United States Department of Labor
Employees' Compensation Appeals Board

D.R., Appellant	)	
and	)	**Docket No. 16-0378**
	)	**Issued: November 16, 2016**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Philadelphia, PA, Employer	)	

Appearances:
Appellant, pro se
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 28, 2015 appellant filed a timely appeal from July 23 and October 29, 2015 merit decisions and a December 18, 2015 nonmerit 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,[2] the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly computed appellant's pay rate for compensation purposes; and (2) whether OWCP properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted evidence with his appeal to the Board. The Board however cannot consider this evidence as its jurisdiction is limited to the evidence of record that was before OWCP at the time it issued its final decision. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

On appeal appellant asserts that, based on a settlement agreement, he is entitled to compensation based on a recurrent pay rate that was in effect when he officially retired in 2007, rather than the pay rate of the date disability began in 1990.

FACTUAL HISTORY

On December 7, 1987 appellant, then a 37-year-old special agent, filed an occupational disease claim (Form CA-2) alleging that racial discrimination, retaliation, and harassment at work caused post-traumatic stress disorder (PTSD). On May 8, 1990 OWCP accepted PTSD, and he was placed on the periodic compensation rolls, beginning April 28, 1990. Appellant had stopped work on January 29, 1990, returned on March 24, 1990, again stopped on May 16, 1990, and did not return. His pay rate for compensation purposes was based on the date disability began, or January 29, 1990, at a weekly rate of $888.63. The date disability began, or January 29, 1990, was thereafter used in computing appellant's pay rate for compensation purposes.

A settlement agreement was reached between appellant and the employing establishment regarding Equal Employment Opportunity (EEO) claims. In the agreement, signed by appellant on August 8, 1990, the employing establishment agreed to supplement his FECA compensation by paying him the difference between his FECA compensation and his pay, based on the average rate of pay received by those special agents who entered duty in 1981 and continued to be employed full time by the employing establishment, minus standard payroll deductions. This was identified as "front pay." Appellant was also to be retroactively promoted, and the employing establishment was to pay his temporary living expenses, relocation expenses, and counsel fees.

In May 1991, appellant's compensation was adjusted for the periods April 16, 1990 through April 6, 1991 to reflect that he received a promotion. His new pay rate for compensation purposes was based on a pay rate of $977.36 and continued to be based on the date disability began, January 29, 1990.

On August 18, 1995 appellant asked OWCP to adjust his disability payments to include the "front pay" paid by the employing establishment under the August 1990 settlement agreement. OWCP responded, explaining that under FECA there was no provision to authorize front pay. Appellant continued to receive FECA compensation based on the date disability began, January 29, 1990.

In correspondence dated January 29, 1996, a Deputy Regional Solicitor with the Department of Labor (DOL) advised appellant that, upon careful review, the settlement agreement did not require that DOL/OWCP adjust his FECA compensation, rather the employing establishment was solely responsible for assuring payment of any front pay owed, pursuant to the agreement.

Appellant retired from the employing establishment, effective May 31, 2007.[3] Beginning on August 6, 2007 he asked OWCP to include front pay in his FECA compensation, effective

[3] On May 31, 2007 appellant reached mandatory retirement age.

May 31, 2007. In a November 21, 2007 response, OWCP informed appellant that, as noted in the August 25, 1995 and January 29, 1996 correspondence, it was not responsible for any front pay. It informed him that his FECA compensation would continue. Appellant continued to pursue a front pay supplement to his FECA compensation. The employing establishment indicated that his salary when he reached mandatory retirement age was $147,162.44.

By decision dated February 4, 2008, OWCP determined that appellant's pay rate should not be modified effective May 31, 2007 to include a front pay supplement. It informed him FECA defined pay as the monthly pay at the time of injury, at the time disability began, or at the time compensable disability recurred, whichever was greater. OWCP explained that, in his case, January 29, 1990, the date disability began, was the used to calculate his FECA compensation, including the retroactive promotion. It concluded that there was no language in the August 8, 1990 settlement agreement which required or suggested that OWCP should include any amount of front pay he received from the employing establishment under the agreement in his pay rate for compensation purposes.[4]

Appellant timely requested a hearing before an OWCP hearing representative. He submitted evidence previously of record and statements asserting that his FECA compensation should include the front pay supplement and thus be based on his salary when he retired on May 31, 2007. At the hearing, held on May 30, 2008, counsel and appellant asserted that under the terms of the 1990 settlement, appellant's FECA compensation should be based on his salary when he retired, $147,162.44.[5] The hearing representative explained how FECA compensation is calculated and indicated that OWCP should send appellant an election form.

In a decision dated August 11, 2008, an OWCP hearing representative found that appellant was not entitled to an increase in FECA compensation based on front pay, and that the pay rate in effect on January 29, 1990, the date disability began, was the correct pay rate.

On August 28, 2008 appellant requested reconsideration. He submitted evidence previously of record and continued to assert that his FECA compensation should be based on his pay on the date of retirement.

In a merit decision dated June 22, 2009, OWCP denied modification of its prior decisions. It found that appellant's pay rate for compensation purposes was correct.

Appellant appealed to the Board on September 15, 2009. On January 13, 2010 he elected Office of Personnel Management (OPM) retirement, effective June 1, 2007. Appellant attached a copy of an unsigned, undated settlement agreement between the employing establishment,

[4] On February 27, 2008 appellant had a second-opinion evaluation with Dr. Anjali A. Pathak, a Board-certified psychiatrist. Following testing and examination, Dr. Pathak diagnosed PTSD, atypical depression, and advised that appellant continued to be totally disabled due to the employment injury.

[5] At the hearing appellant was represented by counsel Michael Rubin.

OPM, and himself.[6] On January 14, 2010 he requested that his appeal to the Board be dismissed. By order dated February 26, 2010, the Board dismissed the appeal.[7]

On March 9, 2011 John Moreland, Ph.D., advised that he had been seeing appellant since 2006 for psychological treatment of his employment-related PTSD. He noted that appellant administratively returned to duty on May 30, 2006 and reached mandatory retirement age on May 31, 2007 and had been on OPM retirement since that date.

In a September 1, 2011 report, Dr. Samuel M. Albert, a Board-certified psychiatrist, diagnosed PTSD and advised that appellant continued to be totally disabled. He noted that appellant provided a history that he had returned to work with the employing establishment on May 30, 2006 and retired on May 31, 2007. Dr. Albert recommended that appellant change from OPM retirement to FECA compensation.

In February 2012, appellant requested an Election of Benefits form from OWCP. In a May 1, 2012 letter, OWCP informed him that his FECA compensation each four weeks would be $4,235.23. It forwarded appellant an Election of Benefits form. Appellant elected to return to FECA compensation, effective April 8, 2012. He asserted that he was entitled to compensation based on his salary on the date of retirement, May 31, 2007. On September 25, 2013 OPM advised OWCP that appellant's OPM retirement benefit would be stopped, effective September 30, 2013. Appellant continued to express his belief that he was entitled to front pay, and his FECA compensation should be based on his salary when he retired on May 31, 2007. His FECA compensation was restored beginning October 1, 2013, with a retroactive payment of $10,541.83. Appellant was placed on the periodic compensation rolls, effective February 9, 2014, at a pay rate based on the date disability began, January 29, 1990.

Appellant continued to assert that his FECA compensation should be based on his pay on the date of retirement. The General Counsel for the Federal Law Enforcement Officers Association, supported this contention in letters dated March 11 and August 13, 2014.

By letter dated September 12, 2014, OWCP explained how appellant's FECA compensation had been was calculated, stating that his pay rate for compensation purposes remained in effect for the life of his claim. It informed him that, if indeed, he had returned to work and worked continuously until he retired, an overpayment of compensation would be created. OWCP concluded that, if appellant's OPM retirement benefits were more beneficial, he

[6] The settlement agreement was in regard to appellant's employing establishment retirement benefits, including service credit, calculation and implementation of retirement benefits, and included language that appellant was to secure an election form from OWCP for his election to switch from FECA disability compensation to OPM retirement benefits. Under the provision entitled "Service Credit," the settlement agreement provided that he "will be deemed as having returned to duty with the FBI, effective May 30, 2006, and as having been separated for retirement … effective close of business on May 31, 2007." It also authorized a payment of $380,000.00 to appellant by the employing establishment. The agreement did not preclude appellant from an administrative appeal against OWCP with the Board. His retroactive OPM retirement, effective June 1, 2007, was approved. OPM reimbursed OWCP the amount appellant had received in FECA compensation from June 1, 2007 to January 16, 2010.

[7] Docket No. 09-2272 (issued February 26, 2010).

should request an election of benefits from OWCP, and elect to return to OPM retirement. Appellant continued to assert that his FECA compensation should be based on his salary at the time he retired on May 31, 2007.

On January 9, 2015 OWCP advised appellant that, if he disagreed with the most recent OWCP decision dated June 22, 2009, he should exercise his appeal rights. On January 22, 2015 it again explained how his pay rate for FECA compensation was determined and included explanatory FECA Procedure Manual provisions.

On February 23, 2015 the employing establishment informed OWCP that appellant did not actually return to work. Appellant continued to assert that appellant was entitled to a 2007 recurrent pay rate. On March 11, 2015 OWCP again explained how his FECA compensation was calculated. Appellant continued to dispute this finding. By letter dated April 10, 2015, OWCP advised that, since he had never actually returned to work, he was not entitled to a 2007 recurrent pay rate. It continued that the settlement agreement was with the employing establishment, noting that DOL was not a party to it.

On April 21, 2015 appellant asserted that a 2010 settlement agreement on restoration rights provided that he had returned to work on May 20, 2006, and therefore would have been entitled to the recurrent pay rate when he retired, on May 31, 2007. He continued to assert this position.

In a merit decision dated July 23, 2015, OWCP found that appellant was not entitled to compensation based on a recurrent pay rate. It noted that the 2010 settlement agreement outlined how his retirement benefits would be calculated and implemented. OWCP explained the definition of regular employment and concluded that, because appellant did not physically return to work as an active special agent on May 30, 2006 when he was receiving FECA compensation, he did not perform gainful employment. It further noted that appellant submitted OWCP Forms CA-1032 on June 14, 2006, May 7, 2007, and May 14, 2008, in which he attested that he had not worked in the prior 15 months. OWCP concluded that the May 30, 2006 return to work in was an administrative determination for purposes of reaching a settlement regarding his retirement package, noting that the employing establishment had informed OWCP that he never actually returned to work. On July 29, 2015 it informed appellant that he could again request an election of benefits between OPM and OWCP.

On July 31, 2015 appellant requested reconsideration. He argued that the 2010 settlement agreement established that, as he returned to work on May 30, 2006, he was entitled to a recurrent pay rate for FECA compensation purposes. Appellant asserted that OWCP was aware that he had not physically returned to work and approved a recurrent pay rate.

In an October 29, 2015 merit decision, OWCP denied modification of its prior decisions. The decision again explained that because appellant did not physically return to work on May 30, 2006, he was not entitled to a recurrent pay rate. OWCP made clear that the 2010 agreement granting him a return to work on May 30, 2006 was an administrative finding regarding his retirement benefits, and this did not impact FECA pay rate for compensation purposes.

Appellant again requested reconsideration on November 9, 2015. He reiterated his belief that he was entitled to a recurrent pay rate and submitted evidence previously of record. In a November 25, 2015 report, Dr. Albert discussed a claimed exacerbation in 2010 due to new employing establishment reprisal that was resolved in approximately 2013 by an EEO claim decision in appellant's favor. He reported a history that OWCP found that appellant was not disabled from work after May 30, 2006 until April 8, 2012.

On December 18, 2015 OWCP denied appellant's reconsideration request. It found that the evidence submitted was cumulative and insufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

"Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[8]

Monetary compensation for total or partial disability due to an employment injury is paid as a percentage of monthly pay.[9] Section 8101(4) of FECA 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.[10]

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, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[11]

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly computed appellant's pay rate for compensation purposes. The record supports that he stopped work on January 29, 1990. Although he briefly returned on March 24, 1990 appellant stopped work again on May 16, 1990 and did not return. As he did not resume "regular full-time employment with the United States" for the requisite six-month period, OWCP properly determined his pay rate for compensation purposes was based on his pay on January 29, 1990.[12]

Appellant has asserted that his FECA compensation should be based on a 1990 settlement agreement regarding his EEO complaints. In that agreement, which was between appellant and

[8] 20 C.F.R. § 10.5(f)

[9] 5 U.S.C. §§ 8105, 8106.

[10] *Id*. at § 8101(4); *John D. Williamson*, 40 ECAB 1179 (1989).

[11] 20 C.F.R. § 10.5(x).

[12] *Supra* note 10.

the employing establishment, the employing establishment agreed to supplement appellant's FECA compensation by paying him the difference between his FECA compensation and his pay, based on the average rate of pay received by those special agents who entered duty in 1981 and continued to be employed full time by the employing establishment, minus standard payroll deductions. This was identified as "front pay." Appellant was also to be retroactively promoted. In May 1991, his compensation was adjusted to reflect that he received a promotion. Appellant's new pay rate for compensation purposes was based on a weekly pay rate of $977.36, and continued to be based on the date disability began, January 29, 1990.

As OWCP has explained in previous correspondence and decisions, there is no language in the 1990 settlement agreement which required or suggested that OWCP should include any "front pay" paid by the employing establishment in computing appellant' FECA compensation.

As to appellant's assertion on appeal that, based on a 2010 settlement agreement, he is entitled to compensation based on a recurrent pay rate that was in effect when he officially retired in 2007, he is referring to an unsigned, undated settlement agreement which indicates that it is between him and OPM. While its terms are in regard to retirement benefits,[13] this in no way impacts his FECA compensation.

Under the 1990 EEO settlement agreement, appellant was allowed to remain on the employing establishment rolls until he retired effective May 31, 2007. As noted above, he did not resume "regular full-time employment with the United States" for the requisite six-month period to entitle him to a recurrent pay rate.[14] On February 23, 2015 the employing establishment informed OWCP that appellant did not actually return to work.

Appellant suffered no qualifying recurrence.[15] For a recurrence of disability to occur, the injured worker must have physically returned to work.[16] As there is no evidence that he physically resumed regular full-time work with the employing establishment, as required under section 8104(4) of FECA, OWCP properly calculated his pay rate for compensation purposes based on the date of injury, January 29, 1990.[17]

As to this merit issue, 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.

[13] *Supra* note 6.

[14] *Supra* note 10; *see also Samuel C. Miller*, 55 ECAB 119 (2003).

[15] *See W.B.*, Docket No. 09-1440 (issued April 12, 2010).

[16] *See T.K.*, Docket No. 14-2047 (issued June 2, 2015).

[17] *See T.K.*, Docket No. 13-1833 (issued March 10, 2014).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[18] Section 10.608(a) of OWCP's regulations provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards enumerated in section 10.606(b)(3).[19] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[20] Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[21]

ANALYSIS -- ISSUE 2

With his November 19, 2015 reconsideration request, appellant merely reiterated his belief that he was entitled to a recurrent pay rate. He therefore did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b).[22]

As to the third above-noted requirement under section 10.606(b)(3), appellant submitted evidence previously of record, and a report from his attending psychiatrist. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.[23] Likewise, the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[24] A medical opinion is irrelevant to the merit issue in this case, whether OWCP properly computed appellant's pay rate for compensation purposes.

As appellant did not show that OWCP erroneously applied a specific point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent

[18] 5 U.S.C. § 8128(a).

[19] 20 C.F.R. § 10.608(a).

[20] *Id*. at § 10.608(b)(3).

[21] *Id*. at § 10.608(b).

[22] *Id*. at § 10.606(b).

[23] *J.P.*, 58 ECAB 289 (2007).

[24] *L.H.*, 59 ECAB 253 (2007).

new evidence not previously considered by OWCP, OWCP properly denied his reconsideration request.

CONCLUSION

The Board finds that OWCP properly computed appellant's pay rate for compensation purposes and properly denied his request for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the December 18, October 29, and July 23, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 16, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board