United States Department of Labor
Employees' Compensation Appeals Board

L.W., Appellant	)	
and	)	**Docket No. 10-1425**
	)	**Issued: April 26, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Savannah, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 29, 2010 appellant filed a timely appeal from a January 29, 2010 merit decision of the Office of Workers' Compensation Programs, concerning her pay rate for compensation purposes and an April 6, 2010 Office decision denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and non merits of this case.

ISSUES

The issues are: (1) whether the Office properly calculated appellant's pay rate for the period September 1 to October 31, 2009; and (2) whether the Office properly determined, pursuant to 5 U.S.C. § 8128(a), that appellant's request for reconsideration was insufficient to warrant further merit review of the claim.

On appeal appellant contends that the Office failed to correctly determine her pay rate for her recurrence claim beginning June 17, 2009.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 11, 2004 appellant, then a 46-year-old rural carrier, filed an occupational disease claim alleging that her right wrist condition was employment related. The Office accepted the claim for right ulnocarpal impaction, which was subsequently accepted for joint derangement, scar condition and fibroid of the skin. It authorized arthroscopic surgery, which was performed on June 16, 2005. Appellant accepted the employer's job offer as a modified rural carrier and returned to work on September 19, 2005.

By decision dated July 12, 2006, the Office issued a loss of wage-earning capacity decision based on appellant's actual earnings. It found that she had been performing the job of modified rural carrier for at least two months and that her current salary met or exceeded the salary of her date-of-injury job.[2]

The Office authorized surgery to remove hardware in the right ulna, which was performed on August 17, 2006. Appellant returned to limited-duty work for eight hours a day on September 5, 2006. She stopped work and returned again to limited-duty work on September 28, 2006. The Office paid compensation for the period August 17 to September 4, 2006 and September 6 to 27, 2006. It based appellant's compensation on a weekly pay rate as of August 17, 2006, the date of her recurrence of disability, $988.29 weekly or $51,391.00 annually.

Appellant accepted and began working a modified rural carrier job offer on December 16, 2008 with an annual pay rate of $61,922.00.

On June 8, 2009 appellant filed a claim for a recurrence of disability beginning June 17, 2009 claiming that the job she was working would be rescinded that day. On the back of the form, the employer noted that she had been working in a modified position since May 31, 2005.

In a June 17, 2009 letter, the employing establishment advised appellant that no work was available for her within her restrictions and that she was being placed on immediate administrative leave. It noted that the determination was based on operational needs, a search for assignments within her commuting area, her medical restrictions and the employing establishment's regulations. On July 2, 2009 the employer confirmed that no work was available for appellant within her restrictions and advised her as to her appeal and restorations rights.

On July 31, 2009 appellant filed a claim for a recurrence of total disability beginning June 17, 2009 and indicated that her pay stopped on August 4, 2009. She filed a claim for wage-loss compensation (Form CA-7) for the period August 4 to 31, 2009. On the back of the form, appellant noted her yearly salary for her date-of-injury position was $47,618.00 and that her current yearly salary was $61,922.00.

By letter dated August 10, 2009, the Office acknowledged receipt of appellant's recurrence claim and claim for wage loss. It noted that a loss of wage-earning capacity had been

[2] By decision dated July 12, 2006, the Office granted appellant a schedule award for two percent impairment of her right arm.

issued on July 12, 2006 and advised her of the evidence required to support modification of this decision.

Subsequent to the August 10, 2009 letter, medical and factual evidence was received. Appellant submitted an August 18, 2009 letter from the employing establishment, work status reports dated December 2, 2008 and May 12, 2009 from Dr. Michael J. Sullivan, an attending Board-certified orthopedic surgeon, a December 17, 2008 modified job offer and a November 22, 2008 notification of personnel action. The employing establishment noted appellant's physical restrictions had changed since the September 15, 2005 job offer due to an accepted left wrist injury. Appellant's work restrictions as of the December 12, 2008 job offer were based on a July 2, 2008 medical report.

By decision dated October 16, 2009, the Office vacated the July 12, 2006 loss of wage-earning capacity decision on the grounds that the original decision had been issued in error. It noted that the most recent job offer was withdrawn as part of the National Reassessment Process and that the prior job offers were subject to revision based on the availability of adequate work. The Office concluded that it could not determine whether the position she began working in 2005, upon which the loss of wage-earning capacity determination was based, was a permanent position and that loss of wage-earning capacity was modified because it was erroneous. Appellant was informed that it was processing her wage-loss claim for the period August 4 to 31, 2009. A computer printout shows that she was paid for the period August 4 to 31, 2009 at a weekly pay rate of $988.29, based on an August 17, 2006 recurrence date.

Subsequently appellant filed a CA-7 form claiming wage loss for the period September 1 to 30, 2009.[3] On the back of the form she noted her yearly salary for her date-of-injury position was $47,618.00 and that her current yearly salary was $61,922.00.

The record contains evidence that the Office paid appellant wage-loss compensation from September 1 to November 21, 2009 at a weekly pay rate of $988.29, the August 17, 2006 recurrence date.

By letter dated November 3, 2009, the Office informed appellant that it had placed her on the periodic rolls for temporary total disability. Appellant's compensation benefits were based on a weekly pay rate of $988.29, which was her pay rate as of the August 17, 2006 recurrence.

In a letter dated November 3, 2009, appellant contended that the Office incorrectly calculated her pay rate. She submitted a June 17, 2009 letter titled "NOTICE -- EMPLOYEES WITHOUT MSPB [Merit Systems Protection Board] APPEAL RIGHTS" (Emphasis in the original.) and an October 20, 2009 report from Dr. Sullivan noting no work restrictions and that appellant has not worked since June 2009. The June 17, 2009 letter informed appellant that no work was available within her restrictions and that she was placed on administrative leave until July 3, 2009.

In a November 3, 2009 report, Dr. Sullivan reported that appellant currently had no work or lifting restrictions and she was released to full-time eight-hour workday.

[3] Appellant incorrectly notes the date as September 31, 2009.

By decision dated January 29, 2010, the Office found the July 12, 2006 loss of wage-earning capacity decision should be modified as the evidence of record established that the decision had been issued in error. It found the job upon which the July 12, 2006 decision was "make work" and not a real job. Therefore, the Office was paying appellant compensation under the National Reassessment Program every 28 days. However, as to her rate of pay, it found that, as she returned to a "make work" job and did not return to regular work, she was not entitled to a new recurrence pay rate of June 17, 2009. The Office informed appellant that her rate of pay would be based on her August 17, 2006 recurrence date.

On February 5 and 10, 2010 appellant requested reconsideration arguing that her pay should be adjusted. By decision dated April 6, 2010, the Office denied her reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

Section 8101(4) of the Act[4] defines monthly pay for purposes of computing compensation benefits as follows: 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.[5] In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition.[6]

The Board has defined regular employment as established and not fictitious, odd-lot or sheltered and has contrasted it with a job that was created especially for [appellant]. The duties of regular employment are covered by a specific job classification and such duties would have been performed by another employee if the claimant did not perform them. The test is not whether the tasks the claimant performed during her limited duty would have been done by someone else, but instead whether she occupied a regular position that would have been performed by another employee.[7]

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined the effective pay rate of August 17, 2006 for compensation purposes. The Office used the pay rate in effect on August 17, 2006 the date appellant had surgery to remove hardware from her wrist which was the date it found a recurrence of disability began. A recurrence of temporary total disability is not alone determinative of whether appellant may receive a later and presumably greater pay rate. The

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8101(4); *see J.K.*, Docket No. 08-1148 (issued March 13, 2009); *E.C.*, 59 ECAB 397 (2008); *Dale Mackelprang*, 57 ECAB 168 (2005).

[6] *M.B.*, Docket No. 09-176 (issued September 23, 2009); *E.G.*, 59 ECAB 599 (2008); *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

[7] *Jeffrey T. Hunter*, 52 ECAB 503 (2001).

record must also show that the recurrence of compensable disability began more than six months after appellant resumed regular full-time employment with the United States. So the question is whether she ever resumed regular full-time employment with the United States, and if so, whether she did so more than six months before her August 4, 2009 recurrence claim.

A review of the record shows that, following her August 17, 2006 surgery, appellant returned to limited-duty work for eight hours per day on September 5, 2006, stopped work and returned again to limited-duty work on September 28, 2006 and that she was offered a new modified job based on new restrictions on December 16, 2008. Appellant claimed compensation based on a recurrence of total disability for the period September 1 to October 31, 2009 and claimed wage-loss compensation based on her current pay rate which was computed on a yearly salary of $61,922.00.

The evidence of record, however, does not support appellant's claim that she is entitled to a recurrent pay rate as of September 1, 2009. The record is devoid of any evidence that she resumed full-time work. The employing establishment noted in appellant's June 8, 2009 recurrence claim that she had been working in a modified job since May 31, 2005. A June 17, 2009 letter from the employing establishment noted that no work was available for her based on her restrictions, commuting area and operational needs. In addition, the Office modified the July 12, 2006 loss of wage-earning capacity decision as it was unable to determine whether the job on which it was based, modified rural carrier, and the subsequent modified jobs were permanent. The Office also found appellant was entitled to compensation under the National Reassessment Program under which she was receiving compensation every 28 days. Thus, appellant did not return to regular full-time work as the jobs she performed following her injury and August 17, 2006 recurrence were make shift and solely based on her work restrictions. There was nothing available on the open labor market. Appellant continued to be paid by the employing establishment until August 4, 2009, when her pay stopped. The Board finds that, as she only worked modified duty after the accepted employment injury and August 17, 2006 recurrence and did not return to regular employment, she is not entitled to a recurrent pay rate as of August 4, 2009.[8] The Office properly determined that appellant's correct pay rate was effective August 17, 2006, the date of her last recurrence of total disability and paid her at her pay rate as of that date.

On appeal appellant contends that she is entitled to her pay rate as of August 4, 2009, the date of her recurrence of total disability as a result of the withdrawal of her light-duty job. As explained above, she is not entitled to a recurrent pay rate as of August 4, 2009. Appellant did not return to regular work, but rather returned to a modified job that was solely based on her restrictions and was not available on the open labor market. Thus, the Office properly determined her pay rate based on her prior recurrence date of August 17, 2006.

[8] 5 U.S.C. § 8101(4); *see C.M.*, Docket No. 08-1119 (issued May 13, 2009); *see also Jeffrey T. Hunter*, *supra* note 7.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[9] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[10] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[11] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[12]

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the Office's January 29, 2010 pay rate decision and resubmitted documents already included in the record. In support of her request, she contended that the Office erred in calculating her pay rate as it should be based on the date her job was withdrawn, August 4, 2009. The Board finds that as appellant's contention is repetitive or duplicative of that previously considered by the Office, it is insufficient to warrant further merit review.[13]

CONCLUSION

The Board finds that the Office properly calculated her pay rate. The Board further finds that appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2) in her request for reconsideration and, therefore, the Office properly refused to reopen the case for merit review.

[9] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

[10] 20 C.F.R. § 10.606(b)(2). *See J.M.*, Docket No. 09-218 (issued July 24, 2009); *see also Susan A. Filkins*, 57 ECAB 630 (2006).

[11] 20 C.F.R. § 10.607(a). *See S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

[12] 20 C.F.R. § 10.608(b). *See Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[13] *See Eugene F. Butler*, 36 ECAB 393 (1984).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 6 and January 29, 2010 are affirmed.

Issued: April 26, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board