

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

B.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Federal Way, WA, Employer**

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**Docket No. 14-628
Issued: July 21, 2014**

Appearances:
Steven E. Brown, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 21, 2014 appellant, through counsel, filed a timely appeal from a December 19, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 OWCP properly computed appellant's pay rate for compensation purposes as of April 11, 2011.

FACTUAL HISTORY

On August 17, 2011 appellant, then a 56-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome, arthritis, cervical spinal stenosis and degenerative joint disease as a result of her federal

¹ 5 U.S.C. § 8101 *et seq.*

employment duties. She stated that she first became aware of her condition on July 10, 1997 and of its relationship to her employment on July 30, 2010. Appellant continued to work. She underwent shoulder surgery on April 11, 2011. Appellant did not return to work following this surgery.

By letter dated September 7, 2011, appellant requested that OWCP note her date of injury as July 30, 2010 instead of July 10, 1997. By letter dated September 14, 2011, OWCP informed appellant that the date of injury had been changed to July 30, 2010.

By decision dated April 5, 2012, OWCP accepted appellant's claim for right permanent aggravation of shoulder region and primary osteoarthritis of shoulder region and the date of injury was listed as July 30, 2010.

Appellant filed claim for compensation forms (Form CA-7) for intermittent hours of leave without pay for the period August 15, 2010 to March 29, 2011.

On August 2, 2012 appellant filed a claim for compensation noting intermittent leave without pay from July 10, 2010 to August 2, 2012.

An August 2, 2012 worksheet submitted from the employing establishment determined that appellant's total earnings one year prior to the date of injury on July 30, 2010 amounted to \$21,258.60.² The weekly pay rate was calculated as \$433.85 based on the 49 weeks appellant worked, her hourly rate and the average number of hours worked per week during the year in which her disability began.

By letter dated August 10, 2012, OWCP requested that appellant clarify her CA-7 forms requesting wage-loss compensation. Appellant was advised that her file had been reviewed and currently there was no medical evidence to support disability or medical treatment on the dates listed.

In a letter dated September 6, 2012, appellant responded that July 30, 2010 was the correct date of injury because that was when her cervical problems began. She explained that the dates listed on her CA-7 forms were dates of medical visits.

On September 7, 2012 OWCP informed appellant that it had received a request from her treating physician for medical treatment for a cervical condition, which the record indicated was related to a fall from a barn in the 1990's. Appellant was advised that the only accepted condition was a shoulder condition. She was informed that she should submit medical evidence which causally related her cervical condition to the accepted injury.

By decision dated September 27, 2012, OWCP denied appellant's claim for compensation for the period August 15, 2010 to March 29, 2011 finding that the medical evidence of record failed to establish disability as a result of her accepted shoulder conditions.

² The Board notes that appellant was employed as a part-time worker who did not work the same number of hours per week. 20 C.F.R. § 10.216(b)(2).

Appellant filed additional Form CA-7's for leave without pay beginning April 11, 2011 through December 31, 2011 and continuing.

A December 26, 2012 worksheet submitted from the employing establishment determined that appellant's total earnings one year prior to the date of injury amounted to \$17,455.13. The date of injury was noted as April 11, 2011. The weekly pay rate was calculated as \$335.68 based on the 52 weeks appellant worked, her hourly rate and the average number of hours worked per week during the year her disability began.

By decision dated December 19, 2013, OWCP calculated appellant's pay rate as \$335.68 per week. It noted that the date used to determine her pay rate was April 11, 2011, the date of her shoulder surgery which established the date her disability began.

LEGAL PRECEDENT

Section 8101(4) of FECA defines monthly pay as 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.³ In an occupational disease claim, the date of injury is the date the employee was last exposed to the employment conditions which caused or aggravated the claimed condition.⁴

ANALYSIS

On appeal before the Board, counsel for appellant argues that her pay rate should have been calculated based on the July 30, 2010 date of injury which would provide a higher pay rate.

The Board finds that the evidence of record establishes that, as this is an occupational disease claim, the date of injury and the date of disability are the same in this case. The December 19, 2013 pay rate decision based appellant's pay rate on her total earnings one year prior to April 11, 2011, the date OWCP determined that her disability began as a result of her accepted shoulder surgery. The Board notes that the evidence of record establishes that appellant continued to work and be exposed to the factors of employment which caused her injury until she stopped work for her April 11, 2011 shoulder injury.⁵ With respect to date of injury, it is well established that in an occupational disease or illness claim, the date of injury is the date of last exposure to the factors contributing to the injury.⁶ The Board thus concludes that the date of injury and the date of disability are the same in this case. Appellant is entitled to monthly pay based on the greater pay rate, the monthly pay based on the date of injury, the date of disability

³ 5 U.S.C. § 8101(4).

⁴ *Manuel Carbajal*, 37 ECAB 216 (1985).

⁵ While appellant stopped work in March 2011, she has not established that she stopped work due to her shoulder condition.

⁶ *T.K.*, Docket No. 13-1833 (issued March 10, 2014); *see also Henry D. Miles*, Docket No. 92-1757 (issued September 7, 1993); *Thomas V. Harper*, 32 ECAB 400 (1980).

or the date of recurrent disability.⁷ Since appellant did not return to work following her surgery, there is no other relevant date of recurrent disability.

While appellant has alleged that her injury occurred in July 2010 when she first experienced headache, neck and shoulder pain, the evidence of record establishes that the accepted shoulder condition caused disability as of April 21, 2011, and that is the date of injury as well.

Section 8114(d) of FECA provides different methods for determining the average annual earnings depending on the character and duration of the employment:

“(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate 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 his daily wage for the particular employment or the average thereof, if the daily wage has fluctuated by 300, if he 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.”⁸

OWCP properly determined that appellant had worked in the employment in which she was injured for substantially the whole year prior to the injury and that she did not have fixed annual earnings. It, however, did confirm her annual earnings. Based upon her hourly rate of pay, and average number of hours worked per day, OWCP calculated appellant’s weekly and annual total annual earnings for one year prior to April 11, 2011. Appellant’s weekly pay rate was determined to be \$335.68 and her annual earnings totaled \$17,455.13. There is no evidence of record that she was entitled to a higher rate of pay.

CONCLUSION

The Board finds that OWCP properly determined appellant’s rate of pay.

⁷ *Supra* note 2.

⁸ 5 U.S.C. § 8114(d).

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 21, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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