

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

A.W., Appellant)	
)	
and)	Docket No. 19-0557
)	Issued: November 18, 2019
DEPARTMENT OF THE NAVY,)	
PORTSMOUTH NAVAL SHIPYARD,,)	
Portsmouth, NH, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 16, 2019 appellant, through counsel, filed a timely appeal from a December 26, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.³

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.*

³ The Board notes that, following the December 26, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provide: The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly determined appellant's pay rate in calculating his May 3, 2018 schedule award.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as presented in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On January 26, 2004 appellant, then a 46-year-old pipefitter helper, filed a traumatic injury claim (Form CA-1) alleging that he injured his back when carrying fire extinguishers on January 21, 2004 while in the performance of duty. He did not stop work at the time of the injury. OWCP assigned the claim OWCP File No. xxxxxx826 and accepted it for lumbar and thoracic strains. Following the injury, appellant performed limited-duty work. OWCP paid him wage-loss compensation for intermittent absences to attend medical appointments and physical therapy treatments.

On June 8, 2005 appellant filed a traumatic injury claim (Form CA-1) alleging that on June 7, 2005 he sat for a prolonged period in a classroom and reinjured his back while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx794.

On June 25, 2008 appellant filed a schedule award claim (Form CA-7) based on partial loss of use of the left lower extremity under OWCP File No. xxxxxx826.

On January 2, 2010 appellant filed a notice of recurrence (Form CA-2a) requesting medical treatment alleging that the accepted lumbar and thoracic conditions remained active. He noted that he had remained on light duty following the January 21, 2004 employment injury. Appellant indicated that he had not lost time from work other than to attend medical appointments and physical therapy treatments.

By decision dated March 9, 2010, OWCP accepted appellant's recurrence claim. Appellant subsequently filed claims for wage-loss compensation (Form CA-7) for work absences to attend

⁴ Docket No. 11-1915 (issued August 21, 2012) (the Board affirmed an April 22, 2011 OWCP decision rescinding a June 24, 2010 schedule award for permanent impairment of the left lower extremity caused by accepted January 21, 2004 lumbar and thoracic strains. The Board also affirmed a May 16, 2011 OWCP decision denying appellant's request to issue compensation at a recurrent pay rate based on his January 7, 2010 date of recurrence as he had not returned to full duty following the January 21, 2004 employment injury. Additionally, the Board affirmed a July 28, 2011 OWCP decision denying a May 30, 2011 reconsideration request); Docket No. 13-1429 (issued May 23, 2014) (in an *Order Remanding Case*, the Board set aside a May 15, 2013 overpayment determination for further development on the issue of waiver); Docket No. 14-0199 (issued September 16, 2015) (the Board affirmed a September 24, 2013 OWCP decision which found that appellant had not sustained any permanent impairment causally related to his accepted January 21, 2004 thoracic and lumbar conditions); Docket No. 15-0190 (issued August 10, 2016) (the Board affirmed an October 7, 2014 OWCP decision finding an \$11,587.25 overpayment of compensation representing the rescinded schedule award paid from September 4, 2009 to March 4, 2010 for permanent impairment of the left lower extremity); Docket No. 14-0199 (issued September 1, 2017) (the Board set aside OWCP's September 24, 2013 decision denying appellant's schedule award claim for permanent impairment of the lower extremities and remanded the claim for additional medical development).

physical therapy and medical appointments. OWCP paid compensation at the January 24, 2004 date-of-injury pay rate.

On March 11, 2010 appellant filed an occupational disease claim (Form CA-2) alleging that on February 12, 2010 the accepted thoracic strain had progressed to thoracic disc bulges at T10-11. He stopped work on February 12, 2010. OWCP assigned the claim OWCP File No. xxxxxx310.⁵

By decision dated June 24, 2010, OWCP granted appellant a schedule award for nine percent permanent impairment of the left lower extremity under OWCP File No. xxxxxx826.

Following additional medical development, by decision dated September 20, 2010, OWCP modified its June 24, 2010 decision to find that appellant had no ratable impairment of the left lower extremity. By decision dated April 22, 2011, it found that it should have rescinded the June 24, 2010 schedule award as he had no ratable impairment of the left lower extremity.

In letters dated October 30 and November 24, 2010, and February 20, 2011, appellant asserted his entitlement to a recurrent pay rate as OWCP had accepted his claim for a recurrence of disability commencing January 7, 2010.

By decision dated May 16, 2011, OWCP denied appellant's request to be paid compensation based on his date of recurrence, January 7, 2010. It found that he was not eligible for a recurrent pay rate as he had not returned to full duty following the accepted January 21, 2004 injuries. OWCP informed appellant that a recurrent pay rate only applied if a work stoppage began more than six months after a return to regular, full-time employment.

On May 23, 2011 appellant requested reconsideration. He provided a December 14, 2010 duty status report (Form CA-17) noting restrictions against overtime work, shift changes, lifting more than 55 pounds, and lifting for more than three hours a day.

By decision dated July 28, 2011, OWCP denied modification of the May 16, 2011 decision. It found that appellant had not met his burden of proof to establish that he returned to regular, full-time employment. Appellant then appealed to the Board.

On January 5, 2012 OWCP combined OWCP File Nos. xxxxxx826, xxxxxx301, and xxxxxx794 under OWCP File No. xxxxxx826 as the master file number.

On February 15, 2012 OWCP expanded its acceptance of the claim to include a thoracic sprain, lumbar sprain, displacement of cervical intervertebral disc without myelopathy, displacement of lumbar intervertebral disc without myelopathy, thoracic or lumbosacral neuritis

⁵ By decision dated June 8, 2010, OWCP denied the claim as fact of injury was not established. It denied modification by decision dated August 23, 2010. Appellant then appealed to the Board. By order issued November 25, 2011, Docket No. 11-0830, *Order Remanding Case*, (issued November 25, 2011), the Board remanded the claim to OWCP to combine OWCP File No. xxxxxx310 with OWCP File No. xxxxxx826. Following additional medical development, by decision dated February 7, 2012, OWCP accepted a recurrence of disability commencing February 12, 2010 with work absences for medical appointments and physical therapy treatments only. It did not accept that the recurrence had caused a period of disability for work.

or radiculitis not otherwise specified, and displacement of thoracic intervertebral disc without myelopathy.

By decision issued August 21, 2012, the Board affirmed OWCP's July 28, 2011 decision, finding that appellant was not entitled to a recurrent pay rate as he never returned to regular full-duty work following the January 21, 2014 employment injuries.⁶

On August 25, 2012 appellant filed a claim for a schedule award (Form CA-7) based on permanent impairment of both lower extremities. Dr. Frank A. Graf, a Board-certified orthopedic surgeon, provided an October 2, 2012 impairment rating indicating 19 percent lower extremity impairment. Dr. Morley Slutsky, Board-certified in occupational medicine and an OWCP district medical adviser (DMA), opined in a December 6, 2012 report that Dr. Graf's opinion lacked validity.

By decision dated April 2, 2013, OWCP denied appellant's schedule award claim as Dr. Graf's opinion was insufficient to establish a ratable impairment of a scheduled member of the body.

On April 13, 2013 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, held on August 6, 2013.

By decision dated September 24, 2013, an OWCP hearing representative affirmed the April 2, 2013 decision. She found that Dr. Graf's reports lacked sufficient probative value to establish a ratable impairment. Appellant then appealed to the Board.

By decision dated September 16, 2015,⁷ the Board affirmed the September 24, 2013 decision, finding that Dr. Graf's impairment ratings were insufficient to meet appellant's burden of proof to establish a ratable impairment of a scheduled member of the body.

On October 13, 2015 appellant timely requested that the Board reconsider its September 16, 2015 decision.

By order issued September 1, 2017,⁸ the Board granted appellant's petition for reconsideration, finding that OWCP had not considered all accepted conditions in developing his schedule award claim.

By decision issued September 1, 2017,⁹ the Board set aside the September 24, 2013 decision and remanded the case to OWCP for additional medical development.

On remand OWCP obtained a second opinion on February 8, 2018 from Dr. Kenneth D. Polivy, a Board-certified orthopedic surgeon. It routed his report to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP DMA. Dr. Katz reviewed Dr. Polivy's report

⁶ *Supra* note 4.

⁷ Docket No. 14-0199 (issued September 16, 2015).

⁸ *Order Granting Petition for Reconsideration*, Docket No. 14-0199 (issued September 1, 2017).

⁹ Docket No. 14-0199 (issued September 1, 2017).

on March 30, 2018. He opined that appellant had one percent impairment of the left lower extremity. Dr. Katz affirmed that appellant had attained maximum medical improvement as of February 8, 2018.

By decision dated May 3, 2018, OWCP granted appellant a schedule award for one percent permanent impairment of the left lower extremity. The period of the award, equal to 2.88 weeks of compensation, ran from February 8 to 28, 2018. OWCP utilized January 21, 2004 as the pay rate date.¹⁰

On May 9, 2018 appellant, through counsel, requested a telephonic oral hearing before a representative of OWCP's Branch of Hearings and Review. At the hearing, held on October 16, 2018, counsel contended that OWCP should have utilized March 9, 2010 as the schedule award pay rate date as OWCP had accepted a recurrence of disability commencing on that date.

By decision dated December 26, 2018, an OWCP hearing representative affirmed the May 3, 2018 decision. The hearing representative found that appellant did not qualify for a recurrent pay rate as his 2010 recurrence of disability was strictly for medical treatment and not a period of disability due to the accepted conditions. The hearing representative explained that a recurrent pay rate applied only if the total or partial disability for work began more than six months after the first return to full-time, full-duty employment. As appellant had not resumed full-duty work, he was not eligible for a recurrent pay rate.

LEGAL PRECEDENT

Section 8102 of FECA¹¹ 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.

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of the pay rate.¹² 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.¹³ 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

¹⁰ By a second decision dated May 3, 2018, OWCP denied appellant's schedule award claim for permanent impairment of the right lower extremity, right upper extremity, and left upper extremity. Counsel's argument on appeal pertained only to the pay rate of the May 3, 2018 schedule award. As he did not appeal the May 3, 2018 decision denying appellant's schedule award claim for permanent impairment of the right lower extremity and both upper extremities, the Board will not exercise its jurisdiction over that decision on the present appeal.

¹¹ 5 U.S.C. § 8102.

¹² *See id.* at §§ 8105-8107.

¹³ *Supra* note 11 at § 8101(4). *J.S.*, Docket No. 17-1277 (issued April 20, 2018); *K.B.*, Docket No. 13-0569 (issued June 17, 2013).

in computing compensation, and if they are the same, the pay rate should be effective on the date disability began.¹⁴

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.¹⁵ 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.¹⁶

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 highest rate which satisfies the terms of section 8101(4).¹⁷ 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.¹⁸

ANALYSIS

The Board finds that OWCP properly computed appellant's pay rate for compensation purposes.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence that was previously considered in its prior decisions. Findings made in prior Board decisions are *res judicata*, absent any further review by OWCP under section 8128 of FECA.¹⁹

OWCP accepted that appellant sustained thoracic and lumbar injuries in the performance of duty on January 21, 2004. Following the employment injuries, appellant remained in a light-duty status. He did not resume full duty in his date-of-injury pipefitter helper position. Appellant claimed a schedule award for permanent impairment of the left lower extremity and asserted his entitlement to a recurrent pay rate.

In determining the appropriate rate of pay for schedule award purposes, OWCP must determine the greater pay rate based on the date of injury, date of disability, or the date on which

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(3) (September 2011).

¹⁵ *Supra* note 11 at § 8101(4); *J.S.*, *supra* note 13; *see Jon L. Hoagland*, 57 ECAB 635 (2006).

¹⁶ *See Jeffrey T. Hunter*, 52 ECAB 503 (2001).

¹⁷ *Robert A. Flint*, 57 ECAB 369, 374 (2006).

¹⁸ *See Barbara A. Dunnivant*, 48 ECAB 517 (1997).

¹⁹ *K.S.*, Docket No. 19-0537 (issued August 23, 2019); *T.B.*, Docket No. 19-0029 (issued June 21, 2019).

disability recurred.²⁰ A recurrent pay rate applies only if the work stoppage began more than six months after a return to regular full-time employment.²¹ As appellant did not resume “regular full-time employment with the United States” for the requisite six-month period, he is not entitled to a recurrent pay rate on that basis.²²

Additionally, appellant had no dates of disability that would entitle him to a recurrent pay rate. OWCP paid him wage-loss compensation for intermittent absences to attend medical appointments and physical therapy treatments. However, these absences do not qualify as a work stoppage due to disability under section 8101(4).²³ Therefore, appellant suffered no qualifying dates of disability.²⁴

As there is no evidence that appellant physically resumed regular full-time work with the employing establishment, as required under section 8104(4) of FECA,²⁵ and had no recurrence of disability, OWCP properly calculated his pay rate for compensation purposes based on the date of injury, January 21, 2004.²⁶

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.

On appeal counsel contends that OWCP should have based the May 3, 2018 schedule award on appellant’s pay rate in 2010 rather than his January 21, 2004 date-of-injury pay rate. He does not contest the medical aspects of the claim or the percentage of permanent impairment awarded. However, for the reasons set forth above, appellant has not established that OWCP utilized an incorrect pay rate to calculate the May 3, 2018 schedule award.

CONCLUSION

The Board finds that OWCP properly determined appellant’s pay rate in calculating his May 3, 2018 schedule award.

²⁰ 5 U.S.C. § 8101(4).

²¹ *Id.*; *J.R.*, Docket No. 14-1728 (issued June 17, 2015); *see C.M.*, Docket No. 08-1119 (issued May 13, 2009); *supra* note 13 at Chapter 2.900.5(a)(4) (September 2011).

²² *Id.*; *J.S.*, *supra* note 13; *see also Samuel C. Miller*, 55 ECAB 119 (2003).

²³ *Supra* note 11 at § 8101(4).

²⁴ *D.R.*, Docket No. 16-0378 (issued November 16, 2016).

²⁵ *Supra* note 11 at § 8101(4).

²⁶ *J.S.*, *supra* note 13; *see T.K.*, Docket No. 13-1833 (issued March 10, 2014).

ORDER

IT IS HEREBY ORDERED THAT the December 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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