

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

S.K., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
OKLAHOMA CITY VA MEDICAL CENTER,)
Oklahoma City, OK, Employer)

**Docket No. 23-0516
Issued: August 16, 2023**

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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 2, 2023 appellant filed a timely appeal from an October 5, 2022 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

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the October 5, 2022 decisions, appellant submitted additional evidence to OWCP. 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 appellant has met her burden of proof to establish entitlement to premium pay for the periods February 28 through March 18, 2022; March 20 through April 10, 2022; and May 15 through 29, 2022.

FACTUAL HISTORY

On November 13, 2018 appellant, then a 52-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on October 25, 2018 she experienced pain in the left side of neck, left thumb, and arm when a patient pulled her left hand in a downward motion while in the performance of duty. She stopped work on November 18, 2018 and returned on November 20, 2018. OWCP accepted appellant's claim for cervical spine sprain, left shoulder sprain, and left arm sprain.

Appellant submitted an examination report and work limitation slip dated February 21, 2022 wherein Kory Reed, a certified physician assistant, described the October 25, 2018 employment injury, and provided examination findings. Mr. Reed diagnosed cervical spine sprain, cervical radiculopathy, cervical disc degeneration, left shoulder sprain, and left arm sprain. He indicated that appellant could continue working with her current restrictions.

On March 21, 2022 appellant filed a claim for compensation (Form CA-7) requesting "other wage loss" for the period February 28 through March 18, 2022 due to loss of weekend premium pay.

OWCP received a February 17, 2022 notification of personnel action (Standard Form SF-50) and a pay information printout, which showed that she had received Saturday and Sunday pay in the total amount of \$4,842.00 for the 21st pay period of 2017 through the 20th pay period of 2018.

In a March 29, 2022 development letter, OWCP advised the employing establishment that it had received appellant's Form CA-7 claiming wage-loss compensation for the period beginning February 28, 2022. It requested that the employing establishment provide updated pay rate information, and clarify the dates of leave without pay (LWOP) or premium pay wage loss. OWCP afforded the employing establishment 15 days to submit the requested evidence.

On April 15, 2022 appellant filed an additional Form CA-7 requesting "other wage loss" for the period March 20 through April 10, 2022 due to loss of weekend premium pay.

On June 17, 2022 appellant informed OWCP that in March 2022, the employing establishment sent her to a new location, and changed her schedule so that she no longer worked every other weekend. She noted that there was no formal job offer, and alleged that she was moved to a new location due to her work restrictions.

On June 17, 2022 appellant filed an additional Form CA-7 requesting "other wage loss" for the period May 15 through 29, 2022 due to loss of weekend premium pay.

In an October 4, 2022 *Shadrick* memorandum, OWCP applied the formula set forth in *Albert C. Shadrick*³ to find that appellant had no loss of wage-earning capacity for the periods February 28 through March 18, 2022; March 20 through April 10, 2022; and May 15 through 29, 2022.

By decision dated October 5, 2022, OWCP denied wage-loss compensation for the period February 28 through March 18, 2022. It found that appellant was not entitled to wage-loss compensation because her actual weekly earnings for the claimed period exceeded the current weekly wages of the job held when injured.

By separate decision dated October 5, 2022, OWCP denied wage-loss compensation for the period March 20 through April 10, 2022. It found that appellant was not entitled to wage-loss compensation, because her actual weekly earnings for the claimed period exceeded the current weekly wages of the job held when injured.

By a third decision dated October 5, 2022, OWCP denied wage-loss compensation for the period May 15 through 29, 2022. It found that appellant was not entitled to wage-loss compensation, because her actual weekly earnings for the claimed period exceeded the current weekly wages of the job held when injured.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁵ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.⁶ Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical evidence.⁷

Under FECA, the term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.⁸ Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn wages that he or she was receiving at

³ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403(c)-(e).

⁴ *Supra* note 1.

⁵ *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Elaine Pendleton*, 40 ECAB 1143 (1989); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

⁶ *K.C.*, Docket No. 17-1612 (issued October 16, 2018); *William A. Archer*, 55 ECAB 674 (2004).

⁷ *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

⁸ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity. When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.⁹

Section 8114(e) of FECA and OWCP's procedures provide that, in addition to annual base pay, certain items will be included in the computation of pay, such as the value of subsistence and quarters, premium pay, and any form of remuneration in kind for services. Consequently, when the job held at the time of injury includes elements of pay such as night or shift differential, extra compensation for work performed on Sundays and holidays, or pay for administratively uncontrollable overtime, OWCP must include the additional pay in the base pay.¹⁰

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP accepted appellant's claim for cervical spine sprain, left shoulder sprain, and left arm sprain. Appellant subsequently filed claims for wage-loss compensation due to loss of weekend premium pay for the periods February 28 through March 18, 2022, March 20 through April 10, 2022, and May 15 through 29, 2022. By three separate decisions dated October 5, 2022, OWCP denied her claims for wage-loss compensation. It found that because appellant's current wages exceeded the current weekly wages of the date-of-injury job, she was not entitled to wage-loss compensation.

Section 8124(a) of FECA provides that OWCP shall determine and make findings of fact, and make an award for or against payment of compensation.¹¹ OWCP's regulations at 20 C.F.R. § 10.126 further provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.¹² The Board has found that a decision denying a claim should contain a correct description of the basis for the denial in order for the parties interest to have a clear understanding of the precise defect of the claim, and the kind of evidence which would overcome it.¹³ In its separate October 5, 2022 decisions, OWCP did not address whether appellant was entitled to premium weekend pay for the periods February 28 through March 18, 2022, March 20 through April 10, 2022 and May 15 through 29, 2022, nor explain the basis for the denial of her

⁹ See *B.A.*, Docket No. 17-1471 (issued July 27, 2018).

¹⁰ 5 U.S.C. § 8114(e); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.6(b)(7) (March 2011).

¹¹ 5 U.S.C. § 8124(a).

¹² 20 C.F.R. § 10.126.

¹³ *J.W.*, Docket No. 19-1547 (issued October 26, 2020); *O.M.*, Docket No. 19-0342 (issued November 15, 2019); *L.R.*, Docket No. 15-0235 (issued December 21, 2015); *Patrick M. Duffy*, 43 ECAB 280 (1991).

claim for compensation due to loss of weekend premium pay.¹⁴ This lack of explanation would prevent appellant from understanding the reason for the disallowance of the claim and the evidence necessary to overcome the defeat of the claim.¹⁵ As OWCP has not made findings of fact or provided a statement of reasons regarding whether appellant has established entitlement to wage-loss compensation for loss of premium pay from February 28 through March 18, 2022, March 20 through April 10, 2022 and May 15 through 29, 2022, the case must be remanded for a *de novo* decision regarding appellant's entitlement to wage-loss compensation pursuant to the standards set forth in 20 C.F.R. §§ 10.500(a) and 10.126.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2022 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 16, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ See *J.R.*, Docket No. 19-0746 (issued June 9, 2020) (the Board remanded the case because OWCP's December 26, 2018 decision did not contain findings of fact and statement of reasons regarding whether appellant was entitled to wage-loss compensation due to loss of premium pay and night differential).

¹⁵ See *P.G.*, *Order Remanding Case*, Docket No. 17-1461 (issued February 7, 2019).