

ISSUES

The issues are: (1) whether OWCP properly paid appellant's March 1, 2023 schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 4, 2002 appellant, then a 32-year-old federal law enforcement agent, filed a traumatic injury claim (Form CA-1) alleging that on February 1, 2002 he injured his neck, spine, and left shoulder when performing pullups during physical training while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx257 and accepted it for C5-6 and C6-7 disc herniations. Appellant stopped work and OWCP paid him wage-loss compensation.

On June 19, 2002 appellant underwent OWCP-authorized anterior cervical discectomy at C5-6 and C6-7. He returned to full-time light duty on July 8, 2002, and to full duty on August 19, 2002.

On January 7, 2004 appellant filed a claim for compensation (Form CA-7) for a schedule award. On the reverse side of the claim form, the employing establishment listed appellant's base pay as of February 1, 2002 as \$53,289.00, with an additional \$4,604.00 a year in locality pay, and \$14,473.00 in availability pay, totaling \$72,366.00.

By decision dated June 16, 2004, OWCP granted appellant a schedule award for three percent permanent impairment of the left upper extremity due to nerve root impairment originating in the spine.³

On November 16, 2021 OWCP accepted a recurrence of the need for medical treatment and expanded the acceptance of appellant's claim to include cervical disc displacement without myelopathy.

On June 16, 2022 OWCP expanded the acceptance of appellant's claim to include cervical stenosis, cervical radiculopathy and brachial plexopathy.

On August 12, 2022 appellant filed a claim for compensation (Form CA-7) for an additional schedule award.

³ Thereafter, on June 15, 2011, appellant filed a Form CA-1 for a June 13, 2011 left shoulder injury sustained while reloading firearms during a drill while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx404e. On July 1, 2019 appellant filed a Form CA-1 alleging that he sustained a left shoulder injury on June 19, 2019 when performing pullups during physical training while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx088 and accepted it for superior glenoid labrum lesion of left shoulder, and strain of muscle(s) and tendon(s) of the rotator cuff of left shoulder. By decision dated October 1, 2021, under OWCP File No. xxxxxx088, OWCP granted appellant a schedule award for an additional 18 percent permanent impairment of the left upper extremity, for a total of 21 percent. OWCP has administratively combined OWCP File Nos. xxxxxx404, xxxxxx088, and xxxxxx257, with the latter serving as the master file.

In a February 22, 2023 schedule award payment memorandum, OWCP calculated that appellant had sustained 10 percent permanent impairment of the left upper extremity in addition to the 21 percent permanent impairment previously awarded. It noted that while he underwent OWCP-authorized surgery on June 19, 2002, he had not claimed wage-loss compensation at any time. OWCP therefore utilized appellant's annual salary of \$69,198.20 as of June 19, 2002, the date disability began.

By decision dated March 1, 2023, OWCP granted appellant a schedule award for an additional 10 percent permanent impairment of the left upper extremity, for a total of 31 percent. The period of the award ran for 31.2 weeks from December 20, 2022 through February 25, 2023, based on appellant's June 19, 2002 payrate.

On March 31, 2023 appellant requested reconsideration. In an April 10, 2023 statement, he asserted entitlement to a recurrent payrate.

By decision dated April 21, 2023, OWCP denied modification of its March 1, 2023 decision.

On June 1, 2023 appellant requested reconsideration and reiterated his entitlement to a recurrent payrate.

OWCP received a May 19, 2023 report by Dr. John W. Ellis, a physician Board-certified in family medicine, wherein he asserted appellant's entitlement to a recurrent payrate.

By decision dated June 2, 2023, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA⁴ 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.

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of the payrate.⁵ 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.⁶ OWCP's procedures provide that, if the employee did not stop work on the date of injury or immediately afterwards, defined as the next day, the record should indicate the

⁴ *Supra* note 1 at § 8102.

⁵ *See id.* at §§ 8105-8107.

⁶ *Id.* at § 8101(4). *J.S.*, Docket No. 17-1277 (issued April 20, 2018); *K.B.*, Docket No. 13-0569 (issued June 17, 2013).

payrate for the date of injury and the date disability began. The greater of the two should be used in computing compensation, and if they are the same, the payrate should be effective on the date disability began.⁷

In applying section 8101(4), the statute requires OWCP to determine monthly pay by determining the date of the greater payrate, based on the date of injury, date of disability, or the date of recurrent disability. The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).⁸ Where an injury is sustained over a period of time, the date of injury is the date of last exposure to the employment factors causing the injury.⁹

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

In determining the appropriate rate of pay for schedule award purposes, OWCP must determine the greater payrate based on the date of injury, date of disability, or the date on which disability recurred.¹⁰ In this case, OWCP selected the date of injury of June 19, 2002 as appellant had no disability but continuing exposure. Appellant had no dates of subsequent disability that would entitle him to a recurrent payrate. Thus, the Board finds that OWCP properly determined that appellant's payrate as of June 19, 2002, the date disability began, was the appropriate payrate on which to base his schedule award compensation.¹¹

The Board further finds, however, that there is conflicting evidence as to the correct amount of appellant's June 19, 2002 payrate. The employing establishment noted on the reverse side of appellant's January 7, 2004 Form CA-7 that appellant's base pay as of February 1, 2002 was \$53,289.00, with an additional \$4,604.00 a year in locality pay, and \$14,473.00 in availability pay, resulting in total annual salary of \$72,366.00. However, in its February 22, 2023 schedule award payment memo, OWCP listed appellant's annual payrate as of June 19, 2002 as \$69,198.20, an amount of \$3,167.80 less than the February 1, 2002 payrate in effect approximately five months previously. As there is conflicting evidence as to the correct amount of appellant's June 19, 2002 payrate, the case must be remanded to OWCP for resolution of this discrepancy, to be followed by a *de novo* decision.¹²

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.9005a(3) (September 2011).

⁸ A.W., Docket No. 19-0557 (issued November 18, 2019); *Robert A. Flint*, 57 ECAB 369, 374 (2006).

⁹ *See A.I.*, Docket No. 21-0248 (issued April 19, 2023); A.W., *id.*; *Barbara A. Dunnavant*, 48 ECAB 517 (1997).

¹⁰ *Supra* note 1 at § 8101(4).

¹¹ *See S.G.*, Docket No. 24-0225 (issued April 10, 2024).

¹² In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2023 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 13, 2024

Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board