

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

E.F., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Tampa, FL, Employer)

Docket No. 23-0505
Issued: October 11, 2024

Appearances:

Capp P. Taylor, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

PATRICIA H. FITZGERALD, Deputy Chief Judge

JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 16, 2023 appellant, through counsel, filed a timely appeal from a January 31, 2023 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.³

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.*

³ The Board notes that following the January 31, 2023 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.*

ISSUE

The issue is whether OWCP properly determined that appellant was not entitled to consumer price index (CPI) adjustments beginning July 9, 2008 in calculating the pay rate for her schedule award.

FACTUAL HISTORY

On May 8, 2008 appellant, then a 52-year-old transportation security officer/screener, filed a traumatic injury claim (Form CA-1) alleging that on that date she experienced pain extending from her left hand to shoulder when lifting a bag during a search while in the performance of duty. She did not stop work. OWCP accepted the claim for a left forearm strain. It subsequently expanded its acceptance of the claim to include impingement syndrome of the left shoulder and a strain of the left elbow and forearm. On October 7, 2008 OWCP paid appellant for 2.5 hours of time lost from work on July 9 and August 6, 2008 to obtain medical treatment.⁴ It further paid her compensation for 2.5 hours on September 10, 2008 and 3 hours on September 17, 2008 due to time lost from work to attend medical appointments.

In an impairment evaluation dated December 5, 2022, Dr. Robert R. Reppy, an osteopath, found that appellant had 20 percent left upper extremity impairment due to shoulder impingement pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵

On December 20, 2022 appellant filed a claim for compensation (Form CA-7), for a schedule award.

On January 8, 2023 Dr. David J. Slutsky, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), concurred with Dr. Reppy's finding of 20 percent permanent impairment of the left upper extremity. He determined that appellant had reached maximum medical improvement (MMI) on December 5, 2022.

By decision dated January 31, 2023, OWCP granted appellant a schedule award for 20 percent permanent impairment of the left upper extremity. The period of the award ran for 62 weeks from December 5, 2022, the date of MMI, to February 14, 2024. OWCP found an effective pay rate date of May 8, 2008, the date of injury, and a weekly compensation rate of \$221.57 per week.⁶ It determined that this amount was unchanged after the application of cost-of-living adjustments (COLAs).

On appeal counsel challenges OWCP's failure to apply CPI increases. He asserts that she received wage-loss compensation for disability from July 9 through August 6, 2009 and

⁴ OWCP noted that appellant was a part-time employee working 62.5 percent of a full-time schedule. Pursuant to its procedures, it multiplied the total hours worked in a year by her hourly rate to obtain a yearly salary of \$17,282.97, which it divided by 52 to find a weekly pay rate of \$332.36.

⁵ A.M.A., *Guides* (6th ed. 2009).

⁶ OWCP multiplied the weekly pay of \$332.36 by 66 and 2/3 to find a compensation rate of \$221.57.

September 10 through 17, 2008 and thus was entitled to CPI increases beginning July 9, 2008, the date disability began.

LEGAL PRECEDENT

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly rate.⁷ 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.⁸ The compensation rate for schedule awards is the same as compensation for wage loss.⁹

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.¹⁰ Legislative history shows that this phrase means compensation payable for an employment-related condition where the entitlement to such compensation occurred more than one year before the effective date of the cost-of-living increase.¹¹

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.¹² The disability need not have been continuous for the whole year before the increase.¹³

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.¹⁴

OWCP’s procedures provide that the effective pay rate date for schedule awards in traumatic injury claims is the date of injury (DOI), the date disability began, or the date of

⁷ See 5 U.S.C. §§ 8105-8107.

⁸ *Id.* at § 8101(4).

⁹ See 20 C.F.R. § 10.404(b); *S.K.*, Docket No. 20-0422 (issued December 2, 2020); *K.H.*, 59 ECAB 495 (2008).

¹⁰ 5 U.S.C. § 8146(a).

¹¹ *Franklin L. Armfield*, 29 ECAB 500 (1978) (claimant is 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).

¹² 20 C.F.R. § 10.420(a).

¹³ *Id.*

¹⁴ *Id.* at § 10.420(b).

recurrence, whichever is greater.¹⁵ When there is no prior injury-related disability, OWCP procedures indicate that the pay rate date is the DOI.¹⁶ Its procedures further provide 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 provide, regarding CPIs, that "[w]here the schedule award 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

ANALYSIS

The Board finds that OWCP properly determined that appellant was not entitled to CPI adjustments beginning July 9, 2008 in calculating the pay rate for her schedule award.

As noted above, OWCP's procedures provide that the pay rate date for schedule awards, if there is no prior disability, is the DOI. Appellant has not received wage-loss compensation from OWCP for any period of disability due to her accepted employment injury. Consequently, her pay rate date for schedule award purposes is her DOI pay rate.²²

On appeal counsel asserts that OWCP should have applied CPI adjustments to the appellant's pay rate for schedule award purposes. He maintains that she received wage-loss compensation for disability from July 9 through August 6, 2009 and September 10 through 17, 2008. Appellant, however, did not receive wage-loss compensation due to disability for these periods.²³ Instead, OWCP paid her for time lost from work to obtain medical treatment of 2.5 hours on June 9 and August 6, 2008, 2.5 hours on September 10, 2008, and 3 hours on

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900 Exhibit 1 (September 2011).

¹⁶ *Id.*

¹⁷ *Id.* See also *S.K.*, *supra* note 9; *D.G.*, Docket No. 16-1855 (issued August 28, 2017).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Supra* note 15 at Chapter 2.808.7(h) (February 2013).

²¹ *Supra* note 15 at Chapter 2.901.16(a)(5) (February 2013).

²² See *S.K.*, *supra* note 9.

²³ The term "disability" is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury. 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

September 17, 2008. As appellant did not have a period of disability due to her accepted employment injury, her CPI start date is the date of MMI.²⁴

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(a) where the award for such impairment began more than one year prior to the date the cost-of-living adjustment took effect."²⁵ 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 [CPI adjustments] does not begin until one year after the award begins."²⁶ Appellant was thus not entitled to CPI adjustments in calculating her pay rate for schedule award purposes for her left upper extremity schedule award.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly determined that appellant was not entitled to CPI adjustments beginning July 9, 2008 in calculating the pay rate for her schedule award.

²⁴ *Supra* note 18; *S.K.*, *supra* note 9; *see also N.F.*, Docket No. 08-2117 (issued April 21, 2009).

²⁵ 20 C.F.R. § 10.420(b).

²⁶ *S.K.*, *supra* note 9; *David M. Chillemi*, Docket No. 95-2546 (issued August 14, 1997); *Franklin J. Armfield*, *supra* note 11; *supra* note 15 at Chapter 2.808.7(h) (February 2013).

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 11, 2024
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board