

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM E. WILSON, JR. and U.S. POSTAL SERVICE,  
POST OFFICE, Bristol, TN

*Docket No. 03-1278; Submitted on the Record;  
Issued December 19, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs correctly calculated appellant's pay rate in determining his schedule award; and (2) whether appellant is entitled to wage-loss compensation for disability during the period June 1, 1989 through December 29, 1990 due to his accepted employment injury.

On June 12, 1989 appellant, then a 31-year-old part-time flexible letter sorter machine operator, filed an occupational disease claim alleging that on May 1, 1989 he first became aware of his carpal tunnel syndrome. He alleged that on June 1, 1989 he realized his condition was caused by his employment. Appellant stated that he experienced reduced movement and feeling in his right hand, which made it difficult to key on the console. He noted that his regular work hours were from 4:00 p.m. until 9:00 p.m. Monday through Saturday. Appellant's claim was accompanied by several documents including, a case file/information log indicating that his rate of pay was \$13.32 an hour on June 1, 1989.

On September 19, 1990 the Office accepted appellant's claim for cubital tunnel syndrome of the right elbow.

On December 9, 1997 appellant filed a claim (Form CA-7), requesting a schedule award. On the same date he filed another Form CA-7, requesting wage-loss compensation for the period June 1, 1989 through December 2, 1990.

By letter dated January 23, 1998, the employing establishment advised the Office that information regarding appellant's pay rate and a breakdown of his leave/work hours had not yet been obtained because the claimed time period was approximately nine years ago. The employing establishment stated that a review of the file did not indicate that appellant was totally incapacitated for work during the claimed period; therefore, the hours and dates claimed were unclear.

By letter dated January 28, 1998, the Office advised appellant that his case was closed in 1993 and that it would be retrieved from the federal records center. The Office requested that he submit medical evidence supportive of his schedule award claim.

By letter dated January 28, 1998, Postmaster James A. O'Hare informed an employing establishment injury compensation specialist that he did not have any local payroll records regarding appellant's May 1, 1989 injury since the retention period had expired.

In an August 12, 1998 letter, the Office advised appellant that he was entitled to a schedule award for a 10 percent permanent impairment of the right upper extremity. The Office further advised appellant to ask the employing establishment to complete a Form CA-7, if he was interested in receiving payment for the schedule award.

By letter dated January 27, 1999, appellant's attorney requested a copy of the case record and inquired whether appellant was entitled to compensation for lost wages for the period May 1, 1989 through December 29, 1990 for temporary disability compensation.

In a June 16, 1999 letter, the Office informed appellant's attorney that he was entitled to a schedule award for a 10 percent impairment of the right upper extremity or 31.20 weeks of compensation. The Office stated that it asked the employing establishment to respond to appellant's request for wage-loss compensation for the period May 1, 1989 through December 29, 1990 and to submit his pay rate information in order to proceed with the schedule award.

In an October 10, 2000 letter, the Office requested that the employing establishment provide relevant wage information regarding appellant's claims. The Office also requested that appellant provide the exact days and the number of hours for each day he was claiming lost time from work during the period May 1, 1989 through December 29, 1990. Further, the Office asked him to submit medical evidence supportive of his disability claim.

In a November 17, 2000 letter, appellant's attorney informed the Office that he did not know the exact dates or the amount of time he lost from work.

On a December 14, 2000 Form CA-7, Postmaster Roger T. Manus indicated that on May 1, 1989 appellant's pay rate was \$13.32 an hour. He also indicated that appellant received 10 percent night differential pay for hours worked after 6:00 p.m. In addition, he noted that appellant received 25 percent Sunday premium pay for hours worked on Sunday. Postmaster Manus further indicated that appellant was a part-time flexible employee who was not guaranteed 40 hours a week. Glenn Cowan, an employing establishment timekeeper, indicated on the Form CA-7 that appellant received night differential pay and Sunday premium pay. He noted that appellant's leave records were unavailable because payroll records were not kept for more than five years. Both Postmaster Mangus and Mr. Cowan stated that the information supplied on the form was true and correct based on their knowledge. In an accompanying letter dated August 17, 1999, Postmaster O'Hare advised an employing establishment injury compensation specialist that all the files regarding appellant's 1989 employment injury were attached. He stated that the retention period for pay records from 1989 had long past and none were available. Postmaster O'Hare noted that appellant's former supervisor was deceased and

none of the current managers remembered how much time he may or may not have missed or anything about the filing of his accident report. He concluded that he had no knowledge of an available resource to obtain time/pay records that far back.

In a January 3, 2001 memorandum, Postmaster Mangus reiterated that time and attendance records were not kept for more than five years and the information provided on the December 14, 2000 Form CA-7 was true and correct to the best of his knowledge.

In a March 5, 2001 affidavit, appellant stated that subsequent to his May 1, 1989 employment injury he was placed on light-duty work at the employing establishment during the period May 1, 1989 through December 29, 1990. He started work at 6:00 p.m. rather than 4:00 p.m. unlike other employees. Appellant worked two to three hours and was usually sent home while the other part-time employees worked six to eight hours. He stated that this was normal for the first three months of the claimed time period. Appellant further stated that his hours were reduced due to his light-duty status and employment-related injury. After numerous complaints, he stated that the employing establishment found other work for him, but he was still not getting the same amount of hours as the other employees. In the fall of 1990, appellant requested a transfer to a full-duty mail carrier position and he was transferred to this position on December 29, 1990. He reviewed his wage records and those of two coworkers and determined that he worked 225 to 250 hours less each year than his coworkers with a wage difference around \$3,000.00 to \$3,500.00 a year. Appellant stated that he was not paid for time at his physician's office for tests. He calculated a difference of \$6,204.50 between the salaries of his coworkers and himself for 1989 and 1990.

In a December 1, 2001 letter, the Office explained how it calculated the amount of appellant's schedule award based on his weekly salary, compensation rate for claimants with dependents and weeks of entitlement.

By decision dated December 7, 2001, the Office granted appellant a schedule award for a 10 percent impairment for his right upper extremity, covering the period May 13 to December 17, 1990. On December 7, 2001 the Office issued appellant a check in the amount of \$10,789.27. In a December 11, 2001 letter, appellant, through his attorney, requested an oral hearing before an Office hearing representative contending that the Office used an incorrect pay rate in calculating his schedule award. Appellant's attorney also requested the issuance of a subpoena for production of the employing establishment's time and attendance records.<sup>1</sup>

At the August 1, 2002 hearing, appellant submitted his calculation of the wages he received and those received by two of his coworkers in 1989 and 1990.

By decision dated January 13, 2003, the hearing representative found that the Office used the correct pay rate in calculating appellant's schedule award. The hearing representative also

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<sup>1</sup> Appellant's attorney also requested that the Office issue a subpoena to the employing establishment by letter dated July 8, 2002. In a July 25, 2002 letter, an Office hearing representative denied the request. The hearing representative advised appellant that the denial of a subpoena was neither a basis for delaying a hearing, nor appealable prior to the issuance of his decision following the hearing. The hearing representative, however, stated that, if his decision in this case was not in appellant's favor, all issues including, the denial of the requests to issue a subpoena may be appealed.

found that appellant failed to submit sufficient evidence to support his claim for lost wages during the period May 1, 1989 through December 29, 1990. Accordingly, the hearing representative affirmed the Office's December 7, 2001 decision.

The Board finds that this case is not in posture for decision regarding the issue whether the Office properly calculated appellant's pay rate in determining schedule award.

The Board notes that appellant does not dispute the medical determination in this case regarding the extent of his impairment.<sup>2</sup> Rather, he contends that an incorrect pay rate was used to calculate his December 7, 2001 schedule award. Therefore, the Board will not address the medical evidence as it is not at issue.

Section 8101(4) of the Federal Employees' Compensation Act<sup>3</sup> provides, in pertinent part, that in compensation cases, a claimant's monthly compensation rate will be based on the monthly pay rate "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, except, when otherwise determined under section 8113 of this title with respect to any period." The Office's procedures contain a similar provision<sup>4</sup> consistent with Board precedent.<sup>5</sup> The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).<sup>6</sup>

In this case, the Office properly selected the date of disability, May 1, 1989, as the appropriate date for the calculation of appellant's monthly pay for schedule award purposes. The Office, however, erred in calculating his rate of pay as \$13.32 an hour, as the basis for his receipt of compensation. The employing establishment indicated on a December 14, 2002 Form CA-7, that appellant was not only entitled to \$13.32 an hour on May 1, 1989, but also to an additional 10 percent for night differential pay for hours worked after 6:00 p.m. Appellant's Form CA-2 indicates that his regular work hours were from 4:00 p.m. until 9:00 p.m. and he stated in his March 5, 2001 affidavit that he was told to start work at 6:00 p.m. rather than 4:00 p.m. The record indicates entitlement to night differential pay. The Office did not consider appellant's entitlement to night differential pay in calculating the amount of his schedule award compensation.

This case will be remanded to the Office to recalculate appellant's pay rate based on his night differential pay and to determine the amount of his schedule award. After such further development as the Office deems necessary, it should issue a *de novo* decision.

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<sup>2</sup> The Board also notes that appellant has not appealed the Office's decision denying his requests to issue a subpoena for documents and the matter is not before the Board.

<sup>3</sup> 5 U.S.C. § 8101(4).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates, Effective Date of Pay Rate*, Chapter 2.900.5a(1) (April 2002).

<sup>5</sup> *Clarence D. Glenn*, 29 ECAB 779, 783 (1978).

<sup>6</sup> *See Herbert L. Blatt*, 31 ECAB 648 (1980).

The Board further finds that appellant has not established entitlement to wage-loss compensation for disability during the period May 1, 1989 through December 29, 1990 due to his accepted employment injury.

The Board has recognized that an employee is entitled to disability compensation for loss of wages incurred while appellant is unable to perform his regular duty or for wage loss incurred while receiving medical treatment for a work-related injury.<sup>7</sup> However, a person who claims benefits under the Act has the burden of proof in establishing the essential elements of his or her claim, including the fact that an injury occurred in the performance of duty as alleged and that disability for employment was sustained as a result thereof.<sup>8</sup>

Appellant contended that his lost wages during the period May 1, 1989 through December 29, 1990 were due to the reduction of his work hours by the employing establishment. He contended that his regular work hours were from 4:00 p.m. until 9:00 p.m.; that the employing establishment required him to start work at 6:00 p.m. rather than 4:00 p.m.; and that he usually worked two to three hours while the other part-time employees worked six to eight hours. Appellant has failed to establish that the employing establishment reduced his work hours during the period May 1, 1989 through December 29, 1990 resulting in wage loss. He did not provide any evidence establishing the specific dates that his hours were reduced during the claimed period. On October 10, 2000 the Office asked appellant to provide information regarding the specific days and number of hours for each day he was claiming lost time from work during the claimed period. Appellant informed the Office on November 17, 2000 that he could not provide the requested information as he did not know the exact dates or the amount of time he lost from work.

The Office attempted to obtain information regarding the amount of time appellant lost from work during the period May 1, 1989 through December 29, 1990 from the employing establishment on several occasions. The employing establishment was unable to provide appellant's pay rate and a breakdown of his leave/work hours because the claimed time period occurred nine years ago. Mr. Cowan and Postmaster Mangus stated that appellant's leave records were unavailable because payroll records were not kept for more than five years. Postmaster O'Hare stated that he did not have any records regarding appellant's May 1, 1989 employment injury since the retention period had expired and that he did not know of an available resource to obtain time/pay records that far back. Postmaster O'Hare noted that appellant's former supervisor was deceased and none of the current managers remembered how much time he may or may not have missed or anything about the filing of his accident report.

The Board notes that it is appellant's burden to provide the Office with the correct dates and hours of claimed wage loss. The Office correctly denied his claim for compensation as the records relative to the claimed period of disability were not available for retrieval.

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<sup>7</sup> See generally *Henry Hunt Sears*, III, 46 ECAB 192 (1994); *Myrtle B. Carson*, 17 ECAB 644 (1966).

<sup>8</sup> See *Robin L. Brainard*, 43 ECAB 329 (1991); *Dean E. Pierce*, 40 ECAB 1249 (1989); *Daniel R. Hickman*, 34 ECAB 1220 (1983).

The January 13, 2003 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded with regard to the calculation of appellant's pay rate in determining his schedule award. The decision is affirmed with regard to the finding that appellant failed to establish that he is entitled to wage-loss compensation for the period May 1, 1989 through December 29, 1990.

Dated, Washington, DC  
December 19, 2003

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member