

**United States Department of Labor
Employees' Compensation Appeals Board**

MARY M. MARKS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Suitland, MD, Employer**

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**Docket No. 05-832
Issued: January 6, 2006**

Appearances:
Mary M. Marks, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 23, 2005 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated December 20, 2004, which found that her retroactive compensation had been correctly computed. She also appealed a June 18, 2004 decision, which denied her request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the Office's decision denying merit review.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's March 7, 2004 request for review was untimely filed and failed to demonstrate clear evidence of error; and (2) whether the Office properly determined appellant's retroactive compensation. On appeal appellant contends that her pay rate for compensation purposes, including her retroactive compensation, was incorrect.

FACTUAL HISTORY

This case has previously been before the Board on prior appeals. In a decision dated April 20, 1998, the Board set aside a September 11, 1995 Office decision with respect to appellant's pay rate for compensation purposes.¹ By decision dated May 6, 1998, the Board determined that an Office decision regarding an overpayment was not in posture for decision until the pay rate issue had been resolved.² In a decision dated February 20, 2001, the Board found that the Office properly determined that appellant's pay rate for compensation purposes was her date of injury, March 20, 1985, pay rate. The Board further found that appellant was not entitled to waiver of an overpayment in compensation in the amount of \$1,206.22 and that the Office properly denied appellant's request for merit review. On July 31, 2001 the Board denied appellant's request for reconsideration. The law and the facts of the previous Board decisions are incorporated herein by reference.³

Subsequent to the Board's February 20, 2001 decision, on January 8, April 16 and May 13, 2002, appellant requested that the Office reconsider the pay rate issue. By letter dated May 7, 2002, the Office informed her that, as the Board had affirmed that her pay rate was properly determined, she had the burden to submit new evidence that this determination was incorrect. On August 30, 2002 the Office issued a final termination decision. However, appellant was returned to the periodic roll effective September 9, 2002.

By letter dated October 22, 2003, the Office informed appellant that she was not entitled to a recurrent pay rate based on the Board's February 20, 2001 decision but that she could be entitled to Sunday premium pay and night differential. On January 16, 2004 it requested that the employing establishment furnish information regarding her Sunday premium and night differential pay on the date of injury, March 20, 1985. In a February 17, 2004 letter, the employing establishment informed the Office that appellant was entitled to six hours of night differential or \$33.27 a week and Sunday premium pay of \$22.18.

On March 5, 2004 appellant requested reconsideration, arguing that she was entitled to the recurrent pay rate. In checks dated March 12 through April 2, 2004, appellant received retroactive compensation payments of \$1,639.06 for the period October 7, 1985 to August 2, 1986, \$3,174.00 for the period October 3, 1985 to January 15, 1988, \$3,245.96 for the period February 20, 1989 to August 25, 1990, \$14,552.59 for the period August 26, 1990 to April 27, 1996, \$1,809.73 for the period April 28 to December 2, 1996 and \$24,166.09 for the period December 3, 1996 to February 21, 2004. By letter dated April 8, 2004, the Office provided appellant with a summary of the above compensation payments, noting that these were based on a higher weekly pay rate of \$499.07, which consisted of base pay of \$443.62, night pay of \$33.27 and Sunday pay of \$22.18.

¹ Docket No. 96-460 (issued April 20, 1998).

² Docket No. 97-776 (issued May 6, 1998).

³ The record also contains schedule award decisions dated September 28, 1988 and May 14, 1996, which awarded appellant a total 20 percent impairment of her right upper extremity. By decision dated June 18, 2003, Docket No. 02-2350, the Board found that appellant did not have more than a 20 percent permanent impairment of her right upper extremity.

By letter dated May 10, 2004, the Office explained its determination regarding retroactive compensation for the period January 16, 1988 to February 19, 1989. The Office noted that compensation due was based on a weekly pay rate of \$499.07, but explained that an overpayment in compensation in the amount of \$9,003.57 had been created for the period January 16 to July 15, 1988, because appellant had returned to work on January 16, 1988. The Office noted that appellant received compensation based on a schedule award for the period July 16, 1988 to February 19, 1989 and also received compensation from October 23 to November 19, 1988 and for February 10 to March 17, 1989, which created an overpayment of \$27.20. The Office also noted that appellant submitted wage-loss claims for intermittent periods during the period of her schedule award and explained that she could not receive compensation for both wage loss and a schedule award for the same period.

On May 27, 2004 the Office issued a final decision regarding the retroactive compensation payments. The Office noted that overpayments of \$9,003.57 and \$27.20 had been created.⁴ By decision dated June 18, 2004, the Office denied appellant's reconsideration request on the grounds that she failed to establish clear evidence that the Office erred in its October 29, 1998 decision regarding her pay rate for compensation purposes. In a letter postmarked June 15, 2004, appellant requested a review of the written record by the Branch of Hearings and Review of the Office regarding the May 27, 2004 decision. In a letter dated September 8, 2004, the Office of Personnel Management (OPM) informed the Office that appellant had received dual benefits in that she received retirement compensation from OPM and wage-loss compensation from the Office for the period December 7, 2001 to September 7, 2004. By decision dated December 20, 2004, an Office hearing representative affirmed the May 24, 2004 decision.

LEGAL PRECEDENT -- ISSUE 1

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.⁵ The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ The one-year time limitation on reconsideration requests begins to run subsequent to any merit decisions on the issues, including any such decision of the Board.⁷

ANALYSIS -- ISSUE 1

In this case, the Board issued a decision on February 20, 2001 and on January 8, 2002 appellant requested reconsideration. Her request was therefore timely filed pursuant to section 10.607(a) of Office regulations. In its June 18, 2004 decision, the Office erroneously reviewed the evidence submitted in support of appellant's reconsideration request by applying the legal

⁴ The Office also advised appellant that, because she questioned whether she had received all her past compensation checks, she should carefully check compensation history records sent to her.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 20 C.F.R. § 10.607; see *Gladys Mercado*, 52 ECAB 255 (2001).

⁷ *Odell Thomas*, 42 ECAB 405 (1991).

standard reserved for cases where reconsideration is requested after more than one year or the clear evidence of error standard. The Board will therefore remand the case to the Office for review of the evidence under the standard applied to timely requests for reconsideration.⁸

LEGAL PRECEDENT -- ISSUE 2

Pay rate for compensation purposes is defined by the Act and in Office regulations as the employee's pay at the time of injury, time disability began or when compensable disability recurred, if the recurrence began more than six months after the employee resumed regular full-time employment with the United States, whichever is greater.⁹

Sections 8114(d)(1) and (2) of the Act provide methodology for computation of pay rate for compensation purposes, by determination of average annual earnings at the time of injury. Sections 8114(d)(1) and (2) of the Act specify methods of computation of pay for employees who worked in the employment for substantially the whole year prior to the date of injury and for employees who did not work the majority of the preceding year, but for whom the position would be available for a substantial portion of the following year. Section 8114(d)(3) of the Act provides an alternative method for determination of pay to be used for compensation purposes when the methods provided in the foregoing sections of the Act cannot be applied reasonably and fairly.¹⁰

Office procedures also provide that night or shift differential is to be included in the pay rate determination and it is to also include any extra compensation for Sunday or holiday work paid to regular employees of the postal service.¹¹

ANALYSIS -- ISSUE 2

By decision dated February 20, 2001, the Board affirmed an Office finding that the proper pay rate for compensation purposes was the date-of-injury pay rate or that of March 20, 1985. This decision of the Board became final upon the expiration of 30 days from the date of its filing.¹² Appellant has submitted no evidence to show that this rate was incorrect.

⁸ See *Rita A. Delgado*, 53 ECAB 663 (2002). Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. 20 C.F.R. § 10.608(b)(2). Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits. 20 C.F.R. § 10.608(b). Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case. *Helen E. Paglinawan*, 51 ECAB 591 (2000). Evidence that does not address the particular issue involved does not constitute a basis for reopening a case. *Kevin M. Fatzer*, 51 ECAB 407 (2000).

⁹ 5 U.S.C. § 8101(4); 20 C.F.R. § 10.5(s); see *John M. Richmond*, 53 ECAB 702 (2002).

¹⁰ 5 U.S.C. § 8101(d); see *Ricardo Hall*, 49 ECAB 390 (1998).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rate*, Chapter 2.900.7(b) (April 2002).

¹² 20 C.F.R. § 501.6(d).

Thus, the issue adjudicated in the Board's February 20, 2001 decision is *res judicata* and not subject to further consideration by the Board on this appeal.¹³

In October 2003, however, the Office informed appellant that, while she was not entitled to a recurrent pay rate based on the Board's February 20, 2001 decision, she could be entitled to Sunday premium pay and night differential. Following an Office request, the employing establishment advised that appellant was entitled to six hours of night differential or \$33.27 a week and Sunday premium pay of \$22.18. The Office thereafter issued appellant checks totaling \$48,587.43 for the period October 7, 1985 to February 21, 2004, based on the augmented pay rate of \$499.07 a week. A review of Office worksheets and printouts found in the record support that appellant received appropriate compensation for Sunday premium pay and night differential. The Board therefore finds that the Office properly computed her retroactive pay for the specific periods enumerated.

The Board notes that, in the May 27, 2004 decision, overpayments of \$9,003.57 and \$27.20 were noted to exist. As the record before the Board does not contain a final overpayment decision, this issue is not before the Board in the instant appeal.¹⁴

CONCLUSION

The Board finds that, as appellant's January 2002 request for review was timely, the case must be remanded for the Office to review her request under the requirements found in section 10.606(b)(2) of Office regulations. The Board further finds that the Office properly computed appellant's retroactive compensation.

¹³ See *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998); *Hugo A. Mentink*, 9 ECAB 628 (1958).

¹⁴ The Board's jurisdiction is to consider and decide appeals from final decisions of the Office and there shall be no appeal with respect to any interlocutory matter. 20 C.F.R. § 501.2(c); *Steven J. Gundersen*, 53 ECAB 252 (2001). The Board further notes that the record does not contain a formal preliminary overpayment finding.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 18, 2004 is vacated and the case is remanded to the Office. The December 20, 2004 decision is affirmed.

Issued: January 6, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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