United States Department of Labor
Employees' Compensation Appeals Board

JON L. HOAGLAND, Appellant	)	
and	)	**Docket No. 05-1791**
	)	**Issued: June 20, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Salt Lake City, UT, Employer	)	

Appearances:
Jon L. Hoagland, 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 August 30, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 27, 2005 merit decision, concerning his pay rate for compensation purposes. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.[1]

ISSUE

The issue is whether the Office properly calculated appellant's pay rates for compensation purposes.

[1] The record contains a November 3, 2004 decision in which the Office determined that appellant's compensation effective September 4, 2004 should be based on his actual earnings as an office clerk. He has not appealed this decision to the Board.

FACTUAL HISTORY

On March 27, 1984 appellant, then a 35-year-old postal clerk, filed a claim alleging that he sustained a back injury when he slipped while lifting a mail pouch at work on that date.[2] The Office accepted that he sustained a lumbar strain and permanent aggravation of sciatica and paid him compensation for periods of disability.[3] At the time of his injury, appellant was earning a salary of $24,868.00 per year and, in the year prior to his injury, he earned $2,042.26 in night differential pay and $710.42 in Sunday premium pay.

Appellant returned to his regular, full-time work as a postal clerk for the employing establishment on June 7, 1984. He worked 40 hours per week in this position.

The Office accepted that appellant sustained a recurrence of total disability beginning August 5, 1985. In October 1985, the Office requested that the employing establishment provide information regarding his salary at the time of the August 5, 1985 recurrence of disability. The employing establishment responded that appellant was earning a salary of $26,737.00, per year on August 5, 1985 and that, in the year prior to August 5, 1985, he earned $2,138.57, in night differential pay and $1,047.24, in Sunday premium pay.

Appellant returned to a limited-duty job for the employing establishment for about one month beginning in early September 1985 and then returned to work on a part-time basis as a modified general clerk for the employing establishment in October 1987. The number of hours that he worked per day changed periodically according to the work restrictions recommended by his physicians.[4]

In October 1992, the employing establishment indicated that it was changing appellant's modified clerk position to require working eight hours per day, but he generally spent two hours per day participating in an Office-approved therapeutic swimming program.[5] His salary was raised to reflect that his night differential and Sunday premium pay were rolled into his overall salary.[6]

On February 4, 1997 appellant underwent several surgical procedures, including exploratory laparotomy with anterior lumbar discectomy, Bagby and Kuslich segmental cage

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[2] Appellant's job involved such duties as sorting and boxing mail and lifting heavy mail pouches and sacks. He stopped work on March 27, 1984. The Office later accepted that appellant also sustained post-laminectomy syndrome of the lumbar region and lumbosacral spondylosis.

[3] Appellant underwent laminotomy, foraminotomy and discectomy procedures at L3-4 and L4-5 on December 10, 1985 and laminectomy procedures with refusion at L3 through S1 on July 29, 1986. The Office authorized these surgical procedures.

[4] During this period, appellant generally alternated between working four and six hours per day.

[5] In August 1994, the Office determined that this position fairly and reasonably represented appellant's wage-earning capacity.

[6] In August 1998, the Office returned to paying appellant separate amounts for night differential and Sunday premium pay.

fixation, interbody arthrodesis and right iliac bone graft, which were authorized by the Office. The Office accepted that, beginning February 4, 1997 he sustained a recurrence of total disability.

Appellant returned to limited-duty work for the employing establishment for four hours per day in August 1998. By September 1998, he was working six hours per day in this position.[7] Appellant began working for the employing establishment as a modified office clerk for 30 hours per week beginning in April 2002.[8]

The Office accepted that beginning December 8, 2004 appellant sustained a recurrence of total disability. The record contains a Form CA-7 completed by an employing establishment official in January 2005, which indicates that, when he stopped work, he earned a salary of $51,376.00 per year. In the prior year, appellant earned $2,340.00 in night differential pay and $1,182.00 in Sunday premium pay.

By decision dated and finalized February 11, 2005, the Office hearing representative set aside the Office's November 3, 2004 decision and remanded the case for further development of the evidence. She determined that the Office had not adequately explained its rationale for computing appellant's pay rates. The Office hearing representative noted that the Office had not indicated whether the pay rates included amounts for night differential and Sunday premium pay.

Appellant returned to limited-duty work for the employing establishment on a part-time basis in March 2005.[9]

In a document dated May 25, 2005, Karen J. Hernandez, a senior injury compensation specialist for the employing establishment, indicated that she reviewed pay records' documents regarding appellant's night differential and Sunday premium pay in the year prior to his August 5, 1985 recurrence of disability. She concluded that he actually earned $1,977.64 in night differential pay and $1,047.24 in Sunday premium pay. In another document dated May 25, 2005, Ms. Hernandez stated that appellant worked 40 hours per week for only 7 out of 52 weeks in the year prior to his February 4, 1997 recurrence of disability and took either sick leave, annual leave or leave without pay the rest of the time.

In a document dated May 27, 2005, Ms. Hernandez summarized the conclusions she arrived at regarding appellant's pay by examining his pay records. She stated that on the date of

[7] Beginning May 4, 2002 the employing establishment paid appellant administrative leave for the two hours per day he did not work and, effective September 4, 2004, the employing establishment stopped paying him administrative leave for these two hours per day.

[8] By decision dated November 3, 2004, the Office determined that effective September 4, 2004 appellant's actual earnings as a modified office clerk represented his wage-earning capacity.

[9] In a letter dated April 27, 2005, Linda Knight, an injury compensation specialist for the employing establishment, provided figures for appellant's salaries on various dates. However, it is unclear whether Ms. Knight referenced his actual pay records in obtaining these figures. She indicated that appellant earned $23,710.00 per year on March 27, 1984, $25,705.00 per year on August 5, 1985, $35,683.00 per year on February 4, 1997 and $44,081.00 per year on December 8, 2004.

his March 27, 1984 injury, appellant was earning a salary of $24,868.00 per year and, in the year prior to March 27, 1984, he earned $2,042.26 in night differential pay and $710.42 in Sunday premium pay. On the date of his first recurrence of total disability, August 5, 1985, appellant was earning a salary of $26,737.00 and, in the year prior to August 5, 1985, he earned $1,977.64 in night differential pay and $1,047.24 in Sunday premium pay. On the date of his second recurrence of disability, February 4, 1997, appellant was earning a salary of $42,450.00 per year, an amount which included his night differential pay and Sunday premium pay. Ms. Hernandez indicated that on the date of his third recurrence of total disability, December 8, 2004 appellant was earning a salary of $51,376.00 per year and that, in the year prior to December 8, 2004, he earned $2,308.38 in night differential pay and $1,403.77 in Sunday premium pay.

By decision dated May 27, 2005, the Office found that on the date of his injury, March 27, 1984, appellant was earning a salary of $24,868.00 per year and earned $2,042.26 in night differential pay and $710.42 in Sunday premium pay in the year prior to his injury. On the date of his first recurrence of disability, August 5, 1985, appellant was earning a salary of $26,737.00 per year and that he earned $1,977.64 in night differential pay and $1,047.24 in Sunday premium pay in the year prior to the first recurrence of disability. The Office found that appellant had been working in regular, full-time employment for more than six months prior to his first recurrence of disability on August 5, 1985.

As of the date of his second recurrence of disability, February 4, 1997, appellant was working as a modified office clerk for the employing establishment.[10] The Office indicated that, in the year prior to his second recurrence of disability, he worked 40 hours per week for only 7 out of 52 weeks and used sick leave, annual leave or leave without pay for the remainder of the time. It determined that appellant did not qualify for a new recurrence of disability rate on February 4, 1997 because this recurrence of disability did not begin more than six months after he resumed regular, full-time employment. The Office found that he was only entitled to receive compensation based on his pay at the time of his first recurrence of disability on August 5, 1985.[11] It noted that on the date of his third recurrence of disability, December 8, 2004, appellant had been working as an office clerk for 30 hours per week, *i.e.*, on a part-time basis and, therefore, he continued to only be entitled to receive compensation based on his pay at the time of his first recurrence of disability on August 5, 1985.[12]

[10] The Office stated, "This position does not constitute regular employment because it was for 'incumbent only' and was not available to be put up for bid if you left the position. The job was created specially for your restrictions and an occupation code number and a job title were assigned only because they are required for every employee of the [employing establishment]."

[11] The Office further indicated that on that date the employing establishment ceased paying for two hours of administrative leave per day, September 4, 2004, appellant was still only entitled to receive compensation based on his pay at the time of his first recurrence of disability.

[12] The Office noted that it had properly found that appellant's wage-earning capacity effective September 4, 2004 should be based on his actual earnings as a modified office clerk. The Office also stated that he was still entitled to Office reimbursement for medical treatment necessitated by his employment injuries.

LEGAL PRECEDENT

Section 8105(a) of the Federal Employees' Compensation Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[13] Section 8101(4) of the Act defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he 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...."[14]

In *Johnny A. Muro*,[15] the employee sustained a recurrence of disability more than six months after he resumed regular, full-time employment with the employer and the Board found that under 5 U.S.C. § 8101(4) he was entitled to have his compensation increased based on his pay at the time of this first recurrence of disability.[16] In *Muro*, the Board also found that, if an employee had one recurrence of disability which meets the requirements of 5 U.S.C. § 8101(4), any subsequent recurrence of disability would also meet such requirements and would entitle the employee to a new recurrence pay rate.[17]

ANALYSIS

The Office accepted that appellant, then a postal clerk, sustained a lumbar strain, permanent aggravation of sciatica, post-laminectomy syndrome of the lumbar region and lumbosacral spondylosis in connection with a March 27, 1984 accident at work.[18] Appellant returned to his regular, full-time work as a postal clerk for the employing establishment on June 7, 1984. In a decision dated May 27, 2005, the Office determined that he was entitled to receive greater compensation based on a higher pay rate when appellant sustained his first recurrence of disability on August 5, 1985, but that he was not entitled to receive greater compensation based on pay rates derived from new recurrences of disability when he sustained a

[13] 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

[14] 5 U.S.C. § 8101(4). 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. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

[15] 19 ECAB 104, 106-07 (1967).

[16] The Board has defined "regular" employment, stating that it means "established and not fictitious, odd-lot or sheltered" and has contrasted it with a job that has been created especially for a given employee. *Jeffrey T. Hunte*, 52 ECAB 503, 506 (2001).

[17] *See Muro supra* note 15 at 107-08. *See also Carolyn E. Sellers*, 50 ECAB 393, 396 (1999); *Melvin Hoff, Sr.*, 27 ECAB 458, 465 (1976). For the purposes of 5 U.S.C. § 8101(4), recurrence of disability includes a change from a no disability status to one of partial disability or a change from partial disability to total disability. *See Hoff* at 465.

[18] The Office authorized surgical procedures which were performed on December 10, 1985, July 29, 1986 and December 10, 1985.

second recurrence of total disability on February 4, 1997 and a third recurrence of total disability on December 8, 2004.[19]

The Board finds that the Office properly determined that appellant's compensation beginning March 27, 1984 should be based on his salary, night differential pay and Sunday premium pay at the time of his injury and date of first disability, *i.e.*, March 27, 1984.[20] The record contains documents which show that on March 27, 1984 he was earning a salary of $24,868.00 per year and that, in the year prior to March 27, 1984, he had earned $2,042.26 in night differential pay and $710.42 in Sunday premium pay.[21]

The Office also properly determined that beginning on the date of appellant's first recurrence of total disability, August 5, 1985 he was entitled to receive compensation based on a pay rate derived from his salary, night differential pay and Sunday premium pay at that time. The evidence reveals that on August 5, 1985 appellant earned $26,737.00 and that in the year prior to August 5, 1985 he had earned $1,977.64 in night differential pay and $1,047.24 in Sunday premium pay.[22] Appellant was entitled to this recurrent pay rate because he resumed regular, full-time employment with the employing establishment on June 7, 1984 and more than six months passed before he sustained a recurrence of disability on August 5, 1985.[23] Appellant's rate of pay was higher at the time of his August 5, 1985 recurrence of disability than at the time of his injury on March 27, 1984 and, therefore, it was appropriate for him to receive compensation based on this higher rate of pay.[24]

The Board further finds, however, that the Office improperly determined that appellant was not entitled to receive greater compensation based on pay rates derived from new recurrences of disability when he sustained a second recurrence of total disability on February 4, 1997 and a third recurrence of total disability on December 8, 2004. In reaching this determination, the Office reasoned that applying such recurrent pay rates was not appropriate

[19] Prior to the first recurrence of disability on February 4, 1997 appellant received compensation based on his salary, night differential pay and Sunday premium pay at the time of his injury and date of first disability, *i.e.*, March 27, 1984.

[20] *See* 5 U.S.C. § 8101(4). Appellant's date of injury and date when disability began were the same date, *i.e.*, March 27, 1984.

[21] The records contains documents dated in May 2005 in which Ms. Hernandez, a senior injury compensation specialist for the employing establishment indicated that she derived figures for appellant's salary, night differential pay and Sunday premium pay on various dates by directly reviewing his pay records. The record also contains an April 2005 document in which Ms. Knight, an injury compensation specialist for the employing establishment, listed his salary on various dates, but is unclear whether she reviewed appellant's actual pay records in obtaining these figures.

[22] The record contains an October 1985 document which contains different figures for night differential and Sunday premium pay than those calculated by Ms. Hernandez, but it is unclear whether those figures were calculated by directly reviewing appellant's pay records.

[23] *See* 5 U.S.C. § 8101(4). There is no indication that the postal clerk position appellant returned to for 40 hours per week beginning June 7, 1984 was fictitious, odd-lot or sheltered. *See supra* note 16.

[24] *See* 5 U.S.C. § 8101(4).

because he had not returned to regular, full-time employment in the year prior to February 4, 1997 or in the year prior to December 8, 2004.

The Board finds that the Office applied an improper standard in reaching this determination. The principles of *Johnny A. Muro* and later cases provide that, if an employee has one recurrence of total disability which meets the requirements of 5 U.S.C. § 8101(4), any subsequent recurrence of total disability would also meet such requirements and would entitle the employee to a new recurrence pay rate.[25] As explained above, appellant had one recurrence of disability which met the requirements of 5 U.S.C. § 8101(4), *i.e.*, his August 5, 1985 recurrence of total disability which occurred more than six months after he returned to regular full-time work for the employment establishment. Therefore, beginning February 4, 1997, he would be entitled to receive greater compensation based on his pay at the time of his February 4, 1997 recurrence of total disability. Beginning December 8, 2004, appellant would also be entitled to receive greater compensation based on his pay at the time of his third recurrence of total disability on December 8, 2004.[26]

For these reasons, the case should be remanded to the Office to recalculate appellant's compensation to include pay rates based on his greater pay at the times of his second recurrence of total disability on February 4, 1997 and his third recurrence of total disability on December 8, 2004.[27] After such development it deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that the Office improperly calculated appellant's pay rate by denying him pay rates based on new recurrences of disability when he sustained a second recurrence of total disability on February 4, 1997 and a third recurrence of total disability on December 8, 2004. The case should be remanded to the Office for a proper calculation of appellant's pay rate for compensation purposes, to be followed by an appropriate decision on this matter.

[25] *See supra* note 17 and accompanying text.

[26] On February 4, 1997 appellant earned more than he earned at the time of his first recurrence of disability on August 5, 1985 and on December 8, 2004 he earned more than he earned on February 4, 1997. The record contains evidence which shows that on February 4, 1997 he was earning a salary of $42,450.00 per year, a figure which included his night differential pay and Sunday premium pay, that on December 8, 2004 he was earning a salary of $51,376.00 per year and that in the year prior to December 8, 2004 he had earned $2,308.38 in night differential pay and $1,403.77 in Sunday premium pay. The record contains a January 2005 document which contains different figures for night differential and Sunday premium pay than those calculated by Ms. Hernandez, but it is unclear whether those figures were calculated by directly reviewing appellant's pay records.

[27] Between May 4, 2002 and September 4, 2004, the employing establishment paid appellant administrative leave for the two hours per day he did not work. In making its calculations, the Office should take into consideration the fact that appellant ostensibly lost pay after the administrative leave program ended on September 4, 2004.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 27, 2005 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: June 20, 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