

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

L.P., Appellant

and

**U.S. POSTAL SERVICE, PORT CHARLOTTE
CARRIER ANNEX, Port Charlotte, FL,
Employer**

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**Docket No. 11-1889
Issued: August 1, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On August 8, 2011 appellant filed a timely appeal from a February 9, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) determining her pay rate.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. See 20 C.F.R. § 501.3(f)(2). As OWCP's merit decision was issued on February 9, 2011, the 180-day computation begins February 10, 2011. One hundred and eighty days from February 19, 2012 was August 8, 2011. Since using August 15, 2011, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is August 8, 2011, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly determined appellant's pay rate for compensation purposes.

FACTUAL HISTORY

On February 6, 1997 appellant, then a 32-year-old rural mail carrier, filed a recurrence of disability claim beginning that date causally related to a 1991 employment injury. OWCP adjudicated the alleged recurrence of disability as an occupational disease claim and accepted the claim for right shoulder strain and a cervical herniated disc. On April 9, 1997 appellant returned to work for four hours a day and on June 2, 1997 she returned to work in her date-of-injury position for eight hours a day. OWCP accepted that she sustained a recurrence of disability commencing on November 3, 1998.

Appellant returned to modified part-time employment in 2002. By decision dated August 4, 2004, OWCP reduced her compensation based on its finding that her actual earnings working 20 hours a week as a part-time modified mail processing clerk fairly and reasonably represented her wage-earning capacity. It utilized appellant's weekly pay rate of \$781.17 effective November 7, 1998, when disability recurred, to determine her wage-earning capacity. OWCP calculated that she had a loss of wage-earning capacity of \$390.59 per week.

On January 11, 2010 appellant requested compensation for lost wages beginning December 19, 2009 after the employing establishment reduced her work hours from four to two hours per day under the National Reassessment Process (NRP). In a decision dated March 9, 2010, OWCP modified the August 4, 2004 decision after finding that its wage-earning capacity determination was erroneous as the position of modified mail processing clerk was makeshift in nature. It paid appellant compensation for lost wages based on a pay rate date of November 7, 1998, the date of her prior recurrence of disability.

By letter dated April 26, 2010, appellant related that she should be paid what she was currently earning as she "was never given a chance to return to a full[-]time job as a rural carrier." She maintained that OWCP should pay her at her current pay rate.

By decision dated July 13, 2010, OWCP found that appellant was not entitled to a recurrent pay rate as she had not returned to regular full-time employment. It concluded that it properly based her compensation rate on her pay rate effective November 7, 1998.

On August 11, 2010 appellant requested an oral hearing. A telephone hearing was held on December 22, 2010. At the hearing, appellant related that when she returned to work as a clerk she did the same job as the other clerks. She asserted that she should be paid at the current pay rate instead of a 1997 pay rate. Appellant indicated that she stopped work in 1997 and returned to work in 2002 following surgery. She currently worked four hours per day.

By decision dated February 9, 2011, the hearing representative affirmed the July 13, 2010 decision as modified to show that appellant was entitled to a recurrent pay rate. He found that following her injury she returned to full-time regular employment on June 2, 1997 and worked

until her recurrence of disability on November 3, 1998. In 2002 appellant returned to part-time work for four hours per day. On December 19, 2009 the employing establishment reduced her work hours to two per day. The hearing representative found that appellant was entitled to a recurrence pay rate beginning December 19, 2009. He determined, however, that her pay rate as of December 19, 2009 was \$1,214.17 a week, or \$607.09 for a 20-hour week, and her pay rate as of November 7, 1998 was \$787.17 a week. The hearing representative concluded that appellant's pay rate of \$607.09 in December 2009 was less than her pay rate in November 1998 of \$787.17 a week. Consequently, he found that OWCP properly paid her compensation based on the November 1998 pay rate.

On appeal appellant indicated that OWCP correctly found that she earned \$607.09 per week beginning December 19, 2009. She argued, however, that OWCP erred in finding that her current compensation was based on a weekly pay rate of \$787.17. In an attached copy of the hearing representative's decision, appellant noted that \$787.17 divided by her 20-hour workweek equaled \$393.58 per week.

LEGAL PRECEDENT

Section 8105(a) of FECA³ 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 [her] monthly pay, which is known as [her] basic compensation for total disability."⁴ Section 8110(b) of FECA provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents.⁵ Section 8101(4) defines monthly pay for purposes of computing compensation benefits as the monthly pay at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.⁶

In *Johnny A. Muro*,⁷ the employee sustained a recurrence of disability more than six months after he resumed regular, full-time employment with the employer and the Board found that under 5 U.S.C. § 8101(4) he was entitled to have his compensation increased based on his pay at the time of this first recurrence of disability. In *Muro*, the Board also found that, if an employee had one recurrence of disability which meets the requirements of 5 U.S.C. § 8101(4), any subsequent recurrence of disability would also meet such requirements and would entitle the employee to a new recurrence pay rate.⁸

³ *Id.*

⁴ *Id.* at § 8105(a).

⁵ *Id.* at § 8110(b).

⁶ *Id.* at §§ 8101(4); 8114; *see also* 20 C.F.R. § 10.5(s).

⁷ 19 ECAB 104 (1967).

⁸ *See Muro, supra* note 7; *see also Carolyn E. Sellers*, 50 ECAB 393 (1999).

ANALYSIS

OWCP accepted that appellant sustained right shoulder strain and a cervical herniated disc due to factors of her federal employment. Following her injury she returned to modified work for four hours per day on April 9, 1997. Appellant resumed her full-time regular employment on June 2, 1997. OWCP accepted that she sustained a recurrence of disability in November 1998.

Appellant returned to part-time work in 2002. By decision dated August 4, 2004, OWCP found that her actual earnings as a part-time modified mail processing clerk fairly and reasonably represented her wage-earning capacity. It based appellant's compensation payments on her weekly pay rate effective November 7, 1998 of \$781.17 per week.

Beginning December 19, 2009, the employing establishment reduced appellant's hours from four to two per day. Appellant filed a claim for compensation for lost time. On March 9, 2010 OWCP modified its August 4, 2004 wage-earning capacity decision after finding that the original determination was in error as the position of modified mail processing clerk was makeshift in nature. It paid appellant compensation for lost time beginning December 19, 2009 based on her recurrent pay rate of November 7, 1998.

Section 8101(4) of FECA defines monthly pay for purposes of computing compensation benefits as the monthly pay at the time of injury, 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 federal employment, whichever is greater.⁹ The Board has held that, if an employee has one recurrence of total disability which meets the requirements of 5 U.S.C. § 8101(4), any subsequent recurrence of total disability would also meet such requirements and would entitle the employee to a new recurrence pay rate.¹⁰ As appellant returned to her regular full-time employment in June 1997 and worked until November 7, 1998, she was entitled to compensation based on her recurrent pay rate at the time of her November 7, 1998 recurrence of disability. She was also entitled to the pay rate in effect at the time of any subsequent recurrence of disability. The hearing representative thus properly found that appellant was entitled to a recurrent pay rate as of December 19, 2009, the date that the employing establishment reduced her hours from four to two a day.¹¹ He, however, further determined that appellant's pay rate on November 1998 working 40 hours per week was higher than her pay rate at the time of her recurrence of disability on December 19, 2009 when she worked only 20 hours per week. The hearing representative calculated that her pay rate effective December 19, 2009 was \$1,214.17 per week, or \$607.09 for a 20-hour workweek. He compared the \$607.09 she earned working 20 hours per week for the employing establishment with \$787.17 per week, the amount that she earned working full time prior to her November 7, 1998 recurrence of disability. The hearing representative thus concluded that OWCP properly based

⁹ 5 U.S.C. § 8101(4); *Carl R. Benavidez*, 56 ECAB 596 (2005).

¹⁰ *See supra* note 8.

¹¹ For the purposes of 5 U.S.C. § 8101(4), recurrence of disability includes a change from a no disability status to one of partial disability or a change from partial disability to total disability. *See Melvin Hoff, Sr.*, 27 ECAB 458 (1976).

her pay rate on the rate in effect at the time of her November 7, 1998 recurrence of disability as it was a higher amount.

On appeal appellant argues that the hearing representative should have compared the \$607.09 pay rate she earned working a 20-hour week with the amount she earned working 20 hours per week for the employing establishment after her November 7, 1998 recurrence of disability. She seeks compensation based on the pay rate of a full-time employee rather than the pay she actually earned working 20 hours per week. OWCP's procedure manual states that "the recurrent pay rate should be considered the actual weekly amount the claimant earned."¹² It further provides that a lower pay rate can occur "when the claimant is working part time or has been rated for loss of wage-earning capacity. Even if the [employing establishment] reports a higher hourly pay for a [date of recurrence], the recurrent pay rate should be considered the actual weekly amount the claimant earned."¹³ In such cases, OWCP procedures provide that the pay rate on either the date of injury, date disability began or the date of a prior recurrence of disability should be used as it would be higher. A recurrent pay rate may thus be lower than the pay rate at the time of injury or at the time of prior recurrence of disability, as in this case when appellant was working full time at the time of the prior recurrence of disability and only part time at the time of the subsequent recurrence of disability.¹⁴ Her recurrent pay rate on November 7, 1998 was based on her weekly pay rate working full time of \$787.17. Appellant's recurrent pay rate at the time of her December 19, 2009 recurrence of disability was her weekly pay rate working 20 hours per week of \$607.09. The hearing representative thus properly found that OWCP properly paid her based on her pay rate at the time of her November 7, 1998 recurrence of disability as it was higher than her pay rate at the time of her subsequent recurrence of disability.

CONCLUSION

The Board finds that OWCP properly determined appellant's pay rate for compensation purposes.

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(6) (November 2007).

¹³ *Id.*

¹⁴ *Id.*; see also *Carla D. Allen*, Docket No. 96-306 (issued November 6, 1998).

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 1, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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