

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

R.N., Appellant

and

**DEPARTMENT OF THE NAVY, AVIATION
SUPPLY OFFICE, Philadelphia, PA, Employer**

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**Docket No. 10-470
Issued: September 9, 2010**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 9, 2009 appellant, through his representative, filed a timely appeal from the October 7 and December 2, 2009 merit decisions of the Office of Workers' Compensation Programs, which applied a 1989 pay rate to his 2009 schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant is entitled to a recurrent pay rate for his schedule award.

FACTUAL HISTORY

On July 26, 1989 appellant, then a 41-year-old carpenter, sustained an injury in the performance of duty when he felt pain in his right wrist while hammering plastic anchors and molly bolts into a cinderblock wall. The Office accepted his claim for right wrist tendinitis and traumatic arthropathy. Appellant received compensation based on an effective pay rate date of October 6, 1989, the date disability began.

On January 16, 1990 appellant underwent a proximal row carpectomy. He returned to limited duty on January 29, 1990. On August 1, 1990 the attending physician noted: “[Appellant] is performing his regular work activities without significant limitations. Minimal pain. No swelling. At this time [appellant] is discharged from follow up with an excellent result from his surgical procedure.”

The medical evidence indicates that the surgery served appellant very well in terms of mobility and function for 14 years. But appellant developed some increased discomfort in 2004. On June 14, 2005 he underwent arthrodesis of his right wrist with insertion of a plate. On September 5, 2006 appellant underwent authorized surgery to remove the hardware. The surgeon certified that he was disabled for work following the hardware removal.

The Office determined that appellant sustained a new period of total disability due to his right wrist injury and was entitled to compensation for temporary total disability following the September 5, 2006 surgery. It paid compensation based on an effective pay rate date of October 6, 1989.

On October 7, 2009 the Office issued a schedule award for a 30 percent impairment of appellant’s right upper extremity. It based the award on an effective pay rate date of October 6, 1989, the date disability began.

Appellant’s representative requested reconsideration and argued that appellant was entitled to a recurrent pay rate effective September 5, 2006 because the record clearly established a recurrence of disability when he underwent surgery. The representative noted that he had returned to work full time for many years following his 1989 work injury and that authorized surgery to remove hardware from his wrist represented an accepted recurrence of disability.

On December 2, 2009 the Office reviewed the merits of appellant’s claim and denied modification of its prior decision. It noted that disability began on October 6, 1989 and that he returned to a full-time limited-duty position on January 29, 1990, a position made available to accommodate his right wrist partial disability. The Office added that, while performing this limited-duty position, appellant suffered a left knee injury on April 22, 2002, which the Office accepted under OWCP File No. xxxxxx204. Appellant stopped work for that injury on August 19, 2002 and did not return. The Office explained that he was receiving compensation for a constructed loss of wage-earning capacity for his left knee injury when it determined that he was entitled to temporary total disability for his September 5, 2006 right wrist surgery.

The Office found that no work stoppage associated with the recurrence of appellant’s right wrist disability and no pay rate associated with recurrence of disability in September 2006 “because [he] was not working.” It concluded that the correct pay rate was the date disability began because that was the date appellant stopped work as a result of right wrist disability.

Appellant’s representative argues on appeal that the Office recognizes a recurrence on September 5, 2006 but has not undertaken to calculate a recurrent pay rate for the schedule award. “As appellant had returned to work full time for more than six months after October 6, 1989, he was entitled to a [r]ecurrent rate for the September 5, 2006 [r]ecurrence.”

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.¹ "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.²

A "recurrence of disability" means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.³

"Pay rate for compensation purposes" means the employee's pay, as determined under 5 U.S.C. § 8114, at the time of injury, the time disability begins or 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, except as otherwise determined under 5 U.S.C. § 8113 with respect to any period.⁴

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 [appellant]." 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 the claimant performed during his limited duty would have been done by someone else, but instead whether he occupied a regular position that would have been performed by another employee.⁵

ANALYSIS

Not all recurrences of disability entitle an employee to a recurrent pay rate. Only if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States can the Office consider the employee's pay rate at the time compensable disability recurs.

There appears to be no dispute that, compensable disability recurred on or about September 5, 2006, when appellant underwent surgery to remove the hardware in his right wrist. The Office determined that he sustained a new period of total disability due to his July 26, 1989 right wrist injury and was entitled to compensation for temporary total disability following the September 5, 2006 surgery. Whether appellant is entitled to a recurrent pay rate, however,

¹ 5 U.S.C. § 8102(a).

² 20 C.F.R. § 10.5(f).

³ *Id.* at § 10.5(x).

⁴ *Id.* at § 10.5(s); 5 U.S.C. § 8101(4) ("monthly pay" defined).

⁵ *Jeffrey T. Hunter*, 52 ECAB 503 (2001).

depends on whether this recurrence began more than six months after he had resumed regular full-time employment with the United States.

Appellant's representative argues that "appellant had returned to work full time for more than six months after October 6, 1989." But the employment to which appellant returned must be "regular." The Office indicated that he returned to work in a limited-duty capacity on January 29, 1990 and continued to work in this limited-duty position until he stopped work in 2002 for an unrelated left knee injury. "[Appellant] stopped working a limited-duty position, designed to accommodate the limitation which resulted from the right wrist partial disability, to undergo treatment for a left knee condition that is an unrelated injury accepted under another claim."

If appellant never returned to regular employment after October 6, 1989, the date disability began, he is not entitled to a recurrence pay rate. The record shows that he returned to limited duty on January 29, 1990. But on August 1, 1990 the attending physician reported that appellant was performing his regular work activities without significant limitations. Indeed, the attending physician discharged him from follow up with excellent result from his surgical procedure.

The Board finds that the record raises a substantial question of whether appellant resumed regular full-time employment with the United States. Because there is insufficient evidence to support a finding in the matter, the Board will set aside the Office's October 7 and December 2, 2009 decisions on the issue of pay rate and will remand the case for further development. After such further development as may be necessary to resolve the matter, the Office shall issue an appropriate final decision on the pay rate to which appellant is entitled for his October 7, 2009 schedule award.

The Office also argued that there was no work stoppage associated with the September 5, 2006 right wrist surgery because appellant was already off work for his left knee injury. It cited no authority for the proposition that a recurrent pay rate requires an attendant work stoppage. Because disability is defined in terms of incapacity to earn and recurrence of disability is defined in terms of an inability to work, the Board is not persuaded that a work stoppage is necessary for appellant to be entitled to a recurrent pay rate. Appellant sustained a new period of total disability due to his right wrist injury and received compensation for temporary total disability without a work stoppage. So the only issue would appear to be whether this compensable disability recurred more than six months after he resumed regular full-time employment with the United States.

CONCLUSION

The Board finds that this case is not in posture for decision. Further, development of the evidence is warranted to determine whether appellant returned to regular full-time employment with the United States for purposes of establishing a recurrent pay rate.

ORDER

IT IS HEREBY ORDERED THAT the December 2 and October 7, 2009 decisions of the Office of Workers' Compensation Programs are set aside on the issue of pay rate. The case is remanded for further action consistent with this opinion.

Issued: September 9, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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