



## **FACTUAL HISTORY**

This case has previously been before the Board. In a July 11, 2006 decision, the Board reversed a January 11, 2005 OWCP decision,<sup>2</sup> which found that appellant's earnings as an insurance investigator fairly and reasonably represented his wage-earning capacity.<sup>3</sup> The Board found that OWCP improperly relied upon the opinion of Dr. Patrick J. Barry as he was not the physician selected as the impartial specialist. The Board found that there was an unresolved conflict in medical opinion between Dr. Michael A. Abrahams, an attending Board-certified orthopedic surgeon, and Dr. D. Barry Lotman, a second opinion Board-certified orthopedic surgeon, with regard to appellant's work restrictions and continuing residuals. On July 25, 2007 the Board issued an order dismissing appellant's appeal.<sup>4</sup> The Board found that it lacked jurisdiction as OWCP had not issued an adverse final decision within a year of appellant's November 26, 2006 appeal. In an order dated January 30, 2008, the Board dismissed appellant's appeal.<sup>5</sup> The Board found that OWCP had not issued a final decision on the reduction of his wage-loss compensation. In a January 14, 2009 decision, the Board reversed a May 20, 2007 OWCP decision reducing his compensation based upon a constructed loss of wage-earning capacity determination. On December 21, 2012 the Board reversed an April 23, 2012 OWCP loss of wage-earning capacity decision.<sup>6</sup> The Board found that OWCP failed to fully consider all the criteria for making a retroactive wage-earning capacity decision when it found appellant's actual earnings as an attorney represented his wage-earning capacity. The facts of the case as set forth in the Board's prior decisions and orders are incorporated by reference.

On April 25, 2012 OWCP received a copy of an April 18, 2012 settlement agreement between appellant and the employing establishment. Under the settlement agreement, the employing establishment would retroactively reinstate appellant to his position of special agent back to 2004 which included back pay, salary increases, cost-of-living increases, updating his payroll account for retirement purposes and any benefits due him.

On April 25, 2012 appellant elected to receive benefits under the Office of Personnel Management (OPM) effective July 23, 2011.

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<sup>2</sup> Docket No. 06-503 (issued July 11, 2006).

<sup>3</sup> On April 27, 2001 appellant, a 40-year-old special agent, sustained injury to his right knee, left wrist, right ankle and lower back due to an automobile accident. OWCP accepted the claim for right knee open wound, lumbar sprain/strain, right ankle strain/sprain left wrist strain/sprain, closed fracture of the right metatarsal and right chondromalacia of the patella. It authorized right knee arthroscopic surgery, which was performed on November 12, 2002, and right ankle arthroscopic surgery, which was performed on January 14, 2003. By letter dated January 27, 2003, OWCP placed appellant on the periodic rolls. On June 4, 2003 appellant had metatarsophalangeal arthroscopy surgery. On March 12, 2012 OWCP accepted right hip trochanteric bursitis, left knee chondromalacia, left ankle synovitis, left foot plantar fasciitis and left heel spur as consequential injuries.

<sup>4</sup> Docket No. 07-407 (issued July 25, 2007).

<sup>5</sup> Docket No. 07-1734 (issued January 30, 2008).

<sup>6</sup> Docket No. 12-1157 (issued December 21, 2012).

By letter dated May 31, 2012, OPM restored appellant's disability annuity retroactively to March 14, 2010, the date appellant elected OPM benefits in lieu of FECA benefits.

On October 3, 2012 appellant elected to receive benefits under FECA effective April 6, 2012. He referenced the April 18, 2012 settlement agreement with the employing establishment. Appellant submitted corrected SF-50s provided by the employing establishment for the period May 15, 2005 through May 8, 2011.

In a letter dated October 25, 2012, appellant noted that he returned to federal service effective September 9, 2012. The employing establishment informed him that he had been placed in an OWCP leave-without-pay (LWOP) status.

On January 29, 2013 OWCP received a December 4, 2012 SF-50 showing that appellant resigned from the employing establishment effective that day. Appellant's adjusted based salary was listed as \$103,889.00.

On March 19, 2013 appellant elected to receive benefits under FECA effective March 13, 2010 "or the earliest date possible."

In a March 19, 2013 letter, appellant contended that his pay rate should be based on GS 13-7 level with an annual compensation of \$129,785.00. He stated that as part of his settlement agreement the employing establishment would adjust his payroll records so that there was no break in service, that he would be given back pay and then placed in an LWOP/OWCP status.

In a March 26, 2013 memorandum of conference, appellant indicated his intent to elect and receive compensation benefits under FECA rather than under OPM. He argued that OWCP should compute his pay rate based upon the salary noted in the December 4, 2012 SF-50, which was the date he was removed from the employing establishment. Appellant noted that based upon the settlement agreement with the employing establishment he was paid back wages and effectively restored to their rolls until December 4, 2012, when he resigned as the employing establishment could not accommodate his work restrictions. He noted that he had been issued retroactive promotions which he acknowledged occurred following the 2002 pay rate currently on file with OWCP.

In a letter dated March 31, 2013, appellant contended that his resignation effective December 4, 2012 should be considered as a recurrence of disability and, thus, his pay rate should be based on the salary he was earning as of that date. In support of this argument, he noted that he was restored to full duty retroactive to his 2004 removal pursuant to the settlement agreement signed by the employing establishment and him. Appellant argued that the employing establishment withdrew a light-duty position on or about December 4, 2012 based on its determination that he could not perform the full duties of a special agent.

On July 23, 2013 OWCP placed appellant on the periodic rolls for temporary total disability. It determined his weekly pay rate as \$1,605.89, which was based on a November 11, 2002 recurrence date.

In a letter dated July 26, 2013, appellant contended that his weekly pay rate should be \$2,495.86 not \$1,605.89. He noted that an SF-50 form showed his annual salary to be \$129,785.00 as of the date he was removed from employing establishment's rolls.

By decision dated July 29, 2013, OWCP found that it properly based appellant's wage-loss compensation on the \$1,605.89 per week earnings in effect at the time of his recurrence of disability on November 11, 2002.

### **LEGAL PRECEDENT**

Section 8101(4) of FECA<sup>7</sup> 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."<sup>8</sup> 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."<sup>9</sup>

### **ANALYSIS**

OWCP accepted the claim for right knee open wound, lumbar sprain/strain, right ankle strain/sprain and left wrist strain/sprain, which was subsequently expanded to include closed fracture of the right metatarsal, right chondromalacia of the patella, right hip trochanteric bursitis, left knee chondromalacia, left ankle synovitis, left foot plantar fasciitis and left heel spur as consequential injuries. It based appellant's pay rate on his salary as of November 11, 2002, the date of his recurrence of disability. The issue on appeal is whether appellant is entitled to a pay rate based on his salary as of December 4, 2012, the date he resigned from the employing establishment.

The Board finds that appellant's rate of pay should be calculated as of November 11, 2002, the date of his last recurrence. As noted above, monthly pay is determined with reference to the greater of the monthly pay at the time of injury, at the time disability begins, or at the time compensable disability recurs, if the recurrence begins more than six months after the employee resumes regular federal employment on a full-time basis.<sup>10</sup> Appellant's weekly pay was less than \$1,605.89 on the date of injury, April 27, 2001. While he was removed from the employing establishment, effective December 4, 2012, with a weekly pay rate of \$2,495.86, appellant had not returned to regular full-time work. The record establishes that pursuant to a settlement

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<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> 5 U.S.C. § 8101(4); *see J.K.*, Docket No. 08-1148 (issued March 13, 2009); *E.C.*, 59 ECAB 397 (2008); *Dale Mackelprang*, 57 ECAB 168 (2005).

<sup>9</sup> *M.B.*, Docket No. 09-176 (issued September 23, 2009); *E.G.*, 59 ECAB 599 (2008); *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

<sup>10</sup> 5 U.S.C. § 8101(4); *see Dale Mackelprang*, *supra* note 8.

agreement the employing establishment paid appellant back wages from 2004 and placed him on its rolls effective September 9, 2012 pending a determination on his ability to perform the duties of his position. On December 4, 2012 appellant resigned from the employing establishment. At no time was he working for the employing establishment, but was placed in a LWOP status. For this reason, the pay rate as of December 4, 2012 does not factor into the determination of appellant's pay rate for compensation purposes. Thus, OWCP properly found November 11, 2002 was the proper date for computation of his pay rate.

On appeal appellant contends that OWCP used an incorrect pay rate. He argues that OWCP should have used December 4, 2012 the date he was separated from the employing establishment in accordance with a settlement agreement rather than the November 11, 2002 recurrence of disability date. Appellant contends that the December 4, 2012 date constitutes a recurrence of disability as the employing establishment withdrew light-duty work as it could not accommodate his restrictions. The evidence of record establishes that appellant did not even return to work at the employing establishment. He was placed in an LWOP status by the employing establishment until December 4, 2012. As there is no evidence that he resumed regular full-time work with the employing establishment, as required under section 8101(4), he is not entitled to the pay rate noted on the December 4, 2012 SF-50.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP paid appellant compensation based on the correct rate of pay, which was the rate of pay at the time of his recurrence of compensable disability on November 11, 2002.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 29, 2013 is affirmed.

Issued: March 10, 2014  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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