

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

C.G., Appellant)	
)	
and)	Docket No. 19-0357
)	Issued: September 12, 2019
U.S. POSTAL SERVICE, GENERAL MAIL)	
FACILITY, Amarillo, TX, 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
JANICE B. ASKIN, Judge

JURISDICTION

On December 4, 2018 appellant filed a timely appeal from an August 15, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly determined appellant's pay rate in calculating his February 5, 2018 schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the August 15, 2018 decision, OWCP received additional evidence. Furthermore, appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "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.*

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances as set forth in the prior Board decision and orders are incorporated herein by reference. The relevant facts are as follows.³

On July 14, 2003 appellant, then a 45-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that his federal employment duties including repetitive upper extremity motions had caused right carpal tunnel syndrome and a neurological condition of the right elbow. He had stopped work on April 21, 2003 due to emotional stress and had not returned.⁴ OWCP accepted that appellant had sustained right carpal tunnel syndrome and a right ulnar nerve lesion. It later expanded its acceptance of the claim to include lateral epicondylitis of the right elbow.⁵

On December 23, 2003 appellant underwent a nerve release at the right elbow with anterior ulnar nerve transposition, release of the extensor carpi radialis brevis, and lateral epicondylectomy. As of December 26, 2003 appellant's pay rate was \$846.41 per week. He remained off work through approximately March 9, 2004, when he accepted a light-duty position as a modified mail processing clerk. Appellant continued working light duty until shortly before undergoing a C5-6 fusion on June 18, 2004. He returned to light duty on approximately September 14, 2004.

³ Under OWCP File No. xxxxxx700, the Board issued a decision dated January 18, 2006 affirming the denial of appellant's emotional condition claim. Docket No. 05-0252 (issued January 18, 2006). Under OWCP File No. xxxxxx414, the Board issued an *Order Remanding Case* on February 1, 2006 to clarify if OWCP had accepted an employment injury. Docket No. 05-0255 (issued February 1, 2006). Also under OWCP File No. xxxxxx414, the Board issued a decision dated November 20, 2009 which affirmed a schedule award for 11 percent permanent impairment of the right upper extremity. Docket No. 09-0445 (issued November 20, 2009). Also under OWCP File No. xxxxxx414, the Board issued a decision on February 16, 2011 affirming denial of reimbursement for cervical spine surgery. Docket No. 10-1571 (issued February 16, 2011). Under OWCP File No. xxxxxx962, the Board issued an August 14, 2018 decision affirming a schedule award for seven percent permanent impairment of the right lower extremity. Docket No. 18-0392 (issued August 14, 2018). Additionally, under OWCP File No. xxxxxx876, appellant filed an appeal before the Board, but requested that it be dismissed. Accordingly, on May 21, 2009, the Board issued an *Order Dismissing Appeal*, Docket No. 09-0441 (issued May 21, 2009).

⁴ Under OWCP File No. xxxxxx700 appellant had filed an emotional condition claim. OWCP denied the claim. By decision dated January 18, 2006, the Board found that appellant had established a compensable employment factor, but that the medical evidence had not established an emotional condition causally related thereto. Docket No. 05-0252 (issued January 18, 2006).

⁵ OWCP accepted the following claims: File No. xxxxxx225, mild right carpal tunnel syndrome and right ulnar neuropathy sustained on or before July 14, 2003; File No. xxxxxx977, right elbow contusion sustained on February 7, 2004; File No. xxxxxx414, neck sprain/strain, thoracic sprain/strain, brachial neuritis/radiculitis, displaced lumbar intervertebral disc, a right shoulder condition, unspecified arthropathy sustained on March 5, 2004; File No. xxxxxx962, lumbosacral sprain, displacement of lumbar disc without myelopathy, degeneration of lumbar or lumbosacral disc; File No. xxxxxx392, left carpal tunnel syndrome, left lateral epicondylitis, left ulnar nerve lesion sustained on or before January 6, 2005; File No. xxxxxx876, lumbosacral strain sustained March 19, 2005. Effective March 27, 2006, it administratively combined appellant's claims under File No. xxxxxx225 and xxxxxx392. OWCP designated File No. xxxxxx225 as the master file number. It subsequently combined File Nos. xxxxxx977, xxxxxx414, xxxxxx962, and xxxxxx876 under File No. xxxxxx225.

On August 9, 2004 appellant filed a claim for a schedule award (Form CA-7).

By decision dated September 15, 2004, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right upper extremity. It utilized December 26, 2003 as the effective pay rate date. The period of the award, equivalent to 31.2 weeks of compensation, ran from June 11 to September 4, 2004.

Appellant performed modified-duty work from late January through July 25, 2005.⁶ OWCP accepted that he had sustained a recurrence of total disability commencing July 25, 2005 and paid him wage-loss compensation.

On March 6, 2006 appellant underwent a right carpal tunnel release. OWCP paid him wage-loss compensation during his recuperation.

On September 7, 2006 appellant underwent an authorized right ulnar nerve release. He remained off work.

By decision dated November 20, 2006, OWCP granted appellant a schedule award for 11 percent permanent impairment of the right upper extremity due to C7 nerve root impairment. On March 12, 2009 appellant claimed an additional schedule award (Form CA-7).

By decision dated July 15, 2010, under File No. xxxxxx225, OWCP granted appellant a schedule award for an additional five percent permanent impairment of the right upper extremity due to the accepted right elbow condition.⁷ It found that appellant had attained maximum medical improvement (MMI) on February 16, 2010. The period of the award, equivalent to 15.6 weeks, ran from February 16 to June 5, 2010. OWCP utilized December 26, 2003 as the effective pay rate date.⁸

On April 28, 2011 appellant retired from the employing establishment.

On May 1, 2017 appellant claimed an additional schedule award (Form CA-7).⁹ By decision dated February 5, 2018, OWCP granted him a schedule award for an additional 22 percent permanent impairment of the right upper extremity in addition to the 15 percent previously awarded, for a total of 37 percent. The period of the award, equal to 68.64 weeks of compensation,

⁶ An employing establishment investigation revealed that appellant had loaded a pickup truck while receiving total disability compensation under OWCP File No. xxxxxx876. The employing establishment placed appellant off work effective July 25, 2005 pending removal for cause. It terminated his employment effective August 25, 2005. Following arbitration, the employing establishment reinstated appellant with full back pay effective April 15, 2006.

⁷ The method OWCP utilized to calculate the July 5, 2010 schedule award is not of record.

⁸ On November 2, 2010 appellant claimed an augmented pay rate for a schedule award. By decision dated May 18, 2011, OWCP denied his claim for an additional schedule award as the medical evidence did not substantiate a greater percentage of permanent impairment than that previously awarded.

⁹ In support of his request, appellant provided an April 20, 2017 report by Dr. John W. Ellis, Board-certified in family practice and environmental medicine. An OWCP medical adviser and district medical adviser (DMA) reviewed Dr. Ellis' opinion and opined that appellant had 22 percent permanent impairment of the right upper extremity in addition to the 15 percent previously awarded.

ran from April 20, 2017 to February 3, 2018. OWCP authorized payment of compensation at the 66 2/3 rate for claimants with no eligible dependents. It utilized December 26, 2003 as the effective pay rate date.

On March 26, 2018 appellant requested reconsideration. He asserted entitlement to a recurrent pay rate. Appellant also contended his entitlement to compensation at the augmented 75 percent rate as his adult daughter remained an eligible dependent due to intellectual disability. He submitted additional statements, administrative forms, and copies of evidence previously of record.

By decision dated May 1, 2018, OWCP denied modification, finding that appellant was not entitled to a recurrent pay rate as he had not returned to full duty after December 23, 2003. It further found that he had not submitted sufficient medical evidence to establish his daughter's dependent status.

On May 17, 2018 appellant requested reconsideration. He again asserted his entitlement to a recurrent pay rate as he had returned to work following the December 23, 2003 surgery. Additionally, appellant submitted an April 25, 2018 report from his daughter's physician attesting that her intellectual disability permanently prevented her from living independently or supporting herself financially.

By decision dated August 15, 2018, OWCP found that appellant had established his adult daughter as an eligible dependent. It advised him that he would be paid the difference between the 75 percent and 66 2/3 percent compensation rates for the schedule award compensation paid from April 20, 2017 to August 13, 2018. OWCP further found that the December 26, 2003 pay rate was proper under the facts and circumstances of the case.

LEGAL PRECEDENT

Section 8102 of FECA¹⁰ 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.¹¹ 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.¹² 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

¹⁰ 5 U.S.C. § 8102.

¹¹ *See id.* at §§ 8105-8107.

¹² *Id.* at § 8101(4). *J.S.*, Docket No. 17-1277 (issued April 20, 2018); *K.B.*, Docket No. 13-0569 (issued June 17, 2013).

compensation, and if they are the same, the pay rate should be effective on the date disability began.¹³

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.¹⁴ 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.¹⁵

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).¹⁶ 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.¹⁷

ANALYSIS

The Board finds that OWCP properly determined appellant's pay rate in calculating his February 5, 2018 schedule award.

Appellant had stopped work on April 21, 2003 due to emotional stress. He had not returned to work at the time he filed his claim on July 14, 2003. Appellant first became disabled for work under the present claim on December 23, 2003 when he underwent right elbow surgery. He returned to work in a light-duty capacity on approximately March 9, 2004, but did not resume full duty in his date-of-injury mail processor position.

Appellant performed intermittent modified-duty work through July 25, 2005, when he stopped work and did not return. 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.¹⁸

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(3) (September 2011).

¹⁴ *Id.* at § 8101(4); *J.S.*, *supra* note 11; *see Jon L. Hoagland*, 57 ECAB 635 (2006).

¹⁵ *See Jeffrey T. Hunter*, 52 ECAB 503 (2001).

¹⁶ *Robert A. Flint*, 57 ECAB 369, 374 (2006).

¹⁷ *See Barbara A. Dunnivant*, 48 ECAB 517 (1997).

¹⁸ *Id.*; *J.S.*, *supra* note 11; *see also Samuel C. Miller*, 55 ECAB 119 (2003).

Appellant suffered no qualifying recurrence.¹⁹ 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,²⁰ OWCP properly calculated his pay rate for compensation purposes based on the date that disability began, December 26, 2003.²¹

On appeal appellant asserts his entitlement to a recurrent 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 February 5, 2018 schedule award.

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 appellant's pay rate in calculating his February 5, 2018 schedule award.

¹⁹ *D.R.*, Docket No. 16-0378 (issued November 16, 2016).

²⁰ 5 U.S.C. § 8104(4).

²¹ *J.S.*, *supra* note 11; *see T.K.*, Docket No. 13-1833 (issued March 10, 2014).

ORDER

IT IS HEREBY ORDERED THAT the August 15, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board