# United States Department of Labor
# Employees' Compensation Appeals Board

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| **D.B., Appellant** | ) | |
| **and** | ) | **Docket No. 17-1404** |
| | ) | **Issued: March 20, 2018** |
| **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Los Angeles, CA, Employer** | ) | |

*Appearances:*
*Sally F. LaMacchia, Esq.*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On June 13, 2017 appellant filed a timely appeal from a December 19, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

## ***ISSUE***

The issue is whether appellant met his burden of proof to establish entitlement to on-call premium pay as of June 1, 2008.

On appeal appellant, through counsel, contends that appellant is entitled to standby premium pay as of June 1, 2008 because he could not work on-call shifts due to his accepted injury.

## ***FACTUAL HISTORY***

This case has previously been before the Board.[3] The facts of the case as presented in the prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 14, 2007 appellant, then a 52-year-old biomedical engineering technician, filed a traumatic injury claim (Form CA-1) alleging that on February 28, 2007 he sustained neck and shoulder injuries when he fell backwards over a utility box while in the performance of duty. OWCP accepted this claim for neck sprain, left shoulder and upper arm sprain, displacement of cervical intervertebral disc without myopathy, and brachial neuritis or radiculitis. Appellant stopped work on August 6, 2007 and underwent an OWCP-authorized cervical fusion on September 27, 2007. He received wage-loss compensation until February 19, 2008, at which time he was released to regular duty without restrictions. Appellant's pay rate during this time included standby premium pay as the employing establishment confirmed that he had worked 18 on-call shifts during the previous year.[4]

On December 23, 2008 OWCP expanded acceptance of the claim to include the conditions of dysphagia and esophageal reflux.

On May 22, 2012 appellant filed claims for compensation for wage loss (CA-7 forms). He requested compensation for on-call wage loss from May 10, 2008 through May 15, 2012.[5] A May 31, 2012 telephone call memorandum reflects that appellant corrected the date provided on his CA-7 forms and indicated that his on-call wage loss began on June 1, 2008.

In a January 9, 2009 e-mail, received by OWCP on June 12, 2012, appellant advised that he was no longer available for on-call duty due to the stress involved in being on call every three weeks. Emails between appellant and the employing establishment in March 2009 indicated that the employing establishment acknowledged that appellant was unable to perform night work because of medication, and stated that appellant would only be assigned to on-call work from 8:00 a.m. to 6:00 p.m. on weekends and holidays. Appellant argued that he was being discriminated against due to his medical condition and refused to be on call every weekend and holiday. The

[3] Docket No. 16-0381 (issued September 14, 2016).

[4] A memorandum of record dated August 28, 2007 noted the computation of appellant's pay rate as of August 8, 2007 based upon a base pay of $73,800.00, Administratively Uncontrollable Overtime (AUO) pay of $11,495.70 and other pay of $14,760.00.

[5] Appellant also requested additional compensation for loss of retention pay, however, that issue is not before the Board.

employing establishment indicated that appellant would not be on call for every weekend and holiday and that the work would be evenly distributed. Appellant then advised by e-mail dated March 4, 2009 that he would not be available for on-call duty until he ceased taking medication.

By decision dated July 17, 2012, OWCP denied appellant's claim for additional wage-loss compensation. It acknowledged that medical evidence of record indicated that he was unable to work at night. However, OWCP noted that the employing establishment was able to accommodate this restriction and offered appellant on-call shifts during the day.

On January 8, 2013 appellant requested reconsideration. By decision dated April 8, 2013, OWCP denied appellant's request for reconsideration without conducting a merit review.

On June 25, 2013 appellant again requested reconsideration and submitted additional medical evidence. By decision dated September 13, 2013, OWCP denied modification of its prior decision.

OWCP accepted a recurrence of total disability beginning May 8, 2014 based on worsening of appellant's accepted conditions. Appellant received disability compensation on the supplemental compensation rolls beginning May 8, 2014 and was placed on the periodic compensation rolls for total disability as of November 25, 2014.

In an August 25, 2014 pleading, OWCP received appellant's request for reconsideration. Counsel argued that appellant was entitled to on-call pay.

OWCP noted in a memorandum to the file dated September 29, 2014 that appellant would continue to be paid at the weekly pay rate of $1,925.85, effective August 6, 2007, the date disability began, as this pay rate was higher than his date of recurrence pay rate, effective April 29, 2014 of $1,614.62. It found that on the date disability began appellant was entitled to an annual base pay of $73,800.00, retention pay of $14,760.00 and standby shift pay of $11,495.70 for the year prior. However, after he returned to full duty on February 19, 2008, his base pay increased to $83,960.00, but he was no longer on call and he was no longer entitled to premium pay.

By decision dated November 20, 2014, OWCP denied modification of its prior decision. It found that appellant was not entitled to loss of on-call pay as he had voluntarily removed himself from the on-call duty list.

Appellant, through counsel, requested reconsideration on March 31, 2015. By decision dated April 16, 2015, OWCP denied appellant's request for reconsideration without conducting a merit review.

On April 15, 2015 appellant, through counsel, again requested reconsideration. In addition to reiterating prior arguments, appellant submitted a December 17, 2014 report wherein Dr. Santini advised that appellant began taking medicine for anxiety and depression secondary to his chronic pain after undergoing neck surgery in 2008. He noted that appellant was unable to work or drive after taking lorazepam. By decision dated July 27, 2015, OWCP denied modification of its prior decision.

On December 23, 2015 appellant filed an appeal with the Board. By decision dated September 14, 2016, the Board found that the medical evidence of record failed to establish that appellant's accepted conditions prevented him from working daytime on-call shifts as of June 1, 2008. The Board also found that appellant was not entitled to on-call premium pay as of January 29, 2009 as he had voluntarily removed himself from the on-call duty list.[6]

By letter dated September 16, 2016, counsel for appellant asked Dr. Santini to submit a supplemental report. In a September 19, 2016 response, Dr. Santini listed appellant's diagnoses as cervical degenerative disc disease and cervical fusion syndrome. He noted that appellant had restrictions after his cervical surgery, but that it was not until April 29, 2014 that he was unable to work due to chronic neck pain and the medications he required to control the pain.

In an October 10, 2016 report, Dr. Santini diagnosed cervical fusion syndrome, chronic pain, and cervical degenerative disc disease. In a November 10, 2016 report, he indicated that appellant was unable to go back to work secondary to neck and shoulder pain and was unable to drive or be on call while on pain medications. Dr. Santini diagnosed anxiety, uncomplicated opioid dependence, benzodiazepine dependence, cervical fusion syndrome, and unspecified rotator cuff tear or rupture of unspecified shoulder not specified as traumatic. He opined that appellant should remain off work for 12 weeks.[7]

On December 19, 2016 OWCP determined that the evidence was insufficient to modify its prior decision because the evidence submitted was vague and inconsistent with contemporaneous evidence. It also noted that the evidence did not address the fact that appellant voluntarily declined on-call duty.

## ***LEGAL PRECEDENT***

OWCP's regulations define "disability" as "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."[8] Compensation is payable for loss of premium pay due to an employment-related condition.[9]

Section 8101(4) of FECA defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he 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

[6] *Id*.

[7] OWCP also received a November 30, 2016 report from a nurse practitioner. On December 15, 2016 it expanded acceptance of appellant's claim to include periodontal disease, dental caries, chronic periodontitis, and dry mouth. OWCP noted that these conditions developed consequential to the medications prescribed to treat his orthopedic work injury.

[8] 20 C.F.R. § 10.5(f).

[9] *Obie R. Hale*, Docket No. 97-0330 (issued December 2, 1998); *Dempsey Jackson, Jr*., 40 ECAB 942 (1989); *Thomas Donaghue*, 39 ECAB 336 (1988).

begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."[10]

In computing pay rate, section 8114(e) provides for the inclusion of certain premium pay received. OWCP has administratively determined, however, that premium pay for Administratively Uncontrollable Overtime under 5 U.S.C. § 5545(c)(2), is to be included in pay rate calculations.[11]

The relevant part of section 5545(c)(2) provides:

> "The head of an agency, with the approval of the Office of Personnel Management [OPM] may provide that --
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> > (2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position, as determined by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position."[12]

## ***ANALYSIS***

OWCP accepted that on February 28, 2007 appellant sustained injuries when he fell backwards at work over a utility box. Appellant stopped work on August 6, 2007 and received standby premium pay as part of his FECA wage-loss compensation. He returned to full-duty work without restrictions on February 19, 2008, but he claimed that as of June 1, 2008 he was no longer receiving on-call premium pay as part of his wages and that his inability to work on-call shifts was due to the accepted injury.

The Board found in its prior decision that the medical evidence was insufficient to establish that the accepted conditions caused appellant's inability to work on-call daytime shifts until he took himself off the on-call duty list by e-mails dated January 29 and March 24, 2009. The Board's

[10] 5 U.S.C. § 8101(4).

[11] 5 U.S.C. § 5545(c)(2); *see also* FECA Program Memorandum No. 106 (issued October 30, 1969) (provides for inclusion of premium pay in pay rate for compensation purposes under section 5545(c)(2)); FECA Bulletin No. 89-26 (issued September 29, 1989) (by administrative determination, pursuant to section 5545(c)(2), OWCP includes premium pay for administratively uncontrollable overtime in computing compensation).

[12] 5 U.S.C. § 5545(c)(2).

review of the previously submitted medical evidence of record is *res judicata* and, therefore, need not be addressed again in this decision.[13]

In its prior decision, the Board also found that the evidence of record did not establish that the employing establishment withdrew appellant's entitlement to on-call premium pay. The Board found that the record established that appellant voluntarily withdrew himself from on-call shifts in 2009.

Following the Board's prior decision, OWCP received new reports from Dr. Santini. In a September 19, 2016 report, Dr. Santini explained that it was not until April 29, 2014 that appellant was unable to work. In his November 10, 2016 report, Dr. Santini indicated that appellant was unable to go back to work secondary to neck and shoulder pain and was unable to drive or be on call with pain medications. He advised that appellant should be off work for 12 weeks. Dr. Santini addressed appellant's ability to work as of April 29, 2014 and then as of November 10, 2016, but he failed to provide a well-rationalized opinion explaining why appellant could not be on call during the day from June 1, 2008 until January 29, 2009. The Board will not require OWCP to pay compensation disability wage loss in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. For each period of disability claimed, the employee has the burden of establishing that he was disabled for work as a result of the accepted employment injury.[14] Accordingly, Dr. Santini's reports are insufficient to establish appellant's claim as he does not provide a well-rationalized opinion indicating that appellant was unable to work on-call shifts during the daytime between the claimed dates of June 1, 2008, when he stopped receiving on-call pay, until January 29, 2009, when he voluntarily removed himself from the on-call list.[15]

Appellant's disability status changed as of May 8, 2014, when OWCP accepted a recurrence of total disability and appellant again received FECA wage-loss compensation for temporary total disability. OWCP explained in its September 29, 2014 memorandum that appellant would continue to receive wage-loss compensation based upon his August 6, 2007 date of disability pay rate because it was higher than his April 29, 2014 recurrence pay rate. This memorandum noted that the August 6, 2007 pay rate was higher because it incorporated retention pay, and standby shift pay. However, appellant was no longer entitled to premium pay on the date of recurrence.

[13] *See M.A.*, Docket No. 17-0352 (issued June 16, 2017).

[14] *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[15] OWCP also received a report from a nurse practitioner. The opinion of the nurse practitioner is insufficient to establish entitlement to benefits, as she is not considered a physician under FECA and therefore her report has no probative value. Section 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See Merton J. Sills*, 39 ECAB 572, 575 (1988). Healthcare providers such as licensed clinical social workers, nurses, acupuncturists, physician assistants, and physical therapists are not considered physicians under FECA. *See D.F.*, Docket No. 17-0135 (issued June 5, 2017).

As previously noted, appellant was no longer entitled to on-call, standby premium pay as of June 1, 2008 because he did not establish that he was disabled from on-call work and because, as of January 29, 2009, he voluntarily removed himself from the on-call duty list.

The Board finds that OWCP properly determined appellant's greater pay rate under 5 U.S.C. § 8101(4) to be his pay rate as of the date disability began. The evidence of record does not establish entitlement to a greater pay rate as of the date of injury, or date of recurrence of disability.

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 appellant did not meet his burden of proof to establish entitlement to on-call premium pay beginning June 1, 2008.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 19, 2016 is affirmed.

Issued: March 20, 2018
Washington, DC

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

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

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