United States Department of Labor
Employees' Compensation Appeals Board

S.K., Appellant	)	
and	)	**Docket No. 20-0422**
	)	**Issued: December 2, 2020**
FEDERAL JUDICIARY, U.S. SUPREME COURT, Washington, DC, Employer	)	

Appearances:
Wayne Johnson, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On December 13, 2019 appellant, through counsel, filed a timely appeal from October 29 and 31, 2019 merit decisions of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (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] The Board notes that, following the October 31, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

[3] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly determined that appellant was not entitled to consumer price index (CPI) adjustments from 1999 to 2017 in calculating the pay rate for his lower extremity schedule awards.

FACTUAL HISTORY

On July 29, 1998 appellant, then a 45-year-old assistant clerk/mail messenger, filed an occupational disease claim (Form CA-2) alleging that he sustained a left knee condition causally related to factors of his federal employment. OWCP accepted the claim for an aggravation of a medial meniscal tear and an aggravation of osteoarthrosis of the left lower leg. It subsequently expanded acceptance of the claim to include an aggravation of arthritis of the right ankle.

On August 21, 1998 appellant underwent a high tibial osteotomy.

A November 9, 1999 notification of personnel action (Form SF-50) indicated that appellant had resigned from the employing establishment effective October 23, 1999 to take a position at another federal agency.

On September 26, 2000 appellant underwent a left total knee replacement.[4] In December 2009, he underwent a total replacement of the right ankle. On June 23, 2014 appellant underwent a revision of the right ankle replacement.

In a report dated June 28, 2017, Dr. David E. Eichten, an osteopath, opined that appellant had 43 percent permanent impairment of the left knee according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] He advised that appellant had reached maximum medical improvement (MMI) by the time of appellant's March 27, 2017 examination.

On September 27, 2017 Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed Dr. Eichten's findings and opined that appellant had 34 percent permanent impairment of the left lower extremity. He advised that he had obtained MMI on June 28, 2017.

[4] By decision dated January 15, 2015, OWCP found that appellant had not established a recurrence of the need for medical treatment beginning December 11, 2013 causally related to his July 8, 1998 employment injury. By decision dated October 22, 2015, an OWCP hearing representative affirmed the January 15, 2015 decision. By decision dated November 7, 2016, OWCP denied modification of the October 22, 2015 decision. By decision dated January 31, 2018, it vacated the November 7, 2016 decision and found that appellant had established a recurrence of the need for medical treatment. OWCP further expanded acceptance of his claim to include an aggravation of arthritis of the right ankle as a consequential condition.

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

On March 9, 2018 OWCP requested that Dr. Eichten review the DMA's findings and address whether appellant had more than 34 percent permanent impairment of the left lower extremity.[6]

In an April 13, 2018 report, Dr. Eichten opined that appellant had 37 percent permanent impairment of the left lower extremity. He indicated that appellant had reached MMI on March 27, 2017. On August 21, 2018 Dr. Hammel concurred with his impairment rating.

In a September 25, 2018 schedule award memorandum, OWCP found that appellant's weekly pay rate for compensation purposes was $478.92 based on a pay rate date of November 9, 1999, the date of last exposure. It indicated that he had reached MMI on June 28, 2017 which was also the start date for CPI adjustments.

By decision dated September 25, 2018, OWCP granted appellant a schedule award for 37 percent permanent impairment of the left lower extremity. The period of the award ran for 106.56 weeks from June 28, 2017, the date of MMI, to July 13, 2019. OWCP found that the effective pay rate date was November 9, 1999, which yielded a weekly pay rate of $478.92. It multiplied $478.92 by the augmented rate of three-quarters of appellant's weekly pay for a claimant with dependents to find a weekly pay rate $359.19. OWCP indicated that this amount remained unchanged after applying cost-of-living adjustments (COLAs).

On June 26, 2019 appellant filed a claim for a schedule award (Form CA-7) for the right lower extremity.

In a report dated July 25, 2019, Dr. Brian Doerr, a podiatrist, determined that appellant had 59 percent permanent impairment of the right lower extremity due to his right ankle condition. He discussed appellant's history of a total ankle replacement on December 16, 2009 and revision on June 23, 2014. Dr. Doerr advised that on February 20, 2017 appellant had undergone an osteoplasty of the talus and tibia. He opined that the initial right ankle replacement was unrelated to the accepted employment injury, but the latter two surgeries were causally related to the accepted employment injury as OWCP had accepted an aggravation of appellant's right ankle condition. Dr. Doerr opined that appellant had obtained MMI on March 11, 2019.

On August 7, 2019 appellant, through counsel, requested reconsideration of the September 25, 2018 schedule award decision. Counsel indicated that appellant's pay rate on the date of injury (DOI) was $478.92, for a weekly compensation rate for claimants with dependents of $359.19. He observed that OWCP had specified the pay rate date as November 8, 1999 apparently based on appellant's SF-50. Counsel did not dispute the DOI pay rate date or that appellant had reached MMI on June 28, 2017. He contended, however, that appellant was entitled to CPI adjustments from 1999 to 2017. Counsel indicated that he had provided an affidavit that appellant was disabled and also received disability benefits from the Social Security Administration (SSA).

[6] On March 29, 2018 a DMA found that the proposed surgical reversal/replacement of appellant's left knee joint was causally related to the accepted condition and medically necessary. In a letter dated May 11, 2018, appellant's representative advised that he had decided against having the proposed revision of the total knee replacement.

In an April 2, 2019 affidavit, appellant advised that he had not resumed his usual employment with the employing establishment after his August 21, 1998 surgery. He stopped work on October 18, 1999 because the employing establishment could not accommodate his physician's finding that he should work part time.

On October 17, 2019 Dr. Hammel concurred with Dr. Doerr's finding that appellant had 59 percent permanent impairment of the right lower extremity. He opined that appellant had reached MMI on March 23, 2017.

By decision dated October 29, 2019, OWCP denied modification of its September 25, 2018 schedule award decision. It found that appellant had not sustained prior periods of disability and thus he was only entitled to CPI increases during the period of the schedule award.

By decision dated October 31, 2019, OWCP granted appellant a schedule award for 59 percent permanent impairment of the right lower extremity. The period of the award ran from July 14, 2019 to a fraction of a day on October 15, 2022. OWCP found that appellant had reached MMI on March 23, 2017 and that his weekly pay rate for compensation purposes was $478.92, which when multiplied by the augmented rate for the claimant with dependents yielded a weekly pay rate of $359.19. It found that this amount was unchanged after application of COLAs.[7]

LEGAL PRECEDENT

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly rate.[8] Section 8101(4) provides that "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.[9] The compensation rate for schedule awards is the same as compensation for wage loss.[10]

Section 8146(a) of FECA 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 (determined in accordance with the provisions of the section) shall be increased by the percent of the increase.[11] Legislative history shows that this phrase means compensation payable for an

[7] OWCP indicated that appellant's weekly compensation after COLAs was $478.92, his pay rate before multiplying by the rate for a claimant with a dependent. This appears to be a typographical error, as the four-week payment is $1,436.76 based on a weekly pay rate of $359.19.

[8] *See* 5 U.S.C. §§ 8105-8107.

[9] *Id*. at § 8101(4).

[10] *See* 20 C.F.R. § 10.404(b); *K.H*., 59 ECAB 495 (2008).

[11] 5 U.S.C. § 8146(a).

employment-related condition where the entitlement to such compensation occurred more than one year before the effective date of the cost-of-living increase.[12]

In cases of disability, a beneficiary is eligible for COLAs under section 8146(a) where injury-related disability began more than one year prior to the date the COLA took effect. The employee's use of continuation of pay, as provided by section 8118, or of sick or annual leave during any part of the period of disability does not affect the computation of the one-year period.[13] The disability need not have been continuous for the whole year before the increase.[14]

When an injury does not result in disability, but compensation is payable for permanent impairment, a beneficiary is eligible for COLAs under section 8146(a) of FECA where the award for such impairment began more than one year prior to the date the COLA took effect.[15]

OWCP procedures provide that, in determining the pay rate for schedule awards in occupational disease claims, the DOI is the date of last exposure to the employment factors that caused the condition.[16] When there is prior injury-related disability, OWCP procedures indicate that the CPI start date for the schedule award is the effective date of the applicable pay rate.[17] When there is no prior injury-related disability, the CPI start date is the date of MMI.[18] The schedule award start date is also the date of MMI.[19]

OWCP's procedures further provide, regarding CPIs, that "[w]here the schedule awards represents the first payment for compensable disability, the claimant's entitlement to CPIs does not begin until one year after the award begins."[20] Its procedures additionally indicate that when a claimant has no disability for work before the date of MMI, "the one-year waiting period begins on the starting date of the award. This date represents the claimant's first entitlement to compensation, even though the effective date of the pay rate DOI is earlier."[21]

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

[12] *Franklin L. Armfield*, 29 ECAB 500 (1978) (claimant not eligible for a cost-of-living increase, as provided by section 8146(a), unless the date of his entitlement to compensation occurred more than a year before the effective date of the cost-of-living increase).

[13] 20 C.F.R. § 10.420(a).

[14] *Id*.

[15] *Id*. at § 10.420(b).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900 Exhibit (September 2011).

[17] *Id*. *See also D.G.*, Docket No. 16-1855 (issued August 28, 2017).

[18] *Id*.

[19] *Id*.

[20] *Supra* note 16 at Chapter 2.808.7(h) (February 2013).

[21] *Id*. note 16 at Chapter 2.901.16(a)(5) (February 2013).

of the injured member of the body has stabilized and will not improve further.[22] The determination of the date of MMI is factual in nature and depends primarily on the medical evidence.[23] The date of MMI is usually considered to be the date of the evaluation accepted as definitive by OWCP.[24]

OWCP procedures provide that a schedule award "begin[s] on the date of MMI, unless circumstances show a later date should be used."[25]

ANALYSIS

The Board finds that OWCP properly determined that appellant was not entitled to CPI adjustments from 1999 to 2017 in calculating the pay rate for his left lower extremity schedule award.

OWCP's procedures provide that, a schedule award based on an occupational disease should have a pay rate date based on the DOI, the date disability begins, or the date of recurrence of disability, whichever is greater.[26] Appellant has not received wage-loss compensation from OWCP for any period of disability due to his accepted employment injury. Consequently, his pay rate for schedule award purposes is his DOI pay rate. In an occupational disease, where the claimant remains exposed to the employment factors claimed, the DOI is the date of last exposure to the employment factors that resulted in appellant's condition.[27] Appellant resigned from the employing establishment effective October 23, 1999, which is the DOI for pay rate purposes. While OWCP found that the DOI was November 9, 1999, the date of the Form SF-50 advising of his retirement instead of the date of last exposure, there is no evidence that his salary changed from October 23 to November 9, 1999.

As discussed, section 8146(a) of FECA provides that compensation payable on account of disability or death which occurred more than one year before the effective date of a COLA shall be increased by the percentage of the increase.[28] Counsel alleged that OWCP should have applied CPI adjustments to the DOI pay rate beginning in 1999 in calculating appellant's pay rate for schedule award purposes. However, the CPI adjustment start date for a claimant without prior disability in calculating the pay rate for a schedule award is the date of MMI.[29] OWCP properly determined that appellant had obtained MMI for the left lower extremity on June 28, 2017 the date of the impairment evaluation accepted by OWCP for schedule award purposes.[30] Appellant has

[22] *S.B.*, Docket No. 17-1665 (issued January 28, 2019); *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

[23] *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

[24] *Supra* note 16 at Chapter 3.700.3(a)(1)(c) (January 2010).

[25] *Id*. at Chapter 2.808.7(b) (February 2013).

[26] *Id*.

[27] *Id.* at Chapter 2.900.5(a) (September 2011); *Patricia K. Cummings*, 53 ECAB 623 (2002).

[28] *Supra* note 11.

[29] *Supra* note 15; *see also David M. Chillemi*, Docket No. 95-2546 (issued August 14, 1997).

[30] *Supra* note 23.

not demonstrated that he had injury-related disability and thus is entitled to a CPI adjustment start date as of the date of MMI, June 28, 2017.[31] While he contended that SSA found that he was disabled, the findings of other government agencies are not dispositive with regard to questions arising under FECA.[32] As appellant lost no time from work due to his accepted employment injury, his CPI adjustment start date is the date of MMI.[33]

FECA's implementing regulations at section 10.420(b), regarding application of COLAs, provides that a schedule award "[w]here an injury does not result in disability, but compensation is payable for permanent impairment of a covered member, organ, or function of the body, a beneficiary is eligible for COLAs under 5 U.S.C. § 8146 where the award for such impairment began more than one year prior to the date the cost-of-living adjustment took effect."[34] OWCP's procedures and Board precedent incorporate the regulations' principle that, where a "schedule award represents the first payment for compensable disability, the claimant's entitlement to [CPIs] does not[35] begin until one year after the award begins." Appellant was thus not entitled to CPI adjustments from 1999 to 2017 in calculating his pay rate for schedule award purposes for his left lower extremity schedule award.

The Board further finds, however, that the case is not in posture for decision regarding whether OWCP properly found that appellant was not entitled to CPI adjustments in calculating his pay rate for schedule award purposes for the right lower extremity schedule award as further development is needed to determine the date of MMI.

As discussed, OWCP properly found that the applicable pay rate for schedule award purposes was the DOI. It determined that appellant had reached MMI for the right lower extremity on March 23, 2017 and that the period of the award ran from July 14, 2019 to a fraction of a date on October 15, 2022. The impairment evaluation upon which OWCP based the award, however, was the July 25, 2019 report from Dr. Doerr, who found that he had reached MMI on March 11, 2019. Dr. Doerr noted that appellant had undergone surgery on his right ankle on February 20, 2017. The DMA determined that he had retroactively reached MMI for the right lower extremity on March 23, 2017, but provided no rationale for his conclusion. As discussed, the date of MMI is usually considered to be the date of the evaluation accepted as definitive by OWCP.[36] The Board has noted a reluctance of find a date of MMI which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board,

[31] *See F.P.*, Docket No. 07-2315 (issued April 18, 2008). *See also Thomas Donaghue*, 39 ECAB 336 (1988) the legislative history of section 8146(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).

[32] *See A.M.*, Docket No. 17-1192 (issued September 19, 2018).

[33] *Supra* note 15; *see also N.F.*, Docket No. 08-2117 (issued April 21, 2009).

[34] 20 C.F.R. § 10.420(b).

[35] *Moe I. Friedman*, 98-0468 (issued December 27, 1999); *David M. Chillemi*, Docket No. 95-2546 (issued August 14, 1997); *Franklini J. Armfield*, *supra* note 12; *supra* note 16 at Chapter 2.808.7(h) (February 2013).

[36] *Supra* note 23.

therefore, requires persuasive proof of MMI in the selection of a retroactive date of MMI.[37] The DMA's selection of March 23, 2017, a date retroactive to the start of the schedule award, is unexplained. Consequently, the case will be remanded for OWCP to have the DMA provide rationale for his selection of March 23, 2017 as the date of MMI. OWCP should then provide a clear explanation of how it calculated appellant's pay rate for compensation purposes, including the application of any CPI adjustments.[38] Following this and any subsequent development deemed necessary, it should issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP properly determined that appellant was not entitled to CPI adjustments from 1999 to 2017 in calculating the pay rate for his left lower extremity schedule award. The Board further finds that the case is not in posture for decision regarding whether OWCP properly found that he was not entitled to CPI adjustments in calculating the pay rate for the right lower extremity schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 31, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board. The October 29, 2019 decision is affirmed.

Issued: December 2, 2020
Washington, DC

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

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

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

[37] *C.H.*, Docket No. 19-1639 (issued April 3, 2020); *R.M.*, Docket No. 18-1313 (issued April 11, 2019).

[38] *See K.G.*, Docket No. 15-1476 (issued May 6, 2016).