United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	**Docket No. 09-573**
	)	**Issued: January 7, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Spearman, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 28, 2008 appellant filed a timely appeal from a schedule award decision of the Office of Workers' Compensation Programs dated July 9, 2008 and a November 5, 2008 decision that denied her request for written review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office used the proper pay rate in calculating appellant's schedule awards; and (2) whether the Office properly denied appellant's request for a review of the written record. On appeal, appellant asserts that her pay rate for compensation purposes should have been based on a recurrent pay rate rather than the date-of-injury pay rate because she sustained a recurrence of disability on June 23, 2005.

FACTUAL HISTORY

On February 27, 2004 appellant, then a 42-year-old full-time data technician, filed a Form CA-1, traumatic injury claim, alleging that she was injured on February 25, 2004 when she

fell on a wet floor. The employing establishment advised that the date-of-injury pay rate was $44,727.00 per year or $860.13 weekly. Appellant received continuation of pay from February 27 to March 3, 2004,[1] and on March 2, 2004 accepted a modified-duty assignment for eight hours daily.[2] On June 1, 2004 the Office accepted that appellant sustained employment-related neck and thoracic sprain/strains. Appellant accepted additional modified-duty job offers on September 2, 2004 and March 10, 2005.

On June 17, 2005 appellant rejected a limited-duty job offer, stating that it was outside the restrictions provided by her physician and on July 21, 2005, filed a recurrence claim, stating that she sustained a recurrence on June 23, 2005, noting that she was in severe pain and that the employing establishment would not accommodate her injury.[3] She subsequently filed CA-7 forms, claims for compensation. At that time, the employing establishment advised that appellant's pay rate on February 25, 2004, the date of injury, and on February 27, 2004, the date disability began, was $814.35 a week with $39.32 in additional pay, for a total weekly rate of $853.67. Appellant was placed on the periodic rolls, effective June 24, 2005, based on a weekly pay rate of $853.67.[4] She returned to modified duty for four hours daily on December 13, 2005 and continued to receive compensation for four hours daily, based on a weekly pay rate of $853.67. On March 10, 2006 the employing establishment informed the Office that, on February 25, 2004, the date of injury, appellant's annual salary was $44,727.00, or $860.13 per week, and that she was entitled to $39.32 in night differential per week, for a total weekly pay rate of $899.45, and that on March 10, 2006 her annual salary was $47,068.00 or $23,534.00 for a four-hour day, with night differential of $32.60 a week.

By decision dated May 1, 2006, the Office found that appellant's actual earnings fairly and reasonably represented her wage-earning capacity. It reported a weekly pay rate on February 27, 2004 the date disability began, of $899.45, with a current rate of $950.41, for a loss in earning capacity of 24 percent, effective April 4, 2006. Appellant continued to receive compensation at the reduced rate, and the accepted condition was upgraded to include cervical disc displacement. She returned to total disability compensation effective February 15, 2007, underwent an authorized anterior discectomy and cervical fusion on February 16, 2007, and returned to limited duty for four hours daily on May 29, 2007. On June 12, 2007 the employing establishment informed the Office that appellant's current actual earnings for a four-hour day, based on a full-time annual salary of $49,733.00, were $478.20 a week with night differential of $27.00 weekly. By letter dated June 21, 2007, the Office informed appellant that her compensation was reduced, effective May 29, 2007, to reflect her actual earnings. Appellant began working six hours daily on July 10, 2007.

[1] By reports dated February 27, 2004, Drs. James Locum and Clyde Williams advised that appellant could return to work with limitations to her physical activity.

[2] Appellant was working temporarily at the employing establishment on the date of injury from 1:30 a.m. to 10:00 a.m. Her usual duty station was the general mail facility in Amarillo, Texas.

[3] The CA-2a recurrence claim form does not contain information from the employing establishment.

[4] The Office initially paid appellant at the two-thirds rate but amended her compensation to the appropriate augmented three-quarter rate on September 9, 2005.

In a July 30, 2007 report, Dr. Mary F. Burgesser, a Board-certified physiatrist, advised that appellant had reached maximum medical improvement and that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[5] she had a five percent whole person impairment due to a Category 2 cervical thoracic impairment. On September 24, 2007 appellant began full-time modified duty. On April 20, 2008 she filed a schedule award claim and submitted a March 31, 2008 report in which Dr. John W. Ellis, Board-certified in family medicine, noted his review of medical records and appellant's current complaints. Dr. Ellis provided findings on physical examination and an impairment analysis in accordance with Chapter 16 of the A.M.A., *Guides*, stating that maximum medical improvement was reached on February 16, 2008. He advised that appellant had 42 percent right upper extremity impairment and 39 percent impairment on the left. On May 6, 2008 an Office medical adviser reviewed the medical record including Dr. Ellis' report. He agreed that maximum medical improvement was reached on February 16, 2008 and that appellant had 42 percent right upper extremity impairment. Dr. Ellis, however, found that she had a 40 percent left upper extremity impairment.

By decision dated July 9, 2008, appellant was granted schedule awards for a 40 percent left upper extremity impairment and a 42 percent right upper extremity impairment. The award was for 255.84 weeks and was to run from February 16, 2008 to January 10, 2013, and schedule award compensation was based on an effective weekly pay rate of $899.45, the rate effective on the date of injury, February 25, 2004. Appellant elected to receive a lump-sum settlement of the schedule awards. On October 2, 2008 she requested a review of the written record, and by decision dated November 5, 2008, the Office denied the request on the grounds that it was not timely filed.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act,[6] monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly rate.[7] Section 8101(4) provides that "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.[8] The compensation rate for schedule awards is the same as compensation for wage loss.[9] Office procedures provide that if the employee did not stop work on the date of injury or immediately afterwards, defined as the next day, the record should indicate the pay rate for the date of injury and the date disability began.

[5] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[6] 5 U.S.C. §§ 8101-8193.

[7] *See id.* at §§ 8105-8107.

[8] *Id*. at § 8101(4).

[9] *See* 20 C.F.R. § 10.404(b); *K.H.*, 59 ECAB ____ (Docket No. 07-2265, issued April 28, 2008).

The greater of the two should be used in computing compensation, and if they are the same, the pay rate should be effective on the date disability began.[10]

The Board has defined "regular" employment, as "established and not fictitious, odd-lot or sheltered" and has contrasted it with a job "that was created especially for" the employee. The duties of "regular" employment are covered by a specific job classification and such duties would have been performed by another employee if the claimant did not perform them. The test is not whether the tasks that appellant performed during his or her limited duty would have been done by someone else, but instead whether he or she occupied a regular position that would have been performed by another employee.[11]

ANALYSIS -- ISSUE 1

The Board notes that appellant is not challenging the impairment ratings of her schedule awards but questions the rate of pay used to calculate the awards, contending that the pay rate effective on June 23, 2005, the date of recurrence, should have been used.

The rate of pay for compensation purposes is the highest rate which satisfies the terms of section 8104(4) of the Act, *i.e.*, the date of injury, the date disability begins, or the date of recurrent disability.[12] Following the February 25, 2004 employment injury, appellant stopped work on February 27, 2004 and received continuation of pay. She did not return to regular employment after the February 25, 2004 employment injury, but worked at modified full-time duty from March 4, 2004 to June 23, 2005, returned to modified duty for four hours daily on December 13, 2005, until her back surgery on February 15, 2007 when she returned to total disability compensation. Appellant returned to four hours of modified duty daily on May 29, 2007, six hours on July 10, 2007, and eight hours daily of modified duty on September 24, 2007. The Board finds that, as appellant only worked modified duty after the February 25, 2004 employment injury and did not return to regular employment, she is not entitled to a recurrent pay rate.[13]

Office procedures provide that, if the employee did not stop work on the date of injury and the disability began at a later date, the record should show the pay rate for the date of injury and the date when disability began and the greater of the two will be used in computing compensation.[14] In this case, the weekly pay rate on the date of injury, February 25, 2004, and the weekly pay rate on the date disability began on February 27, 2004 were the same, $899.45 ($860.13 base pay plus $39.32 night differential). Therefore, in accordance with the Act and

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Effective Date of Pay Rate*, section 2.900.5(a)(3) (February 2007).

[11] *Jeffrey T. Hunter*, 52 ECAB 503 (2001).

[12] 5 U.S.C. § 8101(4); *see Patricia K. Cummings*, 53 ECAB 623 (2002).

[13] *Id.* at § 8101(4); *see Jeffrey T. Hunter, supra* note 11.

[14] Federal (FECA) Procedure Manual, *supra* note 10.

Office procedures, the Office properly based appellant's schedule award compensation on the weekly pay rate of the date of injury/date disability began.[15]

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[16] The Board has held that the Office, in its broad discretionary authority in the administration of the Act has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[17] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[18]

ANALYSIS -- ISSUE 2

The Office denied appellant's request for a review of the written record on the grounds that it was untimely filed. In a November 5, 2008 decision, it found that appellant was not, as a matter of right, entitled to a record review as her request, dated October 2, 2008, was not made within 30 days of the July 9, 2008 schedule award decision. As appellant's request was dated October 2, 2008, more than 30 days after the date of the July 9, 2008 decision, the Office properly determined that she was not entitled to a review of the written record as a matter of right as her request was untimely filed.[19]

The Office also has the discretionary power to grant a request for a record review when a claimant is not entitled to such as a matter of right. In the November 5, 2008 decision, it properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue in this case could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[20] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of

[15] 5 U.S.C. § 8101(4); *id.*

[16] *Claudio Vazquez*, 52 ECAB 496 (2001).

[17] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[18] *Claudio Vazquez, supra* note 16.

[19] *Id.*

[20] *See J.C.*, 58 ECAB ___ (Docket No. 07-530, issued July 9, 2007).

appellant's request for a review of the written record which could be found to be an abuse of discretion. The Office therefore properly denied her request.

CONCLUSION

The Board finds that the Office used the proper pay rate in calculating appellant's schedule awards and properly denied her request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 5 and July 9, 2008 be affirmed.

Issued: January 7, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board