



On appeal, appellant's attorney asserts that the correct pay rate should be that of the day disability began and OWCP should have sought clarification as to whether appellant lost time from work immediately following his October 10, 2006 employment injury.

### **FACTUAL HISTORY**

On November 13, 2006 appellant, then a 46-year-old part-time flexible city carrier, filed a traumatic injury claim, alleging that on October 10, 2006 he strained his lower back lifting a bag of mail. He stopped work on October 14, 2006 and returned to limited duty on October 21, 2006.<sup>2</sup> The claim form indicated that appellant's pay rate was \$37,996.00 per year. An undated employing establishment payroll form listed his annual salary as \$37,996.00 at an hourly rate of \$19.00. On January 10, 2007 OWCP accepted that appellant sustained a lumbar disc herniation with left-sided radiculitis. It accepted a recurrence of disability on November 29, 2006.

A CA-7 form dated January 10, 2007 advised that appellant's base pay rate on October 10, 2006, the date of injury, was \$19.00 an hour and his pay rate on November 29, 2006 was also \$19.00 an hour. A CA-7 form dated January 23, 2007 indicated that his base pay on October 10, 2006 was \$18.36 an hour with an additional \$3.76 per week for Sunday premium pay and \$0.87 per week for night differential. On November 30, 2006 appellant's base pay was \$19.00 an hour with \$3.76 per week for Sunday premium pay and \$0.87 per week for night differential.<sup>3</sup> Appellant received wage-loss compensation from November 30, 2006 through March 4, 2007, at the augmented rate, based on a weekly pay rate of \$735.32.<sup>4</sup> He returned to full-time duty with no restrictions on March 5, 2007.

On May 21, 2010 appellant filed a schedule award claim. In a January 12, 2010 report, in which Dr. David Weiss, an osteopath, advised that appellant had an 18 percent left lower extremity impairment. In a June 5, 2010 report, Dr. Andrew A. Merola, an OWCP medical adviser, agreed with Dr. Weiss that appellant had an 18 percent impairment of the left lower extremity.

By letter dated August 18, 2010, OWCP asked the employing establishment to verify appellant's correct pay rate. It included copies of the CA-7 forms with inconsistent information regarding the base pay on October 10, 2006, noting that both \$18.36 and \$19.00 per hour were indicated. On August 23, 2010 the employing establishment responded that appellant's base pay on October 10, 2006 was \$19.00 an hour, that he worked an average of 38.72 hours each week and that he was entitled to night differential of \$0.87 each week and Sunday premium pay of \$3.76 each week. An OWCP pay rate memorandum indicated that, on the date disability began

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<sup>2</sup> On December 20, 2006 appellant signed a CA-7a form, noting 36.25 hours of leave used from October 14 to 21, 2006.

<sup>3</sup> A CA-7 form dated February 5, 2007 had no pay rate information.

<sup>4</sup> Section 8105(a) of FECA provides that, if the disability is total, the United States shall pay the employee during the disability monetary compensation equal to 66 2/3 percent of his or her monthly pay, the basic compensation rate for total disability. 5 U.S.C. § 8105(a). Under section 8110, an employee is entitled to compensation at the augmented rate of 75 percent of the weekly pay if he or she has one or more dependents. 5 U.S.C. § 8110; *see R.E.*, 59 ECAB 323 (2008).

or October 13, 2006, appellant's annual salary was \$39,520.00 with a base weekly rate of \$760.00, plus \$3.76 in Sunday premium pay and \$0.87 in night differential, for a total of \$764.63, based on 40 hours each week.

On September 7, 2010 appellant was granted a schedule award for an 18 percent left leg impairment or a total of 51.82 weeks to run from January 12, 2010 to January 9, 2011. The effective date for pay rate computation purposes was that of October 13, 2006, with a weekly pay of \$735.32 which, with cost-of-living adjustments, yielded a weekly award of \$594.75 at the augmented rate. Appellant received a first schedule award payment on September 7, 2010 at that rate, for the period January 12 through August 28, 2010 and thereafter received periodic compensation.

On September 16, 2010 appellant, through his attorney, requested reconsideration of the schedule award pay rate. He submitted a notice of personnel action, effective November 25, 2006, stating that his base hourly wage was \$19.26. In an October 18, 2010 decision, OWCP explained that the pay rate used to calculate the schedule award was taken from appellant's CA-1 form, traumatic injury claim. It noted that he stopped work on October 14, 2006 and returned on October 21, 2006 and this was supported by a CA-7a form. OWCP explained that appellant's annual pay rate on the date of injury was \$37,996.00 with a weekly rate of \$730.69. Sunday premium pay of \$3.76 and night differential of \$0.87 were added, which yielded a weekly pay rate of \$735.32, the pay rate used to calculate the schedule award.

### **LEGAL PRECEDENT**

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly rate.<sup>5</sup> 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.<sup>6</sup> The compensation rate for schedule awards is the same as compensation for wage loss.<sup>7</sup> OWCP 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.<sup>8</sup>

Section 8114(d)(1) of FECA provides that, if the employee worked in the employment in which he or she was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate

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<sup>5</sup> See 5 U.S.C. §§ 8105-8107.

<sup>6</sup> *Id.* at § 8101(4).

<sup>7</sup> See 20 C.F.R. § 10.404(b); *K.H.*, 59 ECAB 495 (2008).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(3) (September 2011).

of pay -- (A) was fixed, the average annual earnings are the annual rate of pay; or (B) was not fixed, the average annual earnings are the product obtained by multiplying the daily wage for the particular employment or the average thereof, if the daily wage has fluctuated, by 300 if he or she was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week and 260 if employed on the basis of a 5-day week.<sup>9</sup> OWCP procedures provide that the pay rate of a part-time flexible employee of the Postal Service who works substantially the entire year prior to injury would be computed under section 8114(d)(1)(B).<sup>10</sup>

### ANALYSIS

The Board finds that this case not in posture for decision regarding appellant's pay rate for computation purposes. Appellant did not challenge the impairment rating of his schedule award but the rate of pay used to calculate the award, contending that OWCP should have sought clarification regarding the date disability began and his pay rate. He sustained an employment injury on October 10, 2006. Appellant stopped work on October 14, 2006, received continuation of pay and returned to limited duty on October 21, 2006.

The rate of pay for schedule award purposes is the highest rate that satisfies the terms of section 8104(4) of FECA, the date of injury, the date disability begins or the date of recurrent disability.<sup>11</sup> As appellant stopped work on October 14, 2006, the correct pay rate would therefore be his rate of pay on that day, as it was the date disability began. He was granted a schedule award on September 7, 2010, based on a weekly pay rate of \$735.32. The record, however, contains contradictory information regarding appellant's pay rate. The case must therefore be remanded to OWCP to explain the pay rate calculation used for his schedule award determination.

The only specific information regarding appellant's rate of pay on the date disability began is an OWCP pay rate memorandum advising that on October 13, 2006 his annual salary was \$39,520.00 based on 40 hours a week, 52 weeks a year, or \$760.00 per week. Sunday premium pay of \$3.76 and night differential of \$0.87 were added to the weekly base pay, for a total weekly pay rate of \$764.63. This pay rate was not used in the September 7, 2010 schedule award which used a weekly rate of \$735.32.

Additional relevant information regarding appellant's rate of pay includes his traumatic injury claim form dated November 13, 2006. This indicated that his pay rate was \$37,996.00 per year. An undated employing establishment payroll form indicated that appellant's annual salary was \$37,996.00 at an hourly rate of \$19.00. A CA-7 form dated January 10, 2007 indicated that his base pay rate on October 10, 2006, the date of injury, was \$19.00 an hour and his pay rate on November 29, 2006 was also \$19.00 an hour. A CA-7 form dated January 23, 2007 indicated that appellant's base pay on October 10, 2006 was \$18.36 an hour with an additional \$3.76 per week for Sunday premium pay and \$0.87 per week for night differential. It indicated that on

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<sup>9</sup> 5 U.S.C. § 8114(d)(1)(B); *see H.S.*, 58 ECAB 511 (2007).

<sup>10</sup> Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.900.4.c(2) (March 2011).

<sup>11</sup> 5 U.S.C. § 8101(4); *see Patricia K. Cummings*, 53 ECAB 623 (2002).

November 30, 2006 his base pay was \$19.00 an hour with \$3.76 per week for Sunday premium pay and \$0.87 per week for night differential.

Following an OWCP request to explain these discrepancies, on August 23, 2010, the employing establishment advised that appellant's base pay on October 10, 2006 was \$19.00 an hour, that he worked an average of 38.72 hours each week and that he was entitled to night differential of \$0.87 each week and Sunday premium pay of \$3.76 each week. An OWCP pay rate memorandum indicated that, on the date disability began or October 13, 2006, appellant's annual salary was \$39,520.00 with a base weekly rate of \$760.00, plus \$3.76 in Sunday premium pay and \$0.87 in night differential for a total of \$764.63, based on 40 hours each week. A notice of personnel action, effective November 25, 2006, indicating that his base hourly wage was \$19.26.

In calculating the September 7, 2010 schedule award, OWCP used a weekly base pay rate of \$730.69 plus \$3.76 in Sunday premium pay and \$0.87 in night differential, to total \$735.32 and did not use the pay rate information found in the employing establishment's August 23, 2010 response to an OWCP inquiry. In the October 18, 2010 merit decision on the schedule award pay rate issue, OWCP explained that appellant's pay rate on the date of injury or October 10, 2006, was used. Notwithstanding that the record contains contradictory information regarding appellant's date-of-injury pay rate, as noted above appellant's disability began on October 14, 2006. OWCP 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.<sup>12</sup> Neither the September 7, 2010 schedule award decision nor the October 18, 2010 decision regarding the schedule award pay rate contained a sufficient explanation regarding the method used in calculating appellant's pay rate for schedule award purposes, especially in light of the contradictory information contained in the record. Moreover, it is unclear whether appellant, a part-time flexible employee, worked substantially the entire year prior to the injury and, if so, whether the principles of section 8114(d)(1) were applied.<sup>13</sup>

For these reasons, the case must be remanded to OWCP to obtain sufficient information from the employing establishment regarding appellant's employment status, to include whether section 8114(d)(1) is applicable and what his hourly wage was on October 14, 2006, the date disability began, to be followed by a decision on the merits with a sufficient explanation regarding the pay rate used to calculate his schedule award.

### **CONCLUSION**

The Board finds that this case is not in posture for decision as to whether OWCP used the proper pay rate in calculating appellant's schedule award.

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<sup>12</sup> Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.900.5(a)(3) (September 2011). Board precedent also contemplates that pay rate discrepancies must be clarified. *See E.C.*, 59 ECAB 397 (2008); *Gary Vancura*, 40 ECAB 427 (1989).

<sup>13</sup> While the employing establishment advised that appellant worked an average of 38.72 hours a week, it did not explain the period used to make this calculation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 18 and September 7, 2010 decisions of the Office of Workers' Compensation Programs are set aside and remanded to OWCP for proceedings consistent with this opinion of the Board regarding appellant's pay rate for computation purposes. The September 7, 2010 decision is affirmed with regard to the degree of his left lower extremity impairment.

Issued: November 8, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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