United States Department of Labor
Employees' Compensation Appeals Board

RAY L. KERR, Appellant **and** **DEPARTMENT OF ENERGY, BONNEVILLE POWER ADMINISTRATION, NORTH BEND MAINTENANCE HEADQUARTERS, North Bend, OR, Employer**	)	**Docket No. 04-68** **Issued: April 21, 2004**

Appearances:
Ray L. Kerr, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 8, 2003 appellant filed a timely appeal from the September 17, 2003 decision of the Office of Workers' Compensation Programs denying modification of a decision which determined the pay rate for purposes of calculating his schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined appellant's pay rate for purposes of calculating his schedule award.

FACTUAL HISTORY

On April 9, 1998 appellant, then a 51-year-old chief substation operator, filed an occupational disease claim alleging that on February 1, 1998 he first realized that his tendinitis, torn rotator cuff and over use degeneration of both shoulders were caused by factors of his federal employment.

By letter dated September 1, 1998, the Office accepted appellant's claim for bilateral rotator cuff tear and authorized right rotator cuff repair.[1]

On November 28, 2000 appellant filed a claim for a schedule award.

In a July 23, 2001 decision, the Office granted appellant a schedule award for 93.60 weeks from March 26, 2001 through January 10, 2003 based on a 14 percent permanent impairment of the right upper extremity and a 16 percent permanent impairment of the left upper extremity. The Office based appellant's schedule award on his weekly pay rate of $1,324.49.

By letter dated August 20, 2001, appellant requested an oral hearing before an Office hearing representative. Appellant requested that the Office recalculate the amount of his schedule award as it did not reflect his pay rate of $33.00 per hour and 4.4 percent benefits offset as set forth in a contract between the union and employing establishment. Appellant submitted correspondence with the Office regarding the status of his compensation claims. He also submitted a copy of an agreement between the employing establishment and union regarding negotiated rates of pay. He also submitted an agreement between the employing establishment and union regarding wages which provided as follows:

> "Management agrees to pay a benefits offset in the amount of 4.4 percent of the basic rate of pay. This amount shall be paid to each employee with a permanent appointment and shall be paid as a differential (*i.e.*, not considered part of basic pay for any purpose) on an hourly basis for each hour of straight-time pay received and shall also be paid for [l]eave [w]ithout [p]ay not to exceed 80 hours in a payroll year. The percentage will be applied to the basic rate of pay shown on the employee's most recent SF-50, [n]otice of [p]ersonnel [a]ction. The payment shall be retroactive to March 14, 1999 for any and all employees who were or are on the system covered by the Columbia Power Trades Council. This percentage amount shall be paid throughout the term of the [a]greement as specified in paragraph 2.02."

The hearing was held on February 27, 2002. Upon review of the hearing transcript, Barbara Riggs, an employing establishment human resources specialist, submitted a March 19, 2002 letter explaining the 4.4 percent benefits offset. She stated that the offset constituted additional earnings intended to compensate employees for the lower value of federal benefits as compared to those of other Northwest electric utilities against which the employing establishment compared wage rates and other working conditions. She explained how the proposed benefits were litigated and reiterated the terms of the resultant agreement as provided by appellant. With respect to payments made by the Office, Ms. Riggs stated that the benefits offset differential would not be applied because appellant was no longer in an employing

[1] On March 22, 2000 appellant filed a claim alleging that he sustained a recurrence of disability on March 21, 2000 when he hurt his left arm and shoulder. The Office determined that appellant sustained a new injury and accepted his claim for a left rotator cuff tear. This claim and the instant occupational disease claim were doubled into a master file assigned number 14-0351908 by the Office.

establishment pay status[2] and the record showed that the employing establishment did not agree to apply it to the Office in response to a direct union question.

By decision dated July 16, 2002, the Office hearing representative found that the type of differential pay described in the agreement between the employing establishment and union may not be included as part of appellant's pay rate for the purpose of determining his entitlement to compensation under the Federal Employees' Compensation Act as it was not listed in the Office's procedures and the agreement specifically provided that the difference was not considered to be part of basic pay for any purpose. Accordingly, the hearing representative affirmed the Office's July 23, 2001 decision. The Office, however, modified its previous decision to reflect that payment of compensation for a 14 percent permanent impairment of the right upper extremity was payable from January 3 to October 31, 2000 based on a weekly pay rate of $1,232.53 and that payment of compensation for the 16 percent permanent impairment of the left upper extremity was payable from January 11 to December 25, 2001 based on a weekly pay rate of $1,324.40. Regarding appellant's right upper extremity, the hearing representative found that he reached maximum medical improvement on January 3, 2000, and thus, he should have received compensation beginning that date through November 3, 2000 based on the pay rate of $1,232.53 per week which was in effect when disability began on April 14, 1999. Regarding appellant's left upper extremity, the hearing representative found that appellant reached maximum medical improvement on January 11, 2000 and that he was entitled to compensation benefits beginning that date through December 25, 2001 based on the pay rate of $1,324.49 per week which was in effect when he was injured on March 21, 2000.

On August 1, 2002 the Office issued decisions granting appellant a schedule award for a 16 percent permanent impairment of the left upper extremity for the period March 26, 2001 through March 10, 2002 based on the weekly pay rate of $1,324.49 and a 14 percent permanent impairment of the right upper extremity for the period March 26, 2001 through January 25, 2002 based on a weekly pay rate of $1,232.53.

In an October 6, 2002 letter, appellant requested reconsideration of the Office's July 16, 2002 decision. He contended that the Office did not follow proper procedures as set forth by its rules in failing to send him a copy of the employing establishment's comments about the hearing transcript. Appellant also stated that he never received a complete copy of the Office's July 16, 2002 decision as he had previously requested.

In an October 18, 2002 letter, Ms. Riggs advised the Office that contrary to its July 16, 2002 decision regarding appellant's right upper extremity, appellant's pay rate on April 14, 1998, the date when disability began, was $1,228.40 rather than $1,232.53 per week. She further advised the Office that regarding appellant's left upper extremity, his pay rate on March 21, 2000, the date of injury, was $33.00 per hour or $1,320.00 per week rather than $1,324.49 per week.

By letter dated July 21, 2003, the Office mailed a copy of the July 16, 2002 decision and the employing establishment's March 19, 2002 comments to appellant. In an August 19, 2003

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[2] The record reveals that appellant retired from the employing establishment on disability in May 2001.

letter, appellant requested reconsideration of the Office's July 16, 2002 decision on the grounds that the "staffing differential" pay claimed was a cost-of-living allowance.

In a September 17, 2003 decision, the Office denied appellant's request for modification based on a merit review of the claim. The Office found that appellant's contention that differential pay constituted a cost-of-living allowance was not supported by the record.

LEGAL PRECEDENT

The Board notes that in all situations, including those involving a schedule award, compensation is to be based on the pay rate either at the time of injury, the rate at the time disability for work begins, or the rate at the time of recurrence of disability of the type described in section 8101(4) of the Act, whichever is greater.[3]

ANALYSIS

Appellant contends that the rate of pay used by the Office to calculate his schedule award compensation for his right and left upper extremities should be based on the 4.4 percent benefits offset, which constituted a cost-of-living allowance, that was agreed upon by his union and the employing establishment.[4] The wage agreement between the employing establishment and union specifically provided that the 4.4 percent "benefits offset" was paid as a "differential" and Ms. Riggs, an employing establishment human resources specialist, stated that the offset constituted "additional earnings." While the Office's procedures do not administratively include "benefits offset" as an element in calculating an employee's pay rate,[5] it is similar to the "differential" pay that is included in an employee's rate of pay set forth in the Office's procedures.[6] This case will be remanded to the Office for reevaluation of appellant's rate of pay. After such further development as the Office deems necessary, it should issue a *de novo* decision with regard to the calculation of appellant's pay rate for compensation purposes.[7]

CONCLUSION

The Board finds that the Office improperly determined appellant's pay rate for purposes of calculating his schedule award.

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[3] *See Henry F. McGinnis,* 24 ECAB 25 (1973); *Evlyn M. Egan,* 23 ECAB 20 (1971).

[4] The Board notes that on appeal appellant does not contest the percentage of impairment awarded for his right and left upper extremities.

[5] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rate* 2.900.7(b) (December 1995).

[6] *Id.*

[7] The Board notes that the pay rates submitted to the Office by Ms. Riggs were slightly lower than the pay rates used by the Office in its August 1, 2002 decisions.

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further proceedings consistent with this decision.

Issued: April 21, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member