United States Department of Labor
Employees' Compensation Appeals Board

E.G., Appellant	)	
and	)	**Docket No. 07-1562**
	)	**Issued: July 2, 2008**
DEPARTMENT OF THE AIR FORCE, OGDEN AIR LOGISTICS CENTER, HILL AIR FORCE BASE, UT, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 21, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 10, 2007 merit decision concerning his pay rate for compensation purposes. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office used proper pay rates for compensation purposes.

FACTUAL HISTORY

In early 2001 the Office accepted that appellant, then a 34-year-old painter/sandblaster, sustained bilateral ulnar nerve entrapment, de Quervain's disease of the right upper extremity and tenosynovitis of the left hand due to performing sandblasting work. Appellant first sought medical treatment for his upper extremity conditions on December 19, 2000.

Appellant first stopped work due to his accepted employment injuries on January 2, 2001. At that time, he was a WG-9, Step 2 earning $16.51 per hour in salary (or $662.62 per week) plus night differential pay of $1.24 per hour.[1] Therefore, he made a total of $712.39 per week.[2]

On January 13, 2001 appellant returned to light-duty work at the employing establishment. On April 23, 2001 he stopped work. In May and July 2001, appellant underwent surgical procedures, which included shortening of both ulna bones, debridement of his right wrist joint and debridement of partial scapholunate tears and triangular fibrocartilagenous cartilage complex tears in both wrists.[3]

On August 6, 2001 appellant returned to limited-duty work for the employing establishment on a full-time basis. On September 28, 2001 he returned to "full-unrestricted duty" as an aircraft painter for the employing establishment on a full-time basis.

The Office accepted that appellant sustained recurrences of disability for numerous periods between February 19 and October 16, 2002.[4] The last recurrence of disability that appellant sustained before stopping work was from November 25 to December 2, 2002. On November 25, 2002 appellant was a WG-9, Step 3 earning $18.48 per hour or $741.69 per week.[5] He worked the day shift and did not receive night differential pay.

Appellant stopped work on January 21, 2003 and later relocated to California. The employing establishment terminated appellant for cause effective November 18, 2003 because he took 225 days of unauthorized leave between January 21 and November 18, 2003.[6]

In an August 8, 2005 decision, the Office terminated appellant's compensation effective September 3, 2005 on the grounds that he no longer had residuals of his employment injuries after that date. In a May 9, 2006 decision (Docket No. 05-1903), the Board reversed the Office's termination determination finding that there was an outstanding conflict in the medical evidence. In a May 23, 2006 decision, the Office rescinded its payment of compensation to appellant for

[1] The record contains a July 20, 2001 e-mail which lists this amount of night differential pay. The e-mail also reveals that appellant did not get night differential pay after January 28, 2001.

[2] Appellant worked slightly more than 40 hours per week. The amount of money he earned on January 2, 2001 was the same as he earned when he first sought treatment for his employment injuries on December 19, 2000.

[3] In a November 30, 2006 decision (Docket No. 06-1088), the Board found that appellant had an 11 percent permanent impairment of his right arm and a 7 percent permanent impairment of his left arm. On December 13, 2006 the Office granted appellant schedule award compensation for this degree of permanent impairment. The matter of appellant's entitlement to schedule award compensation is not the subject of the present appeal.

[4] It appears that the accepted periods were as follows: February 19 to 21, February 28 to March 6, April 3, April 18 to 21, July 11 to 12 and 15 to 17, August 13 to 16 and 20 to 24, September 2 to 23 and October 1 to 16.

[5] Appellant worked slightly more than 40 hours per week.

[6] Appellant received compensation for partial disability after he stopped work. It does not appear that he filed a claim alleging that he sustained a recurrence of total disability on January 21, 2003 due to his employment injuries. There is some suggestion in the record that appellant received compensation for total disability for periods between 2003 and 2005, but there are no documents establishing this as fact.

wage loss after November 18, 2003 because he was terminated by the employing establishment for cause effective November 18, 2003. In a January 25, 2007 decision (Docket No. 06-1530), the Board reversed the Office's rescission determination because it did not adequately explain why appellant would not continue to be entitled to compensation for partial disability after November 18, 2003. These matters are not currently before the Board.

In 2007 appellant contacted the Office to question the amount of compensation he received as of 2005. He asserted that his physician had told him that he could not work beginning June 25, 2003 and therefore he was entitled to a recurrent pay rate based on the salary of his date-of-injury job on that date. Appellant also asserted that his pay rate calculations should have included a September 1993 base pay raise from $18.48 to $19.19 per hour that he would have received if he had continued working in his position. In a February 20, 2007 memorandum, an Office claims examiner indicated that appellant had mostly been paid over the years using a March 1 or 2, 2002 date of recurrence pay rate of $715.20 and $772.05 per week, respectively, which included amounts for base pay and night differential pay.[7] She indicated that these pay rates were incorrect as appellant stopped receiving night differential pay after January 28, 2001. The claims examiner indicated that when appellant's disability began on January 2, 2001 he was earning $662.62 per week. She noted that appellant established a recurrent pay rate in early 2002, a period more than six months after his return to work. Appellant therefore became entitled to additional recurrent pay rates, the last being fixed by his last recurrence of total disability on November 25, 2002. The claims examiner stated that on November 25, 2002 appellant was a WG-9, Step 3 earning $18.48 per hour or $741.69 per week. She indicated that appellant was entitled to receive compensation at the 3/4 rate until July 9, 2006 (and at the 2/3 rate thereafter) because his dependent daughter turned 18 years old on that date. The claims examiner stated that appellant claimed his daughter lived with him and was a full-time student and indicated that the Office would wait the receipt of documentation of this claim.[8]

In a May 10, 2007 decision, the Office determined that it used a proper pay rate for compensation purposes. It explained its determination of appellant's pay rate for calculating his compensation over time. The Office noted that his date of injury was December 19, 2000 and date disability began was January 13, 2001. On both dates, appellant was a WG-9, Step 2 earning $712.39 per week (comprised of $16.51 per hour in base salary and $1.24 per hour of night differential pay). The Office indicated that appellant established a recurrent pay rate in early 2002, a period more than six months after his return to work, and that it began to use this recurrent pay rate and additional recurrent pay rates, as these were higher than his pay at the time of injury or the date disability began in late 2000/early 2001. It indicated that appellant's last

[7] The record reveals that these recurrent pay rates were used on a number of occasions between 2002 and 2006.

[8] On February 17, 2007 the Office received documentation supporting that appellant's daughter was a full-time college student starting January 17, 2007. The record contains several work sheets which further detail its calculations of appellant's compensation.

recurrence of total disability was sustained on November 25, 2002 and noted that it began to use his pay on this date ($741.69) per week in its calculations.[9]

The Office stated that appellant alleged that he was entitled to a recurrent pay rate based on his pay on June 25, 2003 but noted that appellant had not worked since January 21, 2003 and had not established an employment-related recurrence of disability on June 23, 2003. The Office rejected appellant's argument that his pay rate calculations should have included a September 1993 base pay raise from $18.48 to $19.19 per hour he would have received if he had continued working in his position. It noted that the Federal Employees' Compensation Act did not provide for the inclusion of such raises in pay rate calculations. The Office provided an explanation of how appellant's compensation was increased to reflect periodic cost-of-living adjustments (COLA). The Office explained that it paid appellant compensation at the 3/4 rate until July 9, 2006 because his dependent daughter, who turned 18 years old on that date, qualified as a dependent up until that date. It noted that it paid appellant compensation at the 2/3 rate after July 9, 2006 until he presented evidence in early 2007 that his daughter was a full-time student and thus qualified as a dependent again. The Office then began to pay appellant compensation at the 3/4 rate. It attached a number of work sheets which further detailed its calculations of appellant's compensation.

LEGAL PRECEDENT

Section 8105(a) of the Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[10] Section 8101(4) of the Act 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 begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."[11]

The word "disability" is used in several sections of the Act. With the exception of certain sections where the statutory context or the legislative history clearly shows that a different meaning was intended, the word as used in the Act means "Incapacity because of injury in

[9] The Office noted that appellant received too high a pay rate for extended periods because March 1 and 2, 2002 date of recurrence pay rates were used which included night differential pay to which he was not entitled.

[10] 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b). A child is considered a dependent if he or she is under 18 years of age, is over 18 but is unmarried and incapable of self-support because of a physical or mental disability or is an unmarried student under 23 years of age who has not completed four years of education beyond the high school level and is currently pursuing a full-time course of study at a qualifying college, university or training program. 5 U.S.C. § 8110(a)(1) and 8101(17).

[11] 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002). The Board has held that, if an employee has one recurrence of disability which meets the requirements of 8101(4), any subsequent recurrence would also meet such requirements and would entitle the employee to a new recurrence pay rate. *Carolyn E. Sellers*, 50 ECAB 393 (1999).

employment to earn wages which the employee was receiving at the time of such injury." This meaning, for brevity, is expressed as "disability for work."[12]

The Office does not have the authority to enlarge the terms of the Act nor to make an award of benefits under any terms other than those specified in the statute.[13] The Board has consistently held that there is no provision which entitles a claimant to receive additional compensation for grade and step increases which the employee might have received if he had remained in his position with the employing establishment.[14] The appropriate effective date for COLA increases is set by 5 U.S.C. § 8146a and the Office has no authority to change the effective date of March 1, 1983.[15]

ANALYSIS

The Office accepted that appellant sustained bilateral ulnar nerve entrapment, de Quervain's disease of the right upper extremity and tenosynovitis of the left hand due to performing sandblasting work. The Office paid appellant compensation for various periods of disability and he last worked for the employing establishment on January 21, 2003. In 2007 appellant began to contact the Office and question the amount of compensation he received from about 2005 onwards.

The Board finds that the Office properly determined appellant's pay rates and correctly calculated his compensation benefits. The Office properly noted that appellant's date of injury was December 19, 2000[16] and that the date disability began was January 13, 2001. On both dates, appellant was a WG-9, Step 2 earning $712.39 per week (comprised of $16.51 per hour in base salary and $1.24 per hour of night differential pay). Prior to the establishment of a recurrent pay rate, appellant's pay rate on either of these dates would have provided an appropriate basis for calculating his compensation.[17] The Office properly found that appellant had established a recurrent pay rate in April 2002, a period more than six months after his return to regular, full-time work in late September 2001. Therefore, it appropriately began to use this recurrent pay rate and additional recurrent pay rates, as these were higher than his pay at the time of injury or the date disability began. As noted, if an employee has one recurrence of disability which meets the requirements of section 8101(4) of the Act, any subsequent recurrence would also meet such

[12] *See Charles P. Mulholland, Jr.*, 48 ECAB 604, 606 (1997).

[13] *Timothy A. Liesenfelder*, 51 ECAB 599, 602 (2000).

[14] The Board has held that the probability that an employee, if not for his work-related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act. *See Dan C. Boechler*, 53 ECAB 559, 561 (2002); *Dempsey Jackson, Jr.*, 40 ECAB 942, 947 (1989).

[15] 5 U.S.C. § 8146a; *see also* 20 C.F.R. § 10.420 for the standards for applying COLA increases.

[16] Appellant had stopped working in his painter/sandblaster job by this time and therefore had stopped being exposed to the repetitive duties which caused his employment injuries.

[17] *See supra* note 11.

requirements and would entitle the employee to a new recurrence pay rate.[18] Appellant's last recurrence of total disability was sustained on November 25, 2002 and the Office properly used his pay on this date in its calculations.[19] The record contains documents supporting that on November 25, 2002 appellant was a WG-9, Step 3 earning $18.48 per hour or $741.69 per week.[20] He worked the day shift and did not receive night differential pay.[21]

The Office properly rejected appellant's argument that his pay rate calculations should have included a September 1993 base pay raise from $18.48 to $19.19 per hour that he would have received if he continued working in his position. As noted, there is no provision which entitles a claimant to receive additional compensation for such raises.[22] The Office provided a detailed explanation of how appellant's compensation was increased to reflect periodic COLA and there is no evidence that these calculations were incorrect.[23] It properly paid appellant at varying rates to reflect his changing entitlement to augmented compensation.[24] The Office also provided a number of work sheets which supported its explanation of the calculation of appellant's compensation. For these reasons, the Board finds that the Office used proper pay rates for compensation purposes.

CONCLUSION

The Board finds that the Office used proper pay rates for compensation purposes.

[18] *See supra* note 11.

[19] Although it appears that appellant received compensation for partial disability after he stopped work on January 21, 2003, there is no indication that he sustained an employment-related recurrence of total disability on January 21, 2003. Moreover, it appears that his pay on January 21, 2003 was the same as it was on November 25, 2002. There is no evidence that appellant returned to work for the employing establishment after January 21, 2003, let alone that he sustained another recurrence of total disability after November 25, 2002. The Office properly rejected appellant's argument that he was entitled to a recurrent pay rate based on his pay on June 25, 2003 on the grounds that he had not worked since January 21, 2003 and had not established an employment-related recurrence of disability on June 23, 2003.

[20] Appellant worked slightly more than 40 hours per week.

[21] The Office properly noted that appellant probably was paid at too high a pay rate for extended periods between 2002 and 2006 because March 1 and 2, 2002 date of recurrence pay rates were used which included night differential pay to which appellant was not entitled. The record contains a July 20, 2001 e-mail which reveals that appellant was not entitled to night differential pay after January 28, 2001.

[22] *See supra* note 14 and accompanying text.

[23] *See supra* note 15 and accompanying text.

[24] The Office explained that it paid appellant compensation at the 3/4 rate until July 9, 2006 because his dependent daughter, who turned 18 years old on that date, qualified as a dependent up until that date. It noted that it paid appellant compensation at the 2/3 rate after July 9, 2006 until he presented evidence in early 2007 that his daughter was a full-time student and thus qualified as a dependent again. The Office then began to pay appellant compensation at the 3/4 rate. *See supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 10, 2007 decision is affirmed.

Issued: July 2, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board