United States Department of Labor
Employees' Compensation Appeals Board

V.F., Appellant	)	
and	)	**Docket No. 09-1695**
	)	**Issued: May 5, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 15, 2009 appellant filed a timely appeal from the April 29, 2009 merit decision of the Office of Workers' Compensation Programs granting schedule award compensation. 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 calculated appellant's pay rate for schedule award compensation purposes.

FACTUAL HISTORY

The Office accepted that on September 30, 2006 appellant, then a 45-year-old rural carrier associate, sustained a sprain and rotator cuff tendinitis/tendinosis of her left shoulder and a strain of her left upper arm due to performing her work duties on that date. Appellant stopped work on October 4, 2006 and in late October 2006 she returned to limited-duty work for the employing establishment on a part-time basis. She received appropriate compensation from the

Office for various periods of disability. At the time of her September 30, 2006 work injury, appellant was earning $407.98 per week.[1]

On February 4, 2008 appellant began working for the employing establishment as a modified rural carrier associate.[2] In a June 30, 2008 decision, the Office adjusted her compensation based on its determination that her actual wages as a modified rural carrier associate represented her wage-earning capacity.

In a March 20, 2008 report, Dr. Jose De La Torre, an attending Board-certified physical medicine and rehabilitation physician, determined that appellant had a five percent permanent impairment of her left arm based on limited range of motion of her left shoulder. In a June 18, 2008 report, the Office medical adviser found that appellant had a five percent permanent impairment of her left arm. The date of maximum medical improvement was deemed to be April 2, 2008.

In an April 29, 2009 decision, the Office granted appellant a schedule award for a five percent permanent impairment of her left arm. The award ran for 15.6 weeks from August 20 to December 7, 2008. Appellant received $4,984.20 in Office compensation for this period. The effective date of the pay rate of the schedule award was October 4, 2006 and the compensation rate for weekly pay was $306.32.[3]

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,[4] monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly rate.[5] 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.[6] Section 8105(a) of the 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."[7] The compensation rate for schedule awards is the same as

[1] Appellant was paid $17.51 per hour and worked 23.3 hours per week.

[2] Appellant worked for about 38 hours per week.

[3] Appellant's compensation was paid at ¾ rate because she had at least one dependent and, given that her compensation rate was $306.32 per rate, the Office had determined that her pay rate was $408.43 per week based on the amount she earned at the time of her injury and the time she first sustained disability. *See infra* note 7.

[4] 5 U.S.C. §§ 8101-8193.

[5] *See id.* at §§ 8105-8107.

[6] *Id.* at § 8101(4).

[7] *Id.* at § 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).

compensation for wage loss.[8] 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. 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.[9]

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.[10]

ANALYSIS -- ISSUE 1

The Office accepted that on September 30, 2006 appellant sustained traumatic injuries to her left shoulder. Appellant stopped work on October 4, 2006 and in late October 2006 she returned to limited-duty work for the employing establishment on a part-time basis. In an April 29, 2009 decision, the Office granted appellant a schedule award for a five percent permanent impairment of her left arm. The award ran for 15.6 weeks from August 20 to December 7, 2008. The effective date of the pay rate of the schedule award was October 4, 2006 and the compensation rate for weekly pay was $306.32.

The Board notes that appellant is not challenging the impairment rating of her schedule award but is challenging the rate of pay used to calculate the award. On appeal appellant contends that her schedule award should have been based on her pay rate when she reached maximum medical improvement in April 2008 or when she actually received the award in April 2009.

The rate of pay for schedule award 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.[11] Appellant's date of injury was September 30, 2006 and the date disability began was October 4, 2006. On both these dates, appellant earned $407.98 per week. In late October 2006, she returned to limited-duty work for the employing establishment on a part-time basis. Appellant did not return to regular employment after the September 30, 2006 work injury.[12] The Board finds that, as appellant only worked modified duty after the September 30,

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

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

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

[11] 5 U.S.C. § 8101(4); *see Patricia K. Cummings*, 53 ECAB 623 (2002).

[12] On February 4, 2008 appellant began working for the employing establishment as a modified rural carrier associate but this constituted a limited-duty position rather than regular employment.

2006 work injury and did not return to regular employment, she would not be 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, September 30, 2006, and the weekly pay rate on the date disability began on October 4, 2006 was the same, $407.98. Appellant received schedule award compensation that was based on a pay rate that equaled at least this amount.[15] She contends that her schedule award should have been based on her pay rate when she reached maximum medical improvement in April 2008 or when she actually received the award in April 2009, but she did not advance any precedent to support this argument. In accordance with the Act and Office procedures, the Office properly granted appellant appropriate schedule award compensation based on her impairment and applicable pay rate.[16]

CONCLUSION

The Board finds that the Office properly calculated appellant's pay rate for schedule award compensation purposes.

[13] 5 U.S.C. § 8101(4); *see Jeffrey T. Hunter*, *supra* note 10.

[14] Federal (FECA) Procedure Manual, *supra* note 9.

[15] It appears that the Office actually used a slightly higher pay rate of $408.43 per week. Multiplying this pay rate of $408.43 per week times the ¾ compensation rate for claimants with at least one dependent yields the $306.32 compensation rate identified on the April 29, 2009 schedule award. *See supra* note 7.

[16] 5 U.S.C. § 8101(4); *id.*

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 5, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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