

ISSUE

The issue is whether OWCP properly determined appellant's pay rate in calculating his September 22, 2016 schedule award.

FACTUAL HISTORY

On November 12, 2003 appellant, then a 49-year-old welder, filed an occupational disease claim (Form CA-2) alleging that he sustained injury due to working in a stooped or kneeling position in confined areas since November 3, 2003. Following a brief work absence, he returned to work in a light-duty job on or about November 6, 2003. OWCP accepted the claim for lumbosacral and thoracic strain.

On January 19, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a May 27, 2016 e-mail, the employing establishment noted that appellant had retired, effective June 30, 2008. In May 31 and July 8, 2016 e-mails, it found that medical records in appellant's personnel file indicated that he remained on light duty from 2003 through 2007, although there were no specific duty status notations dated after 2005.

By letter dated July 28, 2016, appellant asserted that, from November 6, 2003 to his retirement, he was assigned miscellaneous light duties, such as checking identifications or posting signs, as he was medically disqualified from welding.

In a July 14, 2016 letter, counsel contended that appellant had in effect returned to full duty, as his light-duty position was at a retained rate of pay. He enclosed a leave buy back worksheet (Form CA-7b) and employing establishment pay record indicating that appellant had no wage loss while on light duty.

In a July 26, 2016 telephone memorandum of a conversation with counsel, OWCP acknowledged that appellant "never returned to full duty," but performed full-time light-duty work. Counsel reiterated in an August 2, 2016 letter that appellant "performed other work at the welder pay rate."

By decision dated September 22, 2016, OWCP granted appellant a schedule award for 38 percent permanent impairment of his left lower extremity. It utilized November 3, 2003 as the effective date of pay rate. The period of the award, equivalent to 109.44 weeks, ran from November 16, 2015 to December 21, 2017.

Counsel timely requested a review of the written record by OWCP's Branch of Hearings and Review. He contended in a February 23, 2017 letter that appellant was entitled to a recurrent pay rate as he performed light duty with no wage loss, although he did not return to full duty. Counsel asserted that OWCP should have based the schedule award on appellant's pay rate as of July 17, 2009, when he resumed treatment with Dr. Donald. He did not argue that appellant had more than 38 percent permanent impairment of the left lower extremity.

By decision dated March 29, 2017, an OWCP hearing representative affirmed OWCP's September 22, 2016 decision. The hearing representative found that appellant was not entitled to a recurrent pay rate as he did not return to regular work at any time following the accepted injury.

LEGAL PRECEDENT

Section 8102 of FECA⁴ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁹

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of the pay rate.⁵ 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.⁶ 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.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 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 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 or her limited duty would have been done by someone else, but instead whether he or she occupied a regular position that would have been performed by another employee.⁹

In applying section 8101(4), the statute requires OWCP to determine monthly pay by determining the date of the greater pay rate, based on the date of injury, date of disability, or the date of recurrent disability. The Board has held that rate of pay for schedule award purposes is the

⁴ 5 U.S.C. § 8102.

⁵ *See id.* at §§ 8105-8107.

⁶ *Id.* at § 8101(4). *K.B.*, Docket No. 13-0569 (issued June 17, 2013).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(3) (September 2011).

⁸ *Id.* at § 8101(4); *see Jon L. Hoagland*, 57 ECAB 635 (2006).

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

highest rate which satisfies the terms of section 8101(4).¹⁰ Where an injury is sustained over a period of time, the date of injury is the date of last exposure to the employment factors causing the injury.¹¹

ANALYSIS

The Board finds that OWCP properly computed appellant's pay rate for compensation purposes. The record demonstrates that appellant stopped work briefly on or about November 3, 2003, the date of the accepted lumbar injuries. Appellant returned to work in a light-duty capacity on November 6, 2003, but did not resume full duty in his date-of-injury welder position.

The employing establishment confirmed that appellant did not resume full duty. It noted in May 27 and 31 and July 8, 2016 e-mails that appellant's personnel records showed that he worked only light duty following the accepted November 3, 2003 lumbar injuries. Appellant also explained that he did not resume full duty. He asserted in a July 28, 2016 letter that following the November 3, 2003 injuries, he was assigned miscellaneous light-duty tasks as he was medically disqualified from his job as a welder.

Counsel acknowledged in a July 14, 2016 letter, July 26, 2016 telephone conversation, and an October 18, 2016 letter that appellant did not return to full duty after November 3, 2003. He contended, however, that appellant should be entitled to a recurrent pay rate as he was paid at a retained pay rate while on light duty. However, appellant 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.¹²

Appellant suffered no qualifying recurrence.¹³ 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,¹⁴ OWCP properly calculated his pay rate for compensation purposes based on the date of injury, November 3, 2003.¹⁵

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.

¹⁰ *Robert A. Flint*, 57 ECAB 369, 374 (2006).

¹¹ *See Barbara A. Dunnivant*, 48 ECAB 517 (1997).

¹² *Id.*; *see also Samuel C. Miller*, 55 ECAB 119 (2003).

¹³ *D.R.*, Docket No. 16-0378 (issued November 16, 2016).

¹⁴ 5 U.S.C. § 8104(4).

¹⁵ *See T.K.*, Docket No. 13-1833 (issued March 10, 2014).

CONCLUSION

The Board finds that OWCP properly determined appellant's pay rate in calculating his September 22, 2016 schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 29, 2017 is affirmed.

Issued: April 20, 2018
Washington, DC

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

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

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