

FACTUAL HISTORY

On June 22, 1987 appellant, then a 36-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that he injured his low back in the performance of duty on June 9, 1987. He indicated on the claim form that he was bending and felt pain in the low back. In a June 18, 1987 statement, appellant clarified that he had been working permanent light duty because of a chronic back problem when he was asked to work on the M-36 machines. It was on that assignment where he was allegedly injured. According to a statement of accepted facts (SOAF) dated November 30, 1987, the claim was accepted for lumbosacral sprain/strain and he returned to part-time (20 hours per week) light duty on July 25, 1987.

The record indicates that appellant began receiving compensation for wage loss on July 25, 1987 (20 hours per week) with a pay rate of \$477.56 per week, representing his date-of-injury pay rate. Appellant remained on part-time light duty.

In an October 11, 1989 EN1032 report regarding employment activity, appellant indicated that he continued to work part-time light duty through September 18, 1989 after which he filed a claim for recurrence of disability.³ He began receiving compensation for total disability on September 19, 1989, but returned to part-time light-duty work on January 3, 1990. The record indicates that appellant continued to receive compensation for hours not worked.

To determine appellant's capacity for work, he was referred for a second opinion examination with Dr. Barbara Frieman, a Board-certified orthopedic surgeon. In a report dated February 5, 1990, Dr. Frieman provided results on examination and stated that appellant was working 20 hours per week. She further noted that he should complete a work hardening program and try to expand his work hours to closer to 40 per week. By letter dated May 2, 1990, the employing establishment offered appellant a light-duty job at six hours per day.

In a report dated June 29, 1990, however, appellant's treating physician, Dr. Jamilo de'Moura, an orthopedic surgeon, provided results of a June 18, 1990 examination and stated that appellant should continue to work only 20 hours per week. By report dated August 21, 1990, he provided results of an August 20, 1990 examination and placed appellant off work for two weeks. The case was referred to an OWCP medical adviser.

On August 30, 1990 the employing establishment stated that it was offering appellant a permanent light-duty position, since the evidence indicated that he was permanently disabled for his date-of-injury position. The offer stated that appellant would initially work six hours per day. There is no indication as to whether he accepted that offer. Appellant returned to work on September 8, 1990 at four hours per day.

In a report dated September 12, 1990, an OWCP medical adviser opined that appellant's disability was causally related to the employment injury.⁴

³ Appellant had also filed a claim for a recurrence of disability (Form CA-2a) as of May 30, 1989.

⁴ The medical adviser's memorandum to OWCP referred to an August 18, 1990 examination, but the report from Dr. de'Moura indicated that the examination was August 20, 1990.

Appellant received compensation for total disability from August 20 to September 7, 1990. As of December 16, 1990, his compensation was based on a pay rate date of August 19, 1990 at \$585.71 per week.

In a report dated December 27, 2012, Dr. David Weiss, an osteopath, opined that appellant had a 12 percent permanent impairment to the left leg under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. An OWCP medical adviser concurred that appellant had a 12 percent left leg impairment in a May 19, 2014 report.

By decision dated December 12, 2014, OWCP issued a schedule award for a 12 percent permanent impairment of his left leg. The period of the award was 34.56 weeks commencing December 27, 2012. The pay rate for compensation purposes was \$536.64, representing the date of injury on June 9, 1987.

Appellant requested reconsideration and argued that he was entitled to a pay rate based on a September 18, 1990 recurrence of disability. He submitted a compensation payment report for wage-loss compensation from February 14 to March 13, 2010, showing a pay rate of \$585.71, with a pay rate date of September 19, 1990 based on a recurrence of disability.⁵

By decisions dated March 26 and 27, 2015, OWCP found that the pay rate based on the date of injury was correct and appellant was not entitled to a recurrence of disability pay rate.⁶

LEGAL PRECEDENT

Under 5 U.S.C. § 8101(4), “‘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...” For a schedule award, the rate of pay is the highest rate which satisfies the terms of 5 U.S.C. § 8101(4).⁷

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.⁸ The Board has defined regular employment as established and not fictitious, odd-lot, or sheltered job that was created especially for the claimant.⁹

⁵ This date appears to be a typographical error as appellant’s recurrence claim (Form CA-2a) notes September 18, 1989 as the date of recurrence.

⁶ The record contains identical decisions dated March 26 and 27, 2015.

⁷ *D.D.*, Docket No. 15-193 (issued May 11, 2015).

⁸ *J.R.*, Docket No. 14-1728 (issued June 17, 2015).

⁹ *Jeffrey T. Hunter*, 52 ECAB 503 (2001).

ANALYSIS

Appellant has not contested the degree of permanent impairment found in the December 12, 2014 schedule award decision. He has disputed the use of the date of injury, June 9, 1987, as the pay rate date. According to appellant, there was a recurrence of disability as of September 19, 1990 and the pay rate on that date should be used for his schedule award.

Although OWCP has used a date of September 19, 1990 as a date of recurrence of disability for compensation payments, there was no work stoppage on that date. The Board notes that the actual work stoppages in this case were May 30 and September 18, 1989 and August 20, 1990. On the date-of-injury appellant had been working full-time in a modified mail handler position. Under 5 U.S.C. § 8101(4), he would not be entitled to the pay rate on May 30 and September 18, 1989 or August 20, 1990 unless the date represented a recurrence of disability more than six months after return to regular full-time employment.

In this regard the Board finds that the record does not establish that appellant ever returned to full-time employment. Appellant reported in his October 11, 1989 EN1032 form that he had worked part time until September 18, 1989. He returned to work on January 3, 1990, but again the evidence indicated that he was working part time. Dr. Frieman reported that appellant was working 20 hours per week in her February 5, 1990 report. The record contains a job offer dated May 2, 1990 for six hours per day, although there is no indication that appellant accepted the position. The attending physician, Dr. de'Moura, reported on June 29, 1990 that appellant should continue working 20 hours per week. Appellant continued to receive compensation for partial disability through August 20, 1990, when he stopped work. On September 8, 1990 he resumed working four hours per day.

The Board accordingly finds that the evidence does not establish that appellant returned to full-time work. Since he did not return to full-time work, appellant did not have a recurrence of disability six months after he resumed "regular full-time employment" under 5 U.S.C. § 8101(4). The probative evidence of record indicates that the proper pay rate is the date of injury in this case.

On appeal, appellant's representative states that appellant believes that he returned to full-time work, although he acknowledges that appellant "does not have a firm recollection of the factual circumstances surrounding the recurrence." Based on the evidence of record, there was no indication that appellant ever returned to full-time work after June 9, 1987 his date of injury. He is therefore not entitled to a pay rate based on a recurrence of disability date.

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 properly determined the pay rate for compensation purposes with respect to appellant's schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 27 and 26, 2015 are affirmed.¹⁰

Issued: September 21, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁰ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.