United States Department of Labor
Employees' Compensation Appeals Board

E.M., Appellant	)	
	)	
and	)	**Docket No. 25-0519**
	)	**Issued: June 16, 2025**
U.S. POSTAL SERVICE, POST OFFICE, San Juan, PR, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 29, 2025 appellant filed a timely appeal from an April 4, 2025 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that following the April 4, 2025 decision, OWCP received additional evidence. 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*.

ISSUE

The issue is whether OWCP properly determined appellant's pay rate for compensation purposes.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On March 4, 1988, appellant, then a 37-year-old distribution/window clerk, sustained injuries in a motor vehicle accident (MVA) while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx345 and accepted it for bilateral shoulder bursitis, bilateral carpal tunnel syndrome, a closed fracture of the shaft or unspecified parts of the left femur, a closed fracture of the upper end radius and ulna on the right side, generalized anxiety disorder, bilateral shoulder impingement syndrome, open wound of the left knee/leg/ankle without complications, other specified open wound of the left ocular adnexa, cervical radiculopathy, lumbar radiculopathy, thoracic myositis, and staphylococcal arthritis of the right wrist.[4] Appellant stopped work on March 4, 1988, and returned to work on January 17, 1989. On March 21, 1992, OWCP paid him wage-loss compensation for disability from work during the period March 4 through November 10, 1988.

On May 4, 1992, the employing establishment offered appellant a temporary limited-duty assignment until May 18, 1992, or in accordance with physician's instructions.

In a report of termination of disability and/or payment (Form CA-3) dated October 7, 1997, the employing establishment indicated that appellant returned to work on January 14, 1989, and checked a box marked "No," to indicate that his work assignment had not been changed because of disability resulting from the March 4, 1988 employment injury.

In a Form CA-7 dated June 7, 2001, the employing establishment indicated that appellant had returned to work on January 14, 1989, performing limited duty.

On June 30, 2005, the employing establishment notified appellant of his involuntary reassignment. It indicated that he was "a junior full-time employee within the section" and would become an "unassigned regular full-time employee" as of August 6, 2005. The employing establishment advised appellant that he should bid on vacancies for which he was eligible, and if

[3] Docket No. 24-0467 (issued September 18, 2024); Docket No. 15-1545 (issued October 28, 2015); Docket No. 13-1255 (issued December 3, 2013); Docket No. 04-871 (issued July 16, 2004) and Docket No. 99-727 (issued October 17, 2000).

[4] Appellant has a prior occupational disease claim (Form CA-2) under OWCP File No. xxxxxx855, which OWCP accepted for bilateral calcifying tendinitis of the shoulder. It has administratively combined appellant's claims under OWCP File Nos. xxxxxx855 and xxxxxx345, with the latter serving as the master file.

he did not do so, he would be assigned to any vacant duty assignment for which there was no senior bidder in the same craft.

In a notice of recurrence (Form CA-2a) dated May 10, 2006, appellant asserted that on November 9, 2005 he sustained a recurrence of the need for medical treatment and of disability causally related to his March 4, 1998 employment injury. He related that after he returned to work following his original injury, he was provided limited-duty work from January 17 through October 1989. After October 1989, appellant performed "reasonable duties for my condition." As of 1992, he performed "limited" and "reasonable" duties. Appellant stopped work on November 17, 2005.

On July 19, 2006, the employing establishment asserted that appellant was "working full duty in November 2005."

On September 12, 2006, appellant filed a claim for compensation (Form CA-7) for disability from work commencing November 19, 2005. On the reverse side of the claim form, the employing establishment indicated that he had performed limited-duty work from 1988 through the present.

By decision dated November 28, 2006, OWCP accepted that appellant sustained a recurrence of disability on November 9, 2005.

In a statement dated June 26, 2007, the employing establishment related that appellant had performed "his limited duties as a distribution clerk without complaining." Then, in 2005, he "claimed that his injuries got worse inhibiting him to perform his limited[-]duty assignment."

On August 22, 2007, the Office of Personnel Management (OPM) approved appellant's application for disability retirement. A notification of personnel action (PS Form 50) dated August 27, 2007 indicated that appellant's pay rate effective August 27, 2007 was $48,620.00. On December 10, 2007, he elected to receive FECA benefits effective February 27, 2007 in lieu of retirement benefits from OPM.

In a pay rate memorandum dated September 15, 2010, OWCP noted that appellant had stopped work on November 17, 2005, after an accepted recurrence of disability on November 9, 2005. It indicated that the effective pay rate date was the date of recurrence, November 17, 2005. OWCP found that appellant's pay rate in November 2005 was $45,997.00. per year.

On April 30, 2021, appellant requested that OWCP clarify his pay rate.

In correspondence dated February 14, 2022, OWCP noted that he had filed a recurrence of his employment injury effective November 9, 2005, and that he stopped work on November 17, 2005. It found that the evidence of record did not support that he resumed work after November 17, 2005, and thus found that this date was his effective pay rate date. OWCP asserted that based on evidence from the employing establishment, appellant's base pay rate was $45,997.00.

OWCP continued to receive evidence, including an August 17, 2007 letter from the employing establishment, which indicated that appellant was a clerk employee that worked at the Fernandez Juncos Station and that his "job was writing forms, casing letters and any other clerk work at the station." It also noted that "there is no work at the station where continuously lifting, pushing, and pulling are required on an employee."

In letters dated March 6, 2022, and February 17, 2023, appellant asserted that his pay rate should have been based on his pay rate as of August 27, 2007, the date of his retirement, not the date of his recurrence of disability.

On July 19, 2023, OWCP explained that it had based his wage-loss compensation on the date that he became disabled, November 17, 2005, not August 27, 2007, the date of his retirement. It provided its calculation of his pay rate based on the November 17, 2005 recurrence date and requested that he submit evidence supporting that this amount was incorrect within 30 days of the letter if he disagreed with its pay rate determination.

Subsequently, appellant submitted a June 19, 2019 letter from OPM advising that his disability retirement was approved on August 22, 2007 and that he was separated from the employing establishment on August 27, 2007.

In an undated statement received August 7, 2023, the employing establishment indicated that appellant had separated from employment on August 27, 2007, but that his last day of work was November 17, 2005. He used a combination of leave and unpaid hours until the date of his separation.

On August 4, 2023, appellant again asserted that his effective pay rate date should be August 27, 2007.

By decision dated August 31, 2023, OWCP determined that appellant had not submitted sufficient evidence to support that the effective pay rate date of November 17, 2005 was incorrect.

On September 16, 2023, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated October 4, 2023, OWCP's hearing representative vacated the August 31, 2023 decision. The hearing representative remanded the case for OWCP to request documentation from the employing establishment to verify his salary as of his work stoppage in November 2005 and to confirm or negate any retroactive salary increase.

Appellant subsequently submitted a November 17, 2005 notice to report to a position as a mail processor effective November 26, 2005 with a schedule from 11:00 p.m. to 7:30 a.m.

By letter dated October 12, 2023, OWCP advised the employing establishment that based on a Form CA-7 dated November 3, 2006, it appeared that appellant had stopped work on

"November 19, 2005 and never returned." It noted that the evidence supported that his pay rate on that date was $45,997.00 per year.[5]

By *de novo* decision dated December 4, 2023, OWCP found that it had properly determined appellant's pay rate for compensation purposes based on an effective pay rate date of November 17, 2005.

On December 19, 2023, appellant requested reconsideration, reiterating that his pay rate should be August 27, 2007, the date that he separated from the employing establishment.

By decision dated February 28, 2024, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

On March 22, 2024, appellant appealed to the Board. By decision dated September 18, 2024, the Board set aside the December 4, 2023 decision and remanded the case to OWCP for further development to determine appellant's pay rate for compensation purposes. The Board instructed OWCP to obtain information from the employing establishment regarding whether appellant resumed his regular full-time employment.[6]

By letter dated September 19, 2024, OWCP requested further information from the employing establishment as to whether appellant returned to his regular full-time employment without restrictions, or to a modified position, for six months following the work injury of March 4, 1988. OWCP also provided that "regular work" was defined as "established and not fictitious, odd lot or sheltered" and in contrast to "a job that has been created especially for a given employee."

On November 1, 2024, the employing establishment responded that it could not provide "information of the employee from those dates because on those years the attendance records were manually inputted" and "those manual records are not available for review."

By *de novo* decision dated December 5, 2024, OWCP found that it had properly determined appellant's pay rate for compensation purposes based on an effective pay rate date of November 17, 2005. It noted that prior to the accepted November 9, 2005 recurrence, he had returned to regular work for a period greater than six months following the March 4, 1988 employment injury.

On December 27, 2024, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated April 4, 2025, OWCP's hearing representative affirmed the December 5, 2024 decision.

[5] On October 12, 2023, the employing establishment advised that appellant had not received a retroactive pay adjustment that affected his salary as of the effective pay rate date of November 17, 2005. It confirmed that his yearly salary on November 17, 2005 was $45,997.00.

[6] The Board also set aside OWCP's February 28, 2024 nonmerit decision as moot.

LEGAL PRECEDENT

Section 8102 of FECA[7] 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.[8] 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.[9] 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.[10]

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. 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 determined appellant's pay rate for compensation purposes.

OWCP accepted that appellant sustained a recurrence of disability on November 9, 2005, and that he was entitled to a pay rate based on his pay as of November 17, 2005, which was the date he stopped work. An employee is entitled to compensation at a recurrent pay rate only if he or she resumed regular full-time employment with the United States for six months after returning to full-time work.[12] The Board has defined "regular" employment as "established and not fictitious, odd-lot or sheltered," contrasting it with a job created especially for a claimant.[13] The

[7] 5 U.S.C. § 8102.

[8] *See id*. at §§ 8105-8107.

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

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

[11] *See A.I.*, Docket No. 21-0248 (issued April 19, 2023); *Barbara A. Dunnavant,* 48 ECAB 517 (1997).

[12] *Supra* note 9; *see also N.C.*, Docket No. 16-0441 (issued October 21, 2016).

[13] *See Eltore D. Chinchillo*, 18 ECAB 647 (1967); *supra* note 10 at Chapter 2.900.5a(4) (September 2011).

test is not whether the tasks that appellant performed during his limited duty would have been done by someone else, but instead whether he occupied a regular position that would have been performed by another employee.[14]

In a Form CA-3 dated October 7, 1997, the employing establishment indicated that appellant returned to work on January 14, 1989. It checked a box marked "No," to indicate that his work assignment had not been changed because of disability resulting from the March 4, 1988 employment injury. In a letter dated June 30, 2005, the employing establishment indicated that appellant was "a junior full-time employee within the section," that he would become an "unassigned regular full-time employee" as of August 6, 2005, and that the employing establishment may assign him to any vacant duty assignment for which there was no senior bidder in the same craft. In its August 17, 2007 letter, the employing establishment indicated that appellant was a clerk employee whose "job was writing forms, casing letters and any other clerk work at the station," noting that "there is no work at the station where continuously lifting, pushing, and pulling are required on an employee." The Board finds that this evidence is sufficient to establish that appellant occupied a full-time regular position that would have been performed by another employee and that he did so for more than six months after returning to full-time work.[15] Accordingly, the Board finds that OWCP properly paid appellant wage-loss compensation using a recurrent pay rate date of November 17, 2005.[16]

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 for compensation purposes.

[14] *Id*.

[15] *Id*.

[16] *Supra* note 1 at § 8101(4). *J.S.*, Docket No. 17-1277 (issued April 20, 2018); *K.B.*, Docket No. 13-0569 (issued June 17, 2013).

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2025 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 16, 2025
Washington, DC

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

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

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