United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 14-1728**
	)	**Issued: June 17, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Dallas, TX, Employer	)	

Appearances:
Michael E. Woods, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 7, 2014 appellant, through his representative, filed a timely appeal from an April 14, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 the claim.

ISSUE

The issue is whether OWCP used the proper pay rate in calculating appellant's wage-loss compensation.

FACTUAL HISTORY

OWCP accepted that on April 20, 2006 appellant, then a 47-year-old custodian, sustained a lumbar sprain, left hip sprain, left thigh strain, and bilateral lateral cruciate ligament sprains

[1] 5 U.S.C. § 8101 *et seq.*

when he slipped and fell on a metal ramp. On April 21, 2006 appellant accepted a modified assignment performing clerical work and acting as a lookout.

Dr. Karen Perl, an attending osteopathic physician Board-certified in physiatry and pain management, followed appellant beginning in April 2006.[2] She submitted periodic reports through March 21, 2007 finding that appellant was able to continue performing full-time light-duty work. Appellant stopped work on February 15, 2007, used sick leave through March 14, 2007, then entered a leave without pay status. He received wage-loss compensation on the periodic rolls from March 15 to May 12, 2007. Compensation was based on a weekly pay rate of $736.16.[3]

In an August 29, 2007 report, Dr. Perl found appellant able to return to modified duty with pushing, pulling, and lifting limited to 10 pounds, no kneeling, squatting, or climbing, limited twisting, bending, and stooping, standing and walking limited to two hours, and sitting limited to four hours. On September 21, 2007 appellant accepted the employing establishment's job offer for a modified custodial position within Dr. Perl's August 29, 2007 work restrictions. Dr. Perl submitted periodic reports through December 16, 2009 renewing prior restrictions.[4]

In an October 9, 2007 memorandum, the employing establishment noted that appellant's current pay rate for his date-of-injury position was $711.25 a week, and his actual earnings as a modified custodian were $782.14 a week.

In a May 7, 2008 report, Dr. Perl found that appellant had attained maximum medical improvement. She noted permanent work restrictions limiting lifting to 35 pounds. Dr. Perl submitted August 6, 2008 reports noting continued lumbar symptoms due to L4-5 and L5-S1 disc bulges and an L4-5 annular tear.

By decision dated September 9, 2008, OWCP found that appellant's actual wages as a modified custodian fairly and reasonably represented his wage-earning capacity. It further found that he had no loss of wage-earning capacity as his actual earnings met or exceeded those of the current grade and step of his date-of-injury position. OWCP noted that appellant had successfully performed the position since September 2007. Appellant's current pay rate for his date-of-injury position was $761.36 a week, whereas his actual weekly earnings in the modified custodian position were $829.98 a week.

On January 4, 2010 appellant accepted a new position as a modified custodian at the employing establishment, with duties equivalent to those listed in the position he accepted on

[2] From April through June 2007, appellant underwent bilateral L5 nerve blocks and a series of epidural steroid injections. He participated in physical therapy from May 2006 to June 2007.

[3] On August 7, 2007 appellant claimed a schedule award. Following a review of the medical record and an impairment rating by an OWCP medical adviser, on September 15, 2008, OWCP granted appellant a schedule award for five percent permanent impairment of the left lower extremity. By decision dated January 7, 2011, OWCP denied appellant's claim for an additional schedule award.

[4] Dr. Perl administered an L5-S1 epidural steroid injection at right L5 nerve root block on January 23, 2008.

September 21, 2007. The position required picking up trash and cleaning the workroom for one to four hours, and performing guard duty for the remainder of the day. These duties required intermittent lifting up to 35 pounds, intermittent standing, walking, grasping, and sitting within the time limitations imposed by Dr. Perl. Appellant performed this position through August 2, 2010, when he accepted a new job offer as a modified-duty custodian with the same duties as the January 4, 2010 position. Dr. Perl submitted periodic reports finding that appellant remained able to perform modified duty within the May 7, 2008 work limitations.[5]

Effective March 26, 2011, appellant's modified-duty position was temporarily no longer available to him due to the National Reassessment Process (NRP). OWCP issued wage-loss compensation from March 26 to 29, 2011. Appellant's modified-duty position was subsequently restored. He continued to work modified duty. On February 8, 2012 Dr. Perl raised appellant's lifting limitation to 40 pounds, sitting to eight hours, and standing to six hours.

In a February 23, 2012 letter, the employing establishment advised appellant that he would be placed on administrative leave effective that day as there was no longer work available for him within his medical restrictions. In an April 26, 2012 letter, it advised appellant that there was no work available within his restrictions.

On May 8, 2012 appellant filed a claim for a recurrence of disability (Form CA-2a) commencing March 23, 2012, based on the employing establishment's withdrawal of light-duty work under NRP. Appellant filed Form CA-7 claims for compensation for the period March 23 to June 15, 2012.

In a June 6, 2012 letter, OWCP advised appellant of the three grounds for requesting modification of a standing wage-earning capacity, including that the original wage-earning capacity determination was in error, that he had been vocationally rehabilitated, or that the accepted condition had materially changed.

In a June 22, 2012 letter, appellant's representative asserted that the September 9, 2008 wage-earning capacity decision was in error as it was based on a makeshift position created to conform to appellant's specific work limitations.

By decision dated July 5, 2012, OWCP denied appellant's claim for a recurrence of disability as he did not meet any of the three criteria for modifying a loss of wage-earning capacity determination. In a July 9, 2012 letter, appellant requested an oral hearing, contending that the September 9, 2008 wage-earning capacity determination was in error as it was based on a makeshift position. By decision dated September 7, 2012, OWCP set aside its September 9, 2008 and July 5, 2012 decisions and remanded the case for additional development of the medical record.

[5] Dr. Perl administered lumbar nerve blocks and an L5-S1 epidural steroid injection on June 11, 2010, May 25 and June 1, 2012. Dr. Mike Shah, an attending Board-certified physiatrist, recommended L5-S1 surgery as injections and conservative treatment had not improved his symptoms. OWCP approved the surgical request on January 13, 2014.

On February 14, 2013 OWCP obtained a second opinion from Dr. Tracey R. Adams, a Board-certified physiatrist, who opined that the accepted April 20, 2006 slip and fall also caused thoracic and lumbosacral radiculitis and a displaced L4-5 disc. Based on Dr. Adams' opinion, it expanded the claim to include thoracic radiculitis, lumbosacral radiculitis, and displacement of a lumbar intervertebral disc without myelopathy.

OWCP placed appellant on the periodic compensation rolls effective March 23, 2012, the date he first claimed compensation following the employing establishment's withdrawal of his modified-duty position. It based appellant's compensation payments on his date-of-injury pay rate of $736.16 a week. Appellant remained off work as there was no work available within his restrictions. He received wage-loss compensation on the periodic rolls.

In a letter dated August 14, 2013, appellant's representative asserted that appellant was entitled to a recurrent pay rate as the employing establishment withdrew his light-duty position. He contended that the March 23, 2012 recurrence of disability began more than six months after he resumed full-duty work.

In a September 16, 2013 letter, OWCP explained that appellant was not entitled to a recurrent pay rate as he did not return to full duty following the April 20, 2006 injuries. Appellant's positions after the injury were all modified duty or makeshift positions.

In a September 27, 2013 letter, appellant's representative asserted appellant's entitlement to a recurrent pay rate, as he returned to full-time duty, although in a makeshift position.[6]

By decision dated October 21, 2013, OWCP denied appellant's request for a recurrent pay rate as he had not returned to full-duty work at any time following the accepted injuries. It found that under the Board's decision in *L.W.*,[7] appellant was not entitled to a recurrent pay rate solely due to the withdrawal of his modified-duty position under NRP.

On October 24, 2013 appellant requested an oral hearing, held February 28, 2014. Appellant's representative contended that there was no requirement that a claimant be employed at the time he claimed a recurrence of disability.

By decision dated and finalized April 14, 2014, an OWCP hearing representative affirmed the October 21, 2013 decision, finding that appellant was not entitled to a recurrence pay rate. The hearing representative noted that under FECA Bulletin No. 09-05 regarding the employing establishment's NRP, "cases should be reviewed individually to determine whether the claimant is entitled to a recurrent pay rate. If the recurrence begins more than six months after the injured employee resumed regular full-time employment, payment may then be made at

[6] In August 2013, OWCP referred appellant for vocational rehabilitation. In an October 3, 2013 letter, it advised appellant that he was failing to comply with vocational rehabilitation efforts as he abandoned testing on September 17, 2013, failed to keep an appointment on September 24, 2013, and refused to answer his vocational rehabilitation counselor's calls or letters. OWCP advised appellant to comply with vocational rehabilitation or his compensation would be reduced to zero.

[7] Docket No. 10-1425 (issued April 26, 2011).

a recurrent pay rate based on a CA-7." The hearing representative found that the modified custodian job offers appellant accepted and performed were makeshift positions, not full-duty work. As he did not return to full duty for six months, he was not entitled to a recurrent pay rate.

LEGAL PRECEDENT

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly rate.[8] 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.[9] 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.[10]

Where an employee has a recurrence of disability more than six months after resuming regular, full-time employment with the employing establishment, under section 8101(4) of FECA, the employee is entitled to have his or her compensation increased based on his or her pay at the time of this first recurrence of disability.[11] The Board has defined regular employment as established and not fictitious, odd-lot, or sheltered and has contrasted it with a job that was created especially for the claimant. The duties of regular employment are covered by a specific job classification and such duties would have been performed by another employee if the claimant did not perform them. The test is not whether the tasks the claimant performed during his limited duty would have been done by someone else, but instead whether he occupied a regular position that would have been performed by another employee.[12]

ANALYSIS

Appellant's representative challenged OWCP's use of the date-of-injury pay rate in calculating appellant's wage-loss compensation, asserting appellant's entitlement to a recurrent pay rate. The Board finds that OWCP properly determined appellant's pay rate for compensation purposes.

OWCP accepted that appellant sustained lumbar, thoracic, bilateral knee, and left lower extremity injuries on April 20, 2006. From late April 2006 through March 2012, he performed a

[8] *See* 5 U.S.C. §§ 8105-8107.

[9] *Id.* at § 8101(4). *K.B.*, Docket No. 13-569 (issued June 17, 2013).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(3) (September 2011).

[11] 5 U.S.C. § 8101(4); *see Jon L. Hoagland*, 57 ECAB 635 (2006).

[12] *Supra* note 7; *Jeffrey T. Hunter*, 52 ECAB 503 (2001).

series of modified-duty assignments designed to comply with work restrictions given by Dr. Perl, an attending Board-certified physiatrist and pain management specialist. Appellant's representative contended that OWCP should have used a recurrent pay rate, as OWCP accepted a recurrence of disability commencing March 23, 2012 due to the withdrawal of appellant's modified job under NRP.

A recurrent pay rate applies only if the work stoppage began more than six months after a return to regular full-time employment.[13] In this case, it is found that appellant did not return to regular employment at any time after the April 20, 2006 injuries. The positions he accepted on April 21, 2006, September 21, 2007, January 4 and August 2, 2010 were all designated as modified-duty work specifically designed to comply with his medical restrictions. The Board therefore finds that OWCP properly utilized the date-of-injury pay rate, based on the wages for the position he performed at the time he was injured on April 20, 2006. The Board further finds that OWCP properly calculated appellant's compensation based on this rate of pay. The Board notes that appellant's representative did not allege any mathematical error in OWCP's calculations.

On appeal, appellant's representative reiterates his two arguments. He asserts, first, that the September 9, 2008 wage-earning capacity determination was in error as it was based on a makeshift position and not a full-duty job, but that issue is not before the Board. Appellant's representative contends, on the other hand, that appellant did return to full duty and was, therefore, entitled to be compensated at a recurrent pay rate. The record demonstrates that all of the positions appellant held following his injury were modified duty, not full duty. Therefore, appellant is not entitled to a recurrent pay rate as he did not return to full-duty work for six months prior to the withdrawal of light-duty work.

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 used the proper pay rate in calculating appellant's wage-loss compensation.

[13] 5 U.S.C. § 8101(4); *see C.M.*, Docket No. 08-1119 (issued May 13, 2009); Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.900.5(a)(4) (September 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 14, 2014 is affirmed.

Issued: June 17, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board