

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

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| E.O., Appellant |) | |
| |) | |
| and |) | Docket No. 20-0359 |
| |) | Issued: December 31, 2020 |
| DEPARTMENT OF THE ARMY, ARMY-ROTC |) | |
| CLAIMS, Las Cruces, NM, 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 3, 2019 appellant, through counsel, filed a timely appeal from a September 4, 2019 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 OWCP properly determined appellant's pay rate in calculating his schedule award.

FACTUAL HISTORY

On August 1, 2011 appellant, then a 23-year-old cadet attending Army Cadet Troop Leadership Training, (CTLT),³ filed a traumatic injury claim (Form CA-1) alleging that on July 14, 2011 he sustained an injury to his right shoulder while in the performance of duty. On December 8, 2011 OWCP accepted the claim for sprain of the right shoulder, upper arm, and right acromioclavicular joint.⁴ On April 2, 2014 it expanded the acceptance of the claim to include a complete rotator cuff rupture on the right and trapezius palsy on the right.

On May 19, 2014 appellant filed a claim for a schedule award (Form CA-7).

In a July 9, 2018 report, Dr. Lubor Jarolimek, an orthopedic surgeon, opined that appellant had 10 percent permanent impairment of the right upper extremity, under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵

On January 22, 2019 Dr. Michael Katz, a Board-certified orthopedic surgeon serving as the district medical adviser (DMA), reviewed the medical evidence of record and determined that appellant reached maximum medical improvement on July 9, 2018 the date of Dr. Jarolimek's examination. Utilizing the sixth edition of the A.M.A., *Guides*, Table 15-34, Table 15-35, Table 15-7, Table 15-36, and the Peripheral Nerve Impairment Regional Grid, Table 15-5, the DMA concurred with Dr. Jarolimek's impairment rating, with one exception.⁶ He explained that the finding of 9.45 percent impairment should be rounded down, as opposed to up, to the nearest whole number, which would equate to 9 percent permanent impairment.

By decision dated February 6, 2019, OWCP granted appellant a schedule award for nine percent permanent impairment of the right upper extremity. The award ran for 28 weeks for the period July 9, 2018 to January 21, 2019. OWCP used July 21, 2011, for the effective date of pay rate and utilized a weekly pay rate of \$34.62, multiplied by a compensation rate of 66 and 2/3 percent, resulting in an award of \$24.75 per week.

On February 13, 2019 appellant, through counsel, requested a telephonic hearing, which was held on June 13, 2019. During the hearing, counsel noted that appellant was not objecting to the percentage of impairment awarded, but rather, the rate of pay. Counsel argued that appellant

³ A.T., a professor of military science, provided a September 13, 2011 line of duty letter, which confirmed that appellant was injured in the line of duty while attending CTLT training in Germany on July 14, 2011.

⁴ OWCP initially denied the claim on October 6, 2011.

⁵ A.M.A., *Guides* (6th ed. 2009).

⁶ *Id.* at 403, 406, 475, and 477.

was a cadet in the Reserve Officers' Training Corps (ROTC), but had completed all of his requirements for commission as a second lieutenant and prior to the commission, was sent to Germany on active duty status, when he was injured and medically discharged. Counsel requested that the pay rate be adjusted to reflect appellant's per diem rate of \$158.25 while on duty in Germany. OWCP's hearing representative noted that the rate of pay was set in the procedure manual.⁷

In a letter dated June 13, 2019, counsel again requested that OWCP adjust the rate of pay utilized in the schedule award. He noted that appellant was paid \$158.25 per diem while on assignment in Germany. Counsel also noted that appellant had completed the necessary education and training for his commission for second lieutenant and argued that, although appellant was "technically still in the ROTC program, [appellant] was in active duty."

By decision dated September 4, 2019, OWCP's hearing representative affirmed the February 6, 2019 decision.

LEGAL PRECEDENT

Section 8102 of FECA⁸ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty. The amount of compensation paid is a function of the injured employee's pay rate.⁹

The schedule award provisions of FECA,¹⁰ and its implementing federal regulations,¹¹ 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.¹² As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹³

⁷ Federal (FECA) Procedure Manual, Part 4, *Reserve Officers' Training Corps*, Chapter 4.600.7(a) (May 1996).

⁸ 5 U.S.C. § 8102.

⁹ 20 C.F.R. § 10.404(b). *See J.H.*, Docket No. 18-1207 (issued June 20, 2019).

¹⁰ 5 U.S.C. § 8107.

¹¹ 20 C.F.R. § 10.404.

¹² *Id.* at § 10.404(a).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Chapter 3.700.2 and Exhibit 1 (January 2010).

The pay rate for compensation purposes related to ROTC cadets is set by statute at \$150.00 per month, or \$34.62 per week. In disability cases, the claimant will be entitled to 2/3 or 3/4 of this amount, and in death cases, the usual percentages are used.¹⁴

ANALYSIS

The Board finds that OWCP properly determined appellant's pay rate in calculating his schedule award.

Counsel noted that he was not contesting the permanent impairment percentage, but rather, appellant was requesting an adjustment in the pay rate utilized in the award. He argued that appellant received a per diem of \$158.25 while on assignment in Germany and had completed the necessary education and training for his commission for second lieutenant. However, counsel confirmed that at the time of the injury, appellant was still a cadet in the ROTC program and had not been commissioned as a second lieutenant. As such, appellant was entitled to the rate of pay specified for ROTC cadets.¹⁵

As noted above, the pay rate for compensation purposes related to ROTC cadets is set by statute at \$150.00 per month, or \$34.62 per week. In disability cases, the claimant will be entitled to 2/3 or 3/4 of this amount, and in death cases, the usual percentages are used. OWCP applied the correct pay rate as outlined in the procedures and appropriately paid appellant at the basic rate of 66 and 2/3 percent. Therefore, the Board finds that OWCP properly determined appellant's pay rate.

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 OWCP properly determined appellant's pay rate in calculating his schedule award.

¹⁴ See *supra* note 7.

¹⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 31, 2020
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