

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SAMUEL C. MILLER and DEPARTMENT OF THE NAVY,  
NAVAL AIR REWORK FACILITY, Jacksonville, FL

*Docket No. 03-1233; Submitted on the Record;  
Issued October 2, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant's compensation was properly calculated.

On January 16, 1978 appellant, then a 33-year-old machinist, injured his back while lifting. Appellant filed a timely claim for compensation that was accepted by the Office of Workers' Compensation Programs for a herniated disc at L4-5. Appellant underwent surgery and returned to work on April 17, 1978. On August 20, 1991 he filed a recurrence claim that was accepted by the Office. Appellant was off work until January 13, 1992 and again from May 13, 1992 to the present. Appellant underwent a second back surgery on May 19, 1992. On January 9, 1993 appellant was placed on the periodic rolls. At the time of appellant's recurrence his pay rate was \$751.20 per week (or \$18.72 per hour).

On September 6, 1993 appellant returned to the employing establishment's payroll, although he never actually returned to work, to expend his sick leave. His pay rate during that time was \$819.60 a week (or \$20.49 per hour). On May 14, 1994 after depletion of his sick leave appellant returned to the periodic rolls and a pay rate of \$751.20 per week.

In an August 16, 2001 letter, appellant questioned the proper rate, noting that his pay rate at the time he was removed from the employing establishment's payroll on May 14, 1994 was \$819.60 per week. In support of his claim for the higher rate, appellant submitted a letter from the Office of Personnel Management that stated that his last day of pay was May 13, 1994 and his pay rate was \$20.49 per hour. The record also contains a December 19, 2001 note from a telephone conversation between the Office and the employing establishment indicating that after his recurrence appellant returned to work full time, at a pay rate of \$20.49 per hour until he stopped work on May 12, 1994. In a June 20, 2002 decision, the Office confirmed that appellant's recurrent pay rate should be based on \$20.49 per hour and issued appellant an additional check for \$3,323.47.

In a June 27, 2002 letter, appellant again questioned the way his pay rate was calculated and requested a review of the written record by the Branch of Hearings and Review. In an

August 28, 2002 decision, the Office, after noting that appellant was permanently disabled subsequent to his May 19, 1992 surgery and that appellant only returned to the employing establishment payroll to expend his sick leave, vacated the June 20, 2002 decision and remanded the case to the Office for development and a *de novo* decision.<sup>1</sup> In a November 19, 2002 letter to appellant, as follow up to a telephone conversation with appellant, the claims examiner requested that he submit verification that he actually worked up to May 12, 1994 and appellant indicated that he would forward that information. No further information was submitted. In a December 5, 2002 letter from his representative, appellant argued that the hearing representative went beyond appellant's request in vacating the June 20, 1994 decision regarding appellant's pay rate.

In a January 31, 2003 letter, the Office proposed to reduce his compensation for wage loss finding that all compensation after May 12, 1992 should be based on a pay rate of \$18.78 per hour or \$753.73 per week (based on \$18.78 per hour times 2087 hours divided by 52<sup>2</sup>). The letter also noted that appellant failed to submit any evidence that established his actual last day of work was May 12, 1994.

In a March 7, 2003 decision, the Office finalized the January 31, 2003 proposed decision to reduce his compensation noting that evidence of record indicated that appellant was totally and permanently disabled after his second back surgery on May 19, 1992 and appellant failed to submit any factual evidence to establish that he actually performed worked after that date.

The Board finds that the Office properly calculated appellant's compensation.

Under 5 U.S.C. § 8101(4), “‘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....”

In the present case, appellant last worked on May 12, 1992 before he underwent his second back surgery that rendered him permanently and totally disabled. While he did return to the employing establishment's payroll for several months, he never actually returned to work, but used his remaining sick leave. This temporary return to the payroll does not affect appellant's rate of pay because he never actually returned to work. The Act requires that the employee return to regular full-time employment before a pay rate based on recurrence of disability is appropriate. Appellant was given the opportunity to present evidence that he returned to actual work but he failed to do so. In fact, appellant does not disagree with the Office's finding that he did not return to work. Absent any evidence establishing that he “resumed regular full-time employment” pursuant to the Act, the Board finds that the Office

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<sup>1</sup> The record contains a note to the file indicating that the hearing representative talked to the employing establishment and learned that there were no records available to confirm the last date appellant actually worked. The Board notes that appellant does not contest that he never returned to actual work.

<sup>2</sup> The rate of \$18.78 per hour and not \$18.72 was used due to a cost-of-living adjustment that was explained to appellant.

properly determined that a pay rate based on the date that sick leave expired was not appropriate in this case.<sup>3</sup>

The decision of the Office of Workers' Compensation Programs dated March 7, 2003 is affirmed.

Dated, Washington, DC  
October 2, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>3</sup> Office procedures state that "the dates when 'disability began' or 'compensable disability' recurred are the dates the employee stopped work, not the dates pay stopped." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(1) (March 1996).