United States Department of Labor
Employees' Compensation Appeals Board

A.W., Appellant	)	
and	)	**Docket No. 11-1915**
	)	**Issued: August 21, 2012**
DEPARTMENT OF THE NAVY, PORTSMOUTH NAVAL SHIPYARD, Portsmouth, NH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 23, 2011 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs (OWCP) dated April 22, May 16 and July 28, 2011. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 OWCP met its burden of proof to rescind appellant's schedule award; (2) whether OWCP properly refused to reopen appellant's case for reconsideration under 5 U.S.C. § 8128; and (3) whether OWCP used the proper pay rate in calculating his compensation.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY -- ISSUE 1

On January 21, 2004 appellant, a 46-year-old pipefitter helper, injured his back while carrying fire extinguishers. He filed a claim for benefits on January 26, 2004, which OWCP accepted for lumbar and thoracic strain.

Appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine on May 5, 2004, which showed a loss of disc hydration and mild loss of disc space height at L4-5. Dr. Ellen Gerety, a Board-certified diagnostic radiologist, concluded that he had mild degenerative disc disease at L4-5 with mild bilateral neural foraminal narrowing.

In a February 5, 2008 report, Dr. Frank A. Graf, Board-certified in orthopedic surgery and appellant's treating physician, reviewed the history of injury. He stated that appellant underwent an MRI scan of the thoracolumbar spine, which documented a far lateral neuroforaminal disc herniation at L4-5. Dr. Graf noted that appellant had a lumbosacral spine rating of class 2 based on his documented intervertebral disc herniation, single level, without surgery. He advised that under Table 17-4 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) sixth edition appellant had a 24 percent lower extremity impairment rating.

In a Form CA-7 dated June 25, 2008, appellant requested a schedule award based on a partial loss of use of his left lower extremity.

In a July 30, 2008 report, an OWCP medical adviser stated his disagreement with Dr. Graf's interpretation of the May 5, 2004 MRI scan. While Dr. Graf had interpreted the MRI scan as showing disc herniation at L4-5, the radiologist's report did not mention any herniated disc. The medical adviser opined that there was no documentation of record or in Dr. Graf's most recent examination to establish that appellant had impairment of either lower extremity as a result of his work-related injury. Therefore, there was no basis for a schedule award.

OWCP found that there was a conflict in the medical opinion between Dr. Graf, appellant's treating physician and OWCP's medical adviser as to whether appellant had any permanent impairment from his accepted lumbar and thoracic conditions. It referred appellant to Dr. Jonathan W. Sobel, a specialist in general surgery, for an impartial medical examination to resolve the conflict.

In a November 20, 2008 report, Dr. Sobel found that appellant had no ratable impairment of the lower extremities under the A.M.A., *Guides*. He noted that appellant's May 7, 2004 MRI scan showed some mild degenerative disc disease in the lower lumbar spine and some minor disc bulging but secondary bilateral neuro-foraminal narrowing at L4-5. Dr. Sobel believed this showed age-appropriate degenerative disc disease with minor disc bulges, with no evidence of disc herniation. He concluded that appellant had sustained an overuse sprain/strain of the lumbosacral spine on January 28, 2004; however, there was no documentary evidence in the medical record showing that he sustained a herniated disc at any level in the lumbar spine causally related to his January 2004 work injury. Dr. Sobel referenced the A.M.A., *Guides*, sixth edition and concluded that appellant had no lower extremity impairment due to his accepted lumbar condition.

By decision dated January 2, 2009, OWCP found that appellant had no ratable impairment causally related to an accepted condition and therefore he was not entitled to a schedule award.

By letter dated April 29, 2009, appellant's attorney requested reconsideration. By nonmerit decision dated August 4, 2009, OWCP denied reconsideration without merit review.

Appellant underwent an MRI scan of the lumbar spine on October 14, 2009, which was interpreted by Dr. John G. Pierce, a Board-certified radiologist, as showing mild disc space height loss and desiccation of the disc at the L4-5 level with a small left lateral disc herniation causing mild impingement upon the exiting nerve root.

By letter dated November 24, 2009, appellant, through his attorney, requested reconsideration. He submitted a September 30, 2009 report from Dr. Andrew I. Forrest, Board-certified in orthopedic surgery, who found that appellant had a 23 percent impairment pursuant to the fifth edition of the A.M.A., *Guides*. Dr. Forrest reiterated his opinion that appellant's 2004 MRI scan examination demonstrated disc herniation at L4-5.

By decision dated December 16, 2009, OWCP denied modification of the January 2, 2009 decision.

In a report dated March 4, 2010, Dr. Forrest opined that appellant's 2004 MRI scan showed a disc herniation and that the other physicians of record had mistaken his diagnosis as a lumbar strain. He opined that appellant had radiculopathy stemming from his disc herniation, which resulted in left lower extremity impairment consistent with the fifth edition of the A.M.A., *Guides*.

By letter April 21, 2010, appellant's attorney requested reconsideration.

In an April 8, 2010 report, Dr. Forrest found that appellant had a 25 percent impairment of the left lower extremity under the sixth edition of the A.M.A., *Guides*. On examination, appellant showed diminution in spinal range of motion, normal lower extremity strength, normal tone, normal sensation and normal deep tendon reflexes at the knees and ankles. Dr. Forrest noted asymmetry of the internal hamstring on the left relative to the right. There were no neural tension signs; reflexes were asymmetric; there was no atrophy, sensory deficit or motor deficit and normal electromyelogram (EMG) findings. Noting that, prior evaluations had demonstrated an L4-5 lateral disc herniation, Dr. Forrest diagnosed herniated nucleus pulposus at L4-5 with left L5 radiculopathy and calculated his impairment pursuant to the sixth edition of the A.M.A., *Guides* for intravertebral disc herniation at a single level with medically documented findings with or without surgery and documented radiculopathy.

Dr. Forrest concluded that, under Table 16-10, page 530 of the sixth edition of the A.M.A., *Guides*, appellant had a 10 percent whole person impairment or a 25 percent lower extremity impairment. He offered no explanation as to how appellant's current impairment findings were medically caused by the 2004 employment injury, which was accepted for lumbar and thoracic strains.

In a June 15, 2010 report, an OWCP medical adviser, Dr. George L. Cohen, Board-certified in internal medicine, reviewed Dr. Forrest's April 8, 2010 report. He rated a nine percent left lower extremity impairment based on lumbar radiculopathy, pursuant to Table 17-4, page 570. Dr. Cohen stated that the accepted back conditions affected the extremity and caused permanent impairment.

By decision dated June 24, 2010, OWCP granted appellant a schedule award for a nine percent permanent impairment of the left leg for the period September 4, 2009 to March 4, 2010, or a total of 25.92 weeks of compensation.

By letter dated August 24, 2010, appellant, through his attorney, requested reconsideration. He submitted a June 28, 2010 report from Dr. Forrest, who expressed disagreement with an OWCP medical adviser's report. Dr. Forrest reiterated that appellant had 25 percent left leg impairment under the sixth edition of the A.M.A., *Guides*.

In a September 13, 2010 report, Dr. Craig Uejo, Board-certified in occupational medicine and an OWCP medical adviser, reviewed Dr. Forrest's April 8, 2010 report. He found that appellant had no ratable impairment of the left leg under the sixth edition of the A.M.A., *Guides*. Dr. Uejo noted that Dr. Forrest's impairment rating was not calculated in accordance with the A.M.A., *Guides*. He stated that the approach to the evaluation of spinal nerve impairment, such as radiculopathy affecting the extremities, was clarified in the July/August issue of *The Guides Newsletter*. The sixth edition of the A.M.A., *Guides* had not provided a separate approach to rating spinal nerve impairments, as had previous editions; therefore, *The Guides Newsletter* provided an approach consistent with values assigned for spinal impairment in previous editions. Dr. Uejo explained that the proposed tables outlined in *The Guides Newsletter* set forth a process for rating sensory impairments:

> "First, it must be determined that a verifiable radiculopathy exists and if ratable impairment exists based on residual sensory or motor deficits. While reflex changes do support past or present spinal nerve root involvement in the form of radiculopathy, not all radiculopathy conditions are ratable by the criteria and methodologies outlined in *The Guides Newsletter* and the sixth edition of the A.M.A., *Guides*, for spinal nerve root impairment. Radiculopathy is ratable based on motor or sensory dysfunction of the spinal nerves. While often present along with reflex changes, reflex changes can be an isolated finding of radiculopathy and does not pose a significant impairment … by itself."

While Dr. Uejo agreed with Dr. Forrest that the October 14, 2009 MRI scan verified that appellant had radiculopathy stemming from the L4-5 disc herniation, he stated that a lumbar radiculopathy supportable by clinical facts but absent sensory or motor deficits did not rise to the level of ratable spinal nerve impairment.

Dr. Uejo stated that Dr. Forrest noted normal sensation in the left lower extremity and normal strength and tone in the left lower extremity. While appellant did show a diminished hamstring reflex, Dr. Uejo, noting that the sixth edition of the A.M.A., *Guides* stated that the root tension sign is usually positive in patients that have a verifiable radiculopathy, stated that Dr. Forrest noted no neural tension signs in his April 8, 2010 report. Based on this objective

evidence, Dr. Uejo concluded that appellant had no ratable findings of sensory or motor loss impairment related to the L5 spinal nerve root in the left lower extremity. Therefore, appellant had no left leg impairment.

By decision dated September 20, 2010, OWCP modified the schedule award decision of June 24, 2010, finding that based on Dr. Uejo's opinion appellant had no impairment of the left lower extremity under the sixth edition of the A.M.A., *Guides*, as there were no notable findings of sensory or motor loss in the lower extremity.

In a September 8, 2010 report, received by OWCP on October 4, 2010, Dr. Graf noted that he had been appellant's treating physician for several years. He expressed his concurrence with Dr. Forrest's impairment rating. Dr. Graf was in agreement with the specific references and rationale concerning the appropriate impairment rating for patients with lumbosacral disc herniation with radiculopathy. He advised that the specific tables appropriate for assessment of appellant's condition were located at Table 17-4, page 570 and Table 18-10, page 530 of the fifth edition of the A.M.A., *Guides*.

On December 10, 2010 appellant requested reconsideration.

In a November 24, 2010 report, Dr. Forrest reiterated that appellant had a 25 percent left leg impairment under the sixth edition of the A.M.A., *Guides* based on a herniated disc at L4-5 and radiculopathy. This was supported on examination by a hyporeflexic internal hamstring tendon jerk that demonstrated "in an indirect sense" motor and/or sensory weakness. Dr. Forrest asserted that the tendon reflex abnormality was at a clinically appropriate level based on the MRI scan.

In an April 15, 2011 report, Dr. Uejo essentially reiterated his previous findings and conclusions. Regarding appellant's hamstring reflex findings, the reflex abnormalities were not ratable factors under the sixth edition of the A.M.A., *Guides.*

By decision dated April 22, 2011, OWCP found that appellant had no ratable impairment causally related to an accepted condition and therefore was not entitled to a schedule award. It stated that the September 20, 2010 decision erred in referring to the action taken as a modification of the schedule award. OWCP found that it should have rescinded the schedule award decision of June 24, 2010 entirely and an overpayment resulted as a consequence.

On May 30, 2011 appellant requested reconsideration. In support of his claim, he submitted the May 9 and July 13, 2011 reports of Dr. Graf, who reiterated his previous findings and conclusions. Appellant also submitted a June 24, 2011 report from Dr. H. Matthew Quitkin, Board-certified in orthopedic surgery; and a July 15, 2011 report from Dr. Daniel S. Zipin, an osteopath. None of these reports, however, provided any impairment evaluation under the sixth edition of the A.M.A., *Guides*.

In a December 20, 2010 report, Dr. Jeffrey G. Donatello, a chiropractor, opined that appellant showed signs of radicular neuropathy into his left lower extremity. Appellant had a diminished left patellar reflex and the dermatomal loss over the left L4-5 dermatome, coupled with the radiating leg pain he showed, contributed to his diagnosis.

By decision dated July 28, 2011, OWCP denied appellant's application for review of its schedule award decision on the grounds that it did not raise any substantive legal questions or include new and relevant evidence sufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his motion or on application.[2] The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128 of FECA and where supported by the evidence, set aside or modify a prior decision and issue a new decision.[3] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[4]

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification benefits. This holds true where, as here, OWCP later decides that it erroneously accepted a schedule award claim. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for recission.[5]

The schedule award provision of FECA[6] and its implementing regulations[7] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[8] The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[9]

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[2] 5 U.S.C. § 8128.

[3] *See John W. Graves*, 52 ECAB 160 (2000).

[4] *Id.; see also K.N.*, Docket No. 11-540 (issued February 2, 2012).

[5] *Id.*

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

[8] *Id.*

[9] *Veronica Williams*, 56 ECAB 367, 370 (2005).

ANALYSIS -- ISSUE 1

In the instant case, OWCP accepted that appellant's January 21, 2004 employment injury caused lumbar and thoracic sprain.[10] The Board notes that a schedule award is not payable under FECA for injury to the spine[11] or based on whole person impairment.[12] However, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[13] The Board finds that OWCP properly determined that appellant's schedule award was issued in error as the evidence record was not sufficient to establish that appellant had a permanent impairment caused by his accepted lumbar and thoracic strains, at the time OWCP rescinded his schedule award.

In its January 2, 2009 decision, OWCP denied the claim for a schedule award, finding that based on Dr. Sobel's November 20, 2008 referee report appellant had not sustained a herniated disc as a result of the accepted injury and he had no ratable impairment under the A.M.A., *Guides* stemming from his accepted lumbar and thoracic strain conditions. As Dr. Sobel's report was based upon a proper history of injury, as well as a thorough review of the evidence of record and presented a well-rationalized opinion, it was entitled to great weight.[14]

Following the January 2, 2009 decision, appellant underwent an MRI scan on October 14, 2009 which demonstrated a left-sided herniated disc at L4-5. Dr. Forrest again stated in his April 8, 2010 report that appellant had radiculopathy stemming from this herniated disc at L4-5. Based on this report OWCP granted appellant a schedule award for a nine percent left lower extremity in its June 24, 2010 decision.

The Board finds that OWCP improperly granted this schedule award. Dr. Forrest continued to opine that appellant's 2004 MRI scan documented a herniated disc and that the other physicians of record had "miscoded" his diagnosis. However, this is the same argument he made leading to the IME examination by Dr. Sobel, who concurred with radiologist Dr. Gerety's opinion that the 2004 MRI scan of appellant's lumbar spine did not show a herniated disc but rather documented degenerative changes. The weight of the medical evidence prior to appellant's October 2009 MRI scan established that he had not sustained a herniated disc as a result of his 2004 employment injury.

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[10] The Board notes that, following the appeal of this case, OWCP accepted additional conditions as causally related to the January 21, 2004 employment injury. The Board's review of a case is limited to evidence that was before OWCP at the time of the decision on appeal. The Board cannot review evidence which became part of the record after the appeal was filed. *See* 20 C.F.R. § 501.2 (c)(1).

[11] *Pamela J. Darling*, 49 ECAB 286, n.7 (1998).

[12] *N.M.*, 58 ECAB 273, n.9 (2007).

[13] *Thomas J. Engelhart*, 50 ECAB 319, n.8 (1999).

[14] Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *See Richard R. Lemay*, 56 ECAB 341 (2005).

Appellant's October 14, 2009 MRI scan did document a herniated disc. However, no physician of record provided a rationalized medical opinion explaining how the herniated disc in 2009 was causally related to appellant's 2004 employment injury. Dr. Forrest's reports subsequent to the October 14, 2009 MRI scan are of limited probative value as they failed to acknowledge that the evidence of record did not support a finding of herniated disc, based upon any objective evidence, until the October 14, 2009 scan revealed a herniated disc. He therefore never offered any medical explanation as to how the herniated disc evidenced in October 2009 was causally related to appellant's 2004 employment injury. The Board notes that the medical adviser, Dr. Cohen, on June 15, 2010 cryptically noted that the accepted back condition affected an extremity and caused a permanent impairment. Dr. Cohen offered no explanation as to how appellant's accepted lumbar strain caused a permanent impairment, nor did he offer any explanation as to why the herniated disc found on the 2009 MRI scan was causally related to the 2004 injury. At this point in time OWCP had not accepted that appellant sustained a herniated lumbar disc or radiculopathy as a result of the 2004 employment injury.

Nevertheless OWCP granted appellant a schedule award for nine percent permanent impairment of the left lower extremity based upon Dr. Cohen's report and Dr. Forrest's findings. Appellant requested reconsideration and submitted a June 24, 2010 report from Dr. Forrest, who reiterated that appellant had a 25 percent left lower extremity impairment under the A.M.A., *Guides* based on radiculopathy stemming from a herniated disc at L4-5.

OWCP referred appellant to Dr. Uejo, its medical adviser, who properly found that appellant had no ratable impairment under the sixth edition of the A.M.A., *Guides.* Dr. Uejo noted that Dr. Forrest had reported that appellant had no sensory and motor abnormalities of the lower extremities, except for diminished hamstring reflex. He explained that loss of hamstring reflex was not a ratable factor under the sixth edition of the A.M.A., *Guides*. On September 20, 2010 OWCP found that appellant had a zero percent permanent impairment of the left lower extremity. On April 23, 2011 it rescinded acceptance of his schedule award claim.

The Board finds that, as of April 23, 2011, the date OWCP rescinded appellant's schedule award, OWCP had not accepted that he sustained a herniated disc as a result of his accepted January 2004 employment injury. The impairment ratings of record were premised upon a finding of herniated disc and radiculopathy following the October 14, 2009 MRI scan, but the medical evidence of record did not substantiate that this finding in 2009 was causally related to the 2004 injury, given the fact that appellant's May 5, 2004 MRI scan did not show a herniated disc.

There is no probative medical evidence of record establishing that appellant sustained any permanent impairment stemming from his accepted lumbar and thoracic strain conditions. The Board will affirm the April 22, 2011 decision.

In his appeal to the Board, appellant asserts that he sustained ratable injuries of the left lower extremity and that OWCP ignored the medical evidence indicating that he had a herniated disc at L4-5 and radiculopathy, which entitled him to a schedule award. The question of whether a claimant is entitled to a schedule award is a medical one. OWCP thoroughly reviewed the medical evidence of record and properly determined that it was not sufficient to establish a permanent impairment of the left lower extremity from appellant's accepted lumbar and thoracic conditions.

The Board notes that OWCP has further developed this case since this appeal was filed. Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that OWCP erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not considered by OWCP; or by submitting relevant and pertinent evidence not previously considered by OWCP.[15] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[16]

ANALYSIS -- ISSUE 2

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by OWCP; and he has not submitted relevant and pertinent evidence not previously considered by OWCP. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.[17] The reports from Drs. Quitkin and Zipin did not contain an impairment rating rendered in accordance with the applicable tables and protocols of the A.M.A., *Guides*.[18] Thus these reports did not provide any rationalized medical opinion pertinent to the relevant issue; *i.e.*, whether appellant sustained any permanent impairment of his left lower extremity from his accepted lumbar and thoracic strain conditions. Dr. Graf's May 9 and July 13, 2011 reports were cumulative and repetitive of reports he previously submitted. Dr. Donatello's December 20, 2010 chiropractic report did not contain a diagnosis of subluxation as shown by x-ray and thus did not constitute medical evidence under section 8101(2). Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by OWCP. OWCP did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits in its July 28, 2011 nonmerit decision.

[15] 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

[16] *Howard A. Williams*, 45 ECAB 853 (1994).

[17] *See David J. McDonald*, 50 ECAB 185 (1998).

[18] The Board notes that a description of appellant's impairment must be obtained from appellant's physician, which must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations. *See Peter C. Belkind*, 56 ECAB 580, 585 (2005).

FACTUAL HISTORY -- ISSUE 3

Following the January 21, 2004 injury, appellant returned to work with restrictions although he did miss periods of work intermittently.[19] An August 31, 2004 Form CA-17 from Dr. Graf stated that appellant could perform light duty and outlined the following restrictions: lifting more than 30 pounds; extended walking; occasional bending and stopping and all climbing. A limited-duty memorandum dated October 4, 2006 indicated that appellant had been placed on permanent restrictions of no lifting or carrying of more than 55 pounds for more than three hours a day.

In a February 5, 2008 report, Dr. Graf indicated that appellant could work a maximum of eight hours a day with no overtime or shift changes and had permanent restrictions of no lifting exceeding 55 pounds.

On January 7, 2010 appellant filed a Form CA-2a, claim for benefits, alleging that he sustained a recurrence of disability on January 24, 2004 which was causally related to his accepted lumbar and thoracic conditions. He indicated that there was no time lost from work due to the recurrence. In response to the question of whether appellant was in any way limited in performing his usual duties after returning to work following the original injury he checked the "yes" box; he stated that his limitations continued to date with regard to lifting, hours worked and length of work shift. In response to question number 38 on the CA-2a form asking whether accommodations or adjustments in the employee's regular duties were made, the employing establishment answered "yes," stating: "The employee was returned to full[-]time limited duty in his date[-]of[-]injury position and has been given work assignments within his work tolerances."

By decision dated March 9, 2010, OWCP accepted appellant's January 7, 2010 notice of recurrence of disability.

Appellant subsequently filed several CA-7 forms, claiming intermittent lost time for physical therapy and medical appointments for which wage-loss compensation had been paid. OWCP paid compensation for these claims at the January 24, 2004 date-of-injury pay rate.[20] By letter to OWCP dated October 30, 2010, appellant argued that he was entitled to a higher, recurrent rate of pay because OWCP accepted his recurrence of disability claim on March 9, 2010 and because he had accumulated 152 hours of approved, used leave. He therefore requested recalculation of his pay rate in accordance with his pay rate as of January 7, 2010, the date he allegedly sustained a recurrence of disability.

[19] In a CA-7 form dated April 19, 2005, appellant requested leave buy back from March 18 to August 31, 2004.

[20] In a letter to OWCP dated February 20, 2011, appellant stated that the "difference in pay is substantial and amount to $640.00 vs. $422.00."

By letter dated November 19, 2010, OWCP advised appellant that, regarding his request to be paid in accordance with his recurrent pay rate, the Federal (FECA) Procedural Manual, Part 2 -- Claims, *Computing Compensation,* Pay Rate, Chapter 2.901.16(b) (October 2009) states:

> "Absence from work for the purpose of medical evaluation or treatment does not constitute a recurrence of disability. Therefore, such absence will not entitle the claimant to a higher pay rate under section 8101(4). In *Andrew W. Eickbolt*, 30 ECAB 360 (1979), [the Board] stated that in the definition of monthly pay at section 8101(4), the word 'disability' means 'incapacity because of injury.' An absence to obtain medical services while otherwise capable of working does not reflect an incapacity for work and therefore does not establish 'disability' in the context of section 8101(4), for purposes of changing the pay rate. *See also Amelia S. Jefferson*, 57 ECAB 183 (2005), [the Board] stated that the absence from work for the purpose of medical evaluation does not constitute a recurrence of disability and such absence from work will not entitle the claimant to a higher pay rate under section 8101(4) of FECA)."[21]

By letter dated November 24, 2010, appellant stated that, because OWCP had accepted his claim for recurrence on March 9, 2010, he was entitled to a higher pay rate for his absences for physical therapy appointments.

By letter dated February 20, 2011, appellant asked that his compensation be recalculated using the higher date of recurrence pay rate rather than the date-of-injury pay rate utilized by OWCP. He cited FECA, which defines "monthly pay" as the monthly pay at the time of injury, pay at the time compensable 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.

By decision dated May 16, 2011, OWCP denied appellant's request to be paid compensation based on his date of recurrence, January 7, 2010. It stated that he was not eligible for a date-of-recurrence pay rate because he never returned to regular full-time employment and because his absences for medical treatment and physical therapy were not on account of disability in the context of section 8101(4); *i.e.*, he was not incapacitated for work, but his absences were for the purpose of attending medical appointments. OWCP informed appellant that a recurrent pay rate only applies if a work stoppage begins more than six months after return to regular full-time employment. It found that the record indicated that he never returned to regular full-time employment and had been working full time with restrictions since his January 21, 2004 employment injury.

OWCP further advised appellant that his CA-7 form claims for leave without pay as of September 30, 2008 and continuing were for time lost due to medical appointments, chiropractic treatments, swimming therapy and physical therapy. It found that these claims, based on medical services and not medical treatment, did not reflect an incapacity for work and therefore did not establish "disability" in the context of section 8101(4) for purposes of changing the pay rate.

[21] Federal Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Pay Rate, Chapter 2.901.16(b) (October 2009).

By letter dated May 22, 2011, appellant requested reconsideration. He contended that he should be paid a recurrent pay rate for his wage-loss compensation in light of OWCP's March 9, 2010 acceptance of his recurrence claim. Appellant also argued that he returned to what would be considered regular, full-time work performing the duties of a journey level mechanic pipefitter because his work restrictions related to night and shift work. He submitted documents in support of his allegations. A December 14, 2010 duty status report continued to note appellant's restrictions of no lifting over 55 pounds for more than three hours a day.

By decision dated July 28, 2011, OWCP denied modification of the May 16, 2011 decision. It found that appellant had not established that he returned to regular full-time employment.

LEGAL PRECEDENT -- ISSUE 3

Section 8105(a) of FECA 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.[22]

Section 8101(4) of FECA defines monthly pay for purposes of computing compensation benefits as follows: 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.[23] OWCP regulations provide that 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 resulting from a previous injury or illness without a new or intervening injury.[24]

In applying section 8101(4), the statute requires OWCP to determine monthly pay by determining the date of the greater pay rate, based on the date of injury, date of disability or the date of recurrent disability.

ANALYSIS -- ISSUE 3

OWCP accepted that appellant, a pipefitter, sustained lumbar and thoracic strain injuries on January 21, 2004. Appellant filed a claim for recurrence of disability on January 7, 2010 which OWCP accepted on March 9, 2010. He has not established that he returned to regular full-time employment for six months prior to January 7, 2010. Appellant has also not established that he was in fact disabled as of January 7, 2010.

[22] *Id.* at § 8105(a). 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 U.S.C. § 8110(b).

[23] *Id.* at § 8101(4). The present case concerns a traumatic injury claim. In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

[24] 20 C.F.R. § 10.5(x).

The evidence of record establishes that appellant was placed on permanent restrictions of no lifting or carrying over 55 pounds, for more than three hours a day, at least as of October 4, 2006. In his notice of recurrence of disability dated January 7, 2010, appellant acknowledged continued weight restrictions and he submitted a December 15, 2010 duty status reported which also noted his continued permanent restrictions regarding lifting and carrying of weights over 55 pounds. The evidence of record therefore establishes that he did not return to regular full-time work, prior to January 7, 2010.

The Board also finds that appellant did not sustain a recurrence of actual disability as of January 7, 2010. OWCP paid him wage-loss compensation for attendance at medical appointments at his date-of-injury pay rate. On appeal, appellant contends, as he did below, that he was entitled to a recurrent pay rate for his wage-loss compensation dates due to OWCP's March 9, 2010 acceptance of his recurrence of disability. As noted above, however, the Federal (FECA) Procedural Manual states at Part 2 -- Claims, *Computing Compensation*, Pay Rate, Chapter 2.901.16(b), that an absence from work for the purpose of medical evaluation or treatment does not constitute a recurrence of disability and does not entitle a claimant to a higher pay rate under section 8101(4).[25]

CONCLUSION

The Board finds that appellant has not sustained any permanent impairment to a scheduled member of his body causally related to his accepted lumbar and thoracic conditions, thereby entitling him to a schedule award under 5 U.S.C. § 8107. OWCP properly rescinded acceptance of his schedule award. The Board finds that OWCP properly refused to reopen appellant's case for reconsideration of his claim under 5 U.S.C. § 8128. The Board finds that OWCP issued compensation at the correct pay rate.

[25] *Supra* note 21.

ORDER

IT IS HEREBY ORDERED THAT the July 28, May 16 and April 22, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 21, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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