate. It noted that the record contained an SF-50 form showing that he earned an hourly base rate of $24.91 effective December 31, 1998, his retirement date. OWCP indicated that the total pay figure was listed as $28.65 per hour on both the December 31, 1998 SF-50 form and an OPM Individual Retirement Record (IRR).[8] It asserted that the $28.65 per hour figure included premium pay, noting that the Panama Canal Commission had closed and it was unable to obtain information that appellant was due additional premium pay. OWCP multiplied the total compensation figure of $28.65 per hour times 2,087 (work hours in a year) to equal $59,792.55, and it divided this figure by 52 weeks to equal a weekly pay rate of $1,149.86.

OWCP then calculated that appellant received Sunday premium pay of $49.82 per week, night differential pay of $48.84 per week, and hazard pay of $51.45 per week, forms of pay which were included in the weekly pay rate of $1,149.86. It indicated that the evidence of record, including appellant's statements and a December 1998 calendar-style work schedule, showed that

[7] Dr. Slutsky opined that appellant had reached MMI on May 14, 2012.

[8] The Board notes that the only OPM document in record at that point, a January 4, 1998 document, listed an "hourly salary" of $28.65 and did not provide a figure for total pay per hour.

appellant had a rotating schedule in December 1998.[9] OWCP then converted appellant's total hours of Sunday premium pay for the month (32 hours) to a figure for Sunday premium pay per week (8 hours). It calculated that Sunday premium pay was paid at the rate of $6.22 per hour (appellant's base pay of $24.91 per week times 25 percent, *i.e.*, the rate of additional pay for Sunday premium pay) to conclude that appellant received $49.82 of Sunday premium pay per week. OWCP calculated that night differential pay was paid at the rate of $2.49 per hour (base pay of $24.91 per week times 10 percent, *i.e.*, the rate of additional pay for night differential pay). It attached a worksheet showing that appellant had 1,020 hours of night differential work in 1998 and noted that multiplying this figure times $2.49 per hour yielded $2,539.80 of night differential pay per year (or $48.84 of night differential pay per week). OWCP calculated that the remaining balance of the premium pay that appellant received was represented by $51.45 of hazard pay per week (paid at a rate of 25 percent of base pay). It indicated that appellant claimed he was entitled to $3.74 per week for tropical differential pay in addition to his base pay of $24.91 per week. OWCP noted that hazard pay was an administrative inclusion to the pay rate, but that there was no entitlement to tropical differential pay.

By decision dated September 16, 2013, OWCP granted appellant a schedule award for 28 percent permanent impairment of his left lower extremity, noting that the award would run for 564.48 days from May 14, 2012 to November 29, 2013 and that the payments would be based on a pay rate of $1,149.86 per week.[10] To explain his pay rate calculation, OWCP summarized the discussion it included in the afore-mentioned document entitled "pay rate memo[randum]." It indicated that, although appellant reported that he received tropical differential pay, there was no specific reference to tropical differential pay as a separate differential in employing establishment or OPM records. OWCP considered that tropical differential pay might have been a type of hazard pay, but found that if such were the case "it was already included in the total hazard pay premium." It noted that there was no description provided to show that tropical differential pay was a statutory inclusion to appellant's pay rate.

In an October 3, 2013 letter, appellant provided figures which he claimed accurately reflected his base salary, Sunday premium pay, night differential pay, and tropical differential/ hazard pay, and he asserted that he should have received his schedule award compensation based on a weekly pay rate of $1,255.51. Additionally, in the same October 3, 2013 letter, he indicated that he had neglected to include pay for working the 10 federal holidays in his prior calculation and he asserted that, therefore, his weekly pay rate was at least $1,303.63.

In a November 11, 2013 letter, appellant asserted that a May 12, 1967 SF-50 form showed that he was entitled to have tropical differential pay included in his pay rate. He submitted a SF-50 form with the effective date of May 12, 1967 which contains text indicating "Employee entitled to 15 percent Tropical Differential since he is maintaining his own household." A pay stub for the pay period 25 ending on December 19, 1998 shows "gross pay" of $2,472.40 for that two-week pay period and "gross pay year to date" of $67,499.53.

[9] OWCP characterized appellant's work schedule for December 1998 as follows: first week, 8:00 a.m. to 4:00 p.m. with Sunday scheduled (8 hours of Sunday premium pay); second week, 12:00 a.m. to 8:00 p.m. with no Sunday or Saturday scheduled (0 hours of Sunday premium pay); third week, 4:00 p.m. to 12:00 a.m. with Saturday and Sunday scheduled (16 hours of Sunday premium pay); and fourth week, 8:00 a.m. to 4:00 p.m. with Sunday scheduled (8 hours of Sunday premium pay).

[10] Appellant received schedule award payments from May 14, 2012 to November 29, 2013 based on this pay rate.

In a February 4, 2014 letter, OWCP advised appellant that it was addressing his communications requesting the inclusion of tropical differential pay in his pay rate. It discussed the May 12, 1967 SF-50 and asserted that the tropical differential pay mentioned in the document could be considered post-allowance differential pay because the extra pay was used to maintain a household. OWCP noted that, under its procedures, elements excluded from pay rate included additional pay or post-allowance authorized outside the United States and its possessions because of differential in cost of living or other special circumstances. It noted that appellant submitted a pay stub from his time in Panama, but that it was unable to use the pay stub as SF-50 forms and OPM retirement records would contain the more accurate information.

On May 12, 2014 appellant underwent OWCP-approved left total hip arthroplasty/ replacement surgery.

On January 15, 2015 appellant filed a claim for compensation (Form CA-7) seeking an increased schedule award due to the accepted employment condition.

On January 23, 2015 OWCP referred appellant for a second opinion examination to Dr. Fred I. Ferderigos, a Board-certified orthopedic surgeon. It requested that he provide a permanent impairment rating for appellant's left lower extremity under the sixth edition of the A.M.A., *Guides*.

In a February 9, 2015 report, Dr. Ferderigos discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He indicated that the examination revealed that appellant did not have tenderness to palpation of his left hip and that flexion of the left hip was not attempted beyond 110 degrees in order to avoid joint dislocation. Sensory evaluation of appellant's lower extremities revealed no focal neurological deficits and he had 5/5 strength in his lower extremities. Dr. Ferderigos applied the DBI method for rating permanent impairment under Table 16-4 (Hip Regional Grid) beginning on page 512 of the sixth edition of the A.M.A., *Guides*. He found that appellant's left total hip replacement/arthroplasty with good result fell under class 2 and warranted a default value of 25 percent for permanent impairment of his left lower extremity. Dr. Ferderigos referred to Table 16-6 through Table 16-8 on pages 516 through 520 and calculated a physical examination grade modifier of 0 and clinical studies grade modifier of 0. He determined that the functional history grade modifier was not applicable because functional history was used to place appellant's ratable condition in class 2. Application of the net adjustment formula required movement two spaces to the left of the default value on Table 16-4 and, therefore, the total permanent impairment of appellant's left lower extremity was 21 percent.[11]

On February 24, 2015 OWCP again referred appellant's case for review to Dr. Slutsky in his role as an OWCP medical adviser. It requested that Dr. Slutsky examine Dr. Ferderigos' February 9, 2015 report and provide a permanent impairment rating for appellant's left lower extremity under the sixth edition of the A.M.A., *Guides*.

In a February 24, 2015 report, Dr. Slutsky determined that appellant had 21 percent permanent impairment of his left lower extremity under the sixth edition of the A.M.A., *Guides*. He detailed appellant's factual and medical history and explained how he calculated appellant's

[11] Dr. Ferderigos determined that the date of MMI was February 9, 2015, the date of the physical examination he conducted.

left extremity permanent impairment. Dr. Slutsky applied the DBI method for rating permanent impairment under Table 16-4 (Hip Regional Grid) beginning on page 512 of the sixth edition of the A.M.A., *Guides*. He found that appellant's left total hip replacement/arthroplasty with a good result fell under class 2 and warranted a default value of 25 percent for permanent impairment of his left lower extremity. Dr. Slutsky referred to Table 16-6 through Table 16-8 on pages 516 through 520 and calculated a functional history grade modifier of 1 and physical examination grade modifier of 0.[12] He determined that the clinical studies grade modifier was not applicable because clinical studies were used to place appellant into the correct diagnosis and class. Application of the net adjustment formula required movement two spaces to the left of the default value on Table 16-4 and, therefore, the total permanent impairment of appellant's left lower extremity was 21 percent.[13]

By decision dated April 21, 2015, OWCP found that appellant had 21 percent permanent impairment of his left lower extremity. It determined that the weight of the medical opinion evidence regarding appellant's left lower extremity permanent impairment rested with the April 1, 2015 opinion of Dr. Slutsky, who found that appellant had 21 percent permanent impairment of that member. OWCP indicated that appellant was not entitled to an additional award for the left lower extremity as the current assessment of permanent impairment was lower than the 28 percent permanent impairment to the same member for which he received the September 16, 2013 schedule award.[14]

On April 7, 2016 appellant requested reconsideration and noted that he was challenging OWCP's finding regarding the extent of his permanent impairment and OWCP's use of the weekly pay rate of $1,149.86 for paying him schedule award compensation. He continued to claim that tropical differential pay should have been included in his pay rate.

Appellant submitted a January 13, 2015 OPM document indicating that his "high-3 average pay" was $62,007.00 per year. For 1996, 1997, and 1998, the document listed basic pay earnings derived from annual retirement deductions which were in turn used to compute high-3 average pay. The basic pay earnings figure listed for 1998 was $64,977.49 per year. OWCP noted that its figures for appellant's pay were taken from his IRR and indicated the employing establishment certified in his IRR that appellant received additional forms of pay that were not reflected in column three of the IRR form for listing base pay.[15]

In a September 17, 2015 letter, OPM indicated that it had recalculated appellant's high-3 average pay to be $62,178.00 per year, rather than $62,007.00 as previously calculated, because it

[12] Dr. Slutsky explained that appellant qualified for a functional history grade modifier of 1 due to his antalgic gait and noted that appellant had a physical examination grade modifier of 0 due to fact that he did not have objective left hip deficits, other than those that placed him in the correct diagnostic class. *See* A.M.A., *Guides* 515-18.

[13] Dr. Slutsky determined that the date of MMI was February 9, 2015, the date of Dr. Ferderigos' physical examination.

[14] Appellant did not receive any additional schedule award compensation. However, the April 21, 2015 decision listed the same pay rate for compensation purposes, $1,149.86 per week, which was used to pay appellant compensation in connection with the September 16, 2013 schedule award.

[15] The January 13, 2015 letter indicated that the IRR denoting additional forms of pay received by appellant was attached to the letter. However, the record does not contain an IRR showing these additional forms of pay.

received a supplemental IRR which showed that appellant's basic pay earnings figure for 1998 were $65,490.21 per year, rather than $64,977.49 as previously calculated.[16]

Appellant submitted a February 7, 2016 letter, initially sent to his congressional representative, in which he requested help with his attempt to have tropical differential pay included in his pay rate based on information he received from OPM. In an April 1, 2016 letter, OWCP advised appellant's congressional representative that OWCP does not use the high-3 average pay method to calculate FECA benefits. It noted that FECA benefits were determined by different legislation, regulations, and procedures than annuity payments calculated by OPM.

Appellant submitted excerpts from statutes, including Public Law 96-70 (enacted September 27, 1979), addressing pay to employees of United States agencies in Panama, and excerpts from federal regulations, including 35 C.F.R. § 251.31, entitled "Tropical differential,"[17] and 5 U.S.C. § 5923, entitled "Quarter allowance."

By decision dated November 21, 2016, OWCP denied modification of its April 21, 2015 decision. It found that appellant has not met his burden of proof to establish more than 21 percent permanent impairment of his left lower extremity. OWCP further found that it properly paid appellant schedule award compensation based on a weekly pay rate of $1,149.86. To explain its calculation of the pay rate, OWCP summarized the discussion included in its undated document entitled "pay rate memo[randum]" which was produced shortly before it issued the September 16, 2013 schedule award. It indicated that, although appellant reported that he received tropical differential pay, there was no specific reference to tropical differential pay as a separate differential in employing establishment or OPM records. OWCP considered that tropical differential pay might have been a type of hazard pay, but found that if such were the case "it was already included in the total hazard pay premium." It noted that there was no description provided to show that tropical differential pay was a statutory inclusion to appellant's pay rate.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA[18] and its implementing regulation[19] 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, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for

[16] The record does not contain a copy of this supplemental IRR.

[17] The excerpt provided by appellant indicated that an "overseas tropical differential" for qualifying employees shall be fixed by the head of each agency in an amount equal to 15 percent of the applicable base wage or salary established under 35 C.F.R. § 251.13.

[18] 5 U.S.C. § 8107.

[19] 20 C.F.R. § 10.404 (1999).

evaluating schedule losses.[20] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[21]

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the left hip, the relevant portion of the leg for the present case, reference is made to Table 16-4 (Hip Regional Grid) beginning on page 512.[22] After the Class of Diagnosis (CDX) is determined from the Hip Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE) and grade modifier for Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[23]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish more than 21 percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

OWCP accepted that appellant sustained osteoporosis, avascular necrosis, and aseptic necrosis of the head and neck of his left femur due to performing his diving duties. In a February 13, 2013 report, Dr. Dinenberg, a second opinion physician, determined that appellant had 28 percent permanent impairment of his left lower extremity under the sixth edition of the A.M.A., *Guides* and Dr. Slutsky, an OWCP medical adviser, provided an opinion on June 21, 2013 that appellant had 28 percent permanent impairment of his left lower extremity under the sixth edition. By decision dated September 16, 2013, OWCP granted appellant a schedule award for 28 percent permanent impairment of his left lower extremity.

Appellant later filed a claim for an increased schedule award. In a February 9, 2015 report, Dr. Ferderigos, a second opinion physician, determined that appellant had 21 percent permanent impairment of his left lower extremity under the sixth edition of the A.M.A., *Guides* and Dr. Slutsky determined on April 1, 2015 that appellant had 21 percent permanent impairment of his left lower extremity under the sixth edition. By decision dated April 21, 2015, OWCP found that appellant had 21 percent permanent impairment of his left lower extremity based on the April 1, 2015 opinion of Dr. Slutsky.

The Board finds that, in April 2015, Dr. Slutsky applied the appropriate standards to find that appellant has 21 percent permanent impairment of his left lower extremity and that appellant has not submitted probative medical evidence showing that he has greater permanent impairment.

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[20] *Id*. *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010).

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *see also id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[22] *See* A.M.A., *Guides* (6th ed. 2009) 509-11.

[23] *Id.* at 515-22.

On April 1, 2015 Dr. Slutsky applied the DBI method for rating permanent impairment under Table 16-4 (Hip Regional Grid) beginning on page 512 of the sixth edition of the A.M.A., *Guides*. He properly found that appellant's left total hip replacement/arthroplasty with good result fell under class 2 and warranted a default value of 25 percent for permanent impairment of his left lower extremity.[24] Dr. Slutsky referred to Table 16-6 through Table 16-8 on pages 516 through 520 and calculated a functional history grade modifier of 1 and physical examination grade modifier of 0. He determined that the clinical studies grade modifier was not applicable because clinical studies were used to place appellant into the correct diagnosis and class.[25] Dr. Slutsky properly noted that application of the net adjustment formula on page 521 required movement two spaces to the left of the default value on Table 16-4 and, therefore, he concluded that the total permanent impairment of appellant's left lower extremity was 21 percent.

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.

LEGAL PRECEDENT -- ISSUE 2

Under 5 U.S.C. § 8101(4), monthly pay 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, if the recurrence begins more than [six] months after the injured employee resumes regular full-time employment with the United States, whichever is greater. For a schedule award, the rate of pay is the highest rate which satisfies the terms of 5 U.S.C. § 8101(4).[26]

Under OWCP's procedures, elements in pay rate calculations include Sunday premium, night differential, and hazard pay.[27] 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.[28]

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision regarding the proper pay rate.

[24] Dr. Slutsky determined that the date of MMI was February 9, 2015, the date of Dr. Ferderigos' physical examination.

[25] The Board notes that Dr. Ferderigos calculated different grade modifiers, including a clinical studies grade modifier of 0, without providing an explanation for all of his calculations. Nevertheless, Dr. Ferderigos' application of the net adjustment formula yielded the same degree of permanent impairment of appellant's left lower extremity as calculated by Dr. Slutsky, *i.e.*, 21 percent. The Board further notes that Dr. Slutsky explained how his calculation of grade modifiers was in accordance with the standards of the sixth edition of the A.M.A., *Guides. See* A.M.A., *Guides* 515-21.

[26] *D.D.*, Docket No. 15-193 (issued May 11, 2015); 5 U.S.C. § 8101(4).

[27] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7a(2) (March 2011).

[28] *Id.* at Chapter 2.900.6b.

Appellant retired from the employing establishment effective December 31, 1998 and initially filed a schedule award claim in 2012. He received a schedule award on September 16, 2013 for 28 percent permanent impairment of his left lower extremity for which he received compensation from May 14, 2012 to November 29, 2013 based on a pay rate of $1,149.86 per week. On April 21, 2015 OWCP determined that appellant had 21 percent permanent impairment of his left lower extremity. Appellant claimed that his schedule award compensation was paid at an improper pay rate.

OWCP determined that appellant had received schedule award compensation at a proper pay rate when he received such compensation based on a weekly pay rate of $1,149.86. It found that the date disability began was November 15, 2010, the date appellant underwent left hip surgery necessitated by his accepted employment injury, and that the date disability began fixed the date for evaluating appellant's pay rate for the purpose of paying schedule award compensation.[29] OWCP indicated that the Panama Canal Commission was closed and that it was unable to obtain complete information on premium forms of payment to appellant beyond his basic salary. It advised that it had considered the information appellant had provided, including his SF-50 identified as effective December 31, 1998 and OPM retirement documents. The December 31, 1998 SF-50 listed a total compensation rate $28.65 per hour, a figure which included $3.74 per hour of differential pay. In order to establish the types of premium pay appellant received, OWCP considered personal information appellant submitted, including his statement affirming that he worked the same rotating schedule for 34 years and the calendar-style work schedule showing his schedule for December 1998, the last month he worked. It calculated and added figures for weekly base salary rate, Sunday premium pay, night differential pay, and hazard pay, and concluded that appellant had a total weekly pay rate of $1,149.86. OWCP addressed appellant's contention that tropical differential pay should be included in his pay rate and concluded that such pay should not be included.

As noted above, OWCP indicated that OPM documentation in the case record supported its findings regarding the pay rate for paying appellant schedule award compensation. However, it did not adequately address all of the OPM documents in the case record. The Board notes that some of these documents suggest that appellant would be entitled to receive schedule award compensation based on a weekly pay rate higher than that calculated by OWCP, *i.e.*, a weekly pay rate higher than $1,149.86. For example, in a January 13, 2015 letter, OPM advised appellant that documentation, including his IRR, showed that his average basic pay earnings for the years 1996, 1997, and 1998 was $62,007.00 per year. It further noted that for 1998 alone, the year which OWCP used to fix appellant's pay rate, appellant had basic pay earnings of $64,977.49 per year.[30] Dividing the $64,977.49 figure by 52 weeks to convert it to weekly pay received in 1998 yields $1,249.57, a figure higher than the $1,149.86 figure that OWCP found to be appellant's weekly pay rate for 1998. In a September 17, 2015 letter, OPM indicated that it had recalculated appellant's high-3 average pay to be $62,178.00 per year, rather than $62,007.00 as previously calculated, because it received a supplemental IRR which showed that his basic pay earnings for 1998 were $65,490.21 per year, rather than $64,977.49 as previously calculated. Dividing the

[29] *See supra* note 26.

[30] In its January 13, 2015 letter, OWCP noted the employing establishment certified in appellant's IRR that he received additional forms of pay that were not reflected in column three of the IRR form for listing base pay. OPM indicated that the IRR denoting additional forms of pay was attached to the letter, but the case record does not contain an IRR showing these specific additional forms of pay.

$65,490.21 figure by 52 weeks to convert it to weekly pay received in 1998 yields $1,259.43, a figure higher than the previously calculated figure of $1,249.57. Therefore, this document suggests the possibility of an even higher figure for appellant's total pay received in 1998.[31] The Board notes that the case record contains other records which suggest that appellant had a higher pay rate than calculated by OWCP.[32]

Given that these documents suggest that appellant may be entitled to schedule award compensation higher than that already received, the case should be remanded to OWCP for further development of this matter. Such development is particularly necessary in the present case as the documents needed to provide a full picture of his pay rate for the purpose of paying schedule award compensation, including documents OPM referred to as being part of his IRR are not a type of record which appellant would necessarily have in his possession or that would be easily obtained by him.

Under FECA, although it is the burden of an employee to establish his or her claim, OWCP also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[33]

On remand, in order to ensure a comprehensive and well-reasoned consideration of appellant's pay rate for paying schedule award compensation, OWCP should take whatever other steps are necessary to ensure that appellant's case record is complete with regard to this issue. After carrying out such development, OWCP shall issue a *de novo* decision regarding whether appellant received schedule award compensation at a proper pay rate.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than 21 percent permanent impairment of his left lower extremity. The Board further finds that the case is not in posture for decision regarding whether appellant received schedule award compensation at a proper pay rate.

[31] Appellant submitted a February 7, 2016 letter, initially sent to his congressional representative, in which he requested help with his attempt to have additional forms of pay included in his pay rate based on information he received from OPM. In an April 1, 2016 letter, OWCP advised appellant's congressional representative that OWCP does not use the high-3 average pay method to calculate FECA benefits. While OWCP is correct in this regard, it failed to address the higher level of pay for 1998 denoted in the OPM documents.

[32] The record also contains an undated OPM document which indicates that on December 31, 1998 appellant had "base pay" of $28.65 per hour, as well as a December 26, 1998 OPM document which indicates that on January 4, 1998 appellant had an "hourly salary" of $28.65. These documents suggest that, in late 1998, appellant earned $28.65 per hour without any premium pay being included, but OWCP found that appellant earned $28.65 per hour when all premium pay was included. Therefore, these OPM documents suggest that, in late 1998, appellant earned more than the $28.65 per hour determined by OWCP (*i.e.*, more than $1,149.86 per week). Moreover, a pay stub for the pay period 25 ending on December 19, 1998 shows "gross pay year to date" of $67,499.53 and "gross pay" of $2,472.40 (or gross pay of $1,236.20 per each week of the two-week pay period 25). Therefore, this document also suggests that appellant received more pay in 1998 than determined by OWCP.

[33] *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988).

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2016 decision of the Office of Workers' Compensation Programs is affirmed with respect its finding on the extent of appellant's left lower extremity permanent impairment. The November 21, 2016 decision is set aside, and the case is remanded to OWCP for action consistent with this decision regarding the pay rate for appellant's schedule award compensation.

Issued: August 9, 2018
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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