

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

MARY M. MARKS, Appellant

and

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

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-832
Issued: May 15, 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. 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 refused to reopen appellant's claim for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a); 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 was her date-of-injury pay rate on March 20, 1985. 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

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 the pay rate was properly determined, she had the burden to submit new evidence that her pay rate was incorrect. On August 30, 2002 the Office issued a final termination decision. However, appellant was returned to the periodic rolls 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 Docket No. 99-2221 (issued February 20, 2001). 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 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 under a schedule award for the period July 16, 1988 to February 19, 1989 and also received wage-loss 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 noted that appellant submitted wage-loss claims for intermittent periods during the period of her schedule award and explained that she could not receive both compensation for 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. In a letter postmarked June 15, 2004, appellant requested a review of the written record by the Office's Branch of Hearings and Review. 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

Section 8128 the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).⁶ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.⁷ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at

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. § 8128(a).

⁶ 20 C.F.R. § 10.608(a).

⁷ 20 C.F.R. § 10.608(b)(1) and (2).

least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS -- ISSUE 1

The Board finds that the Office properly denied appellant's reconsideration requests. In her January, April and May 2002 and March 2004 requests, appellant argued that her pay rate was incorrect. As noted, in a February 20, 2001 decision, the Board found that the Office properly determined that appellant's pay rate for compensation purposes was her date-of-injury pay rate.⁹ With her reconsideration requests, therefore, appellant did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).¹⁰ With respect to the third above-noted requirement under section 10.606(b)(2), with her requests, appellant submitted no additional evidence. Therefore, the Office properly denied her reconsideration request.¹¹

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.¹²

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.¹³

⁸ 20 C.F.R. § 10.608(b).

⁹ Docket No. 99-2221, *supra* note 3.

¹⁰ 20 C.F.R. § 10.606(b)(2).

¹¹ *Mark H. Dever*, 53 ECAB 710 (2002).

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

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

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.¹⁴

ANALYSIS -- ISSUE 2

In the February 20, 2001 decision, the Board affirmed that the proper pay rate for compensation purposes was the date-of-injury pay rate as of March 20, 1985. This decision of the Board became final upon the expiration of 30 days from the date of its filing.¹⁵ Appellant has submitted no evidence to show that this rate was incorrect. 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.¹⁶

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 current appeal.¹⁷

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) and that the Office properly computed appellant's retroactive compensation.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rate*, Chapter 2.900.7(b) (April 2002).

¹⁵ 20 C.F.R. § 501.6(d).

¹⁶ See *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998); *Hugo A. Mentink*, 9 ECAB 628 (1958).

¹⁷ 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 decisions of the Office of Workers' Compensation Programs dated December 20 and June 18, 2004 be affirmed.

Issued: May 15, 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