

FACTUAL HISTORY

This case has previously been before the Board on different issues.² The facts and circumstances 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.³ OWCP assigned the claim OWCP File No. xxxxxx345 and it was 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, an open wound of the left knee, leg, and 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 March 4 to November 10, 1988 using an effective pay rate date as of March 4, 1988.

In claims for compensation (Form CA-7) dated July 29 and December 25, 1991, January 7 and November 11, 1992, March 25, 1994, and March 12, 1998, the employing establishment indicated that appellant's assignment had changed when he returned to work due to disability resulting from his injury.

In an attending physician's report (Form CA-20) dated December 4, 1991, Dr. Jan Pierre Zegarra, an orthopedic hand surgeon, noted that appellant had been released to resume light work on January 14, 1989 and was partially disabled from January 4, 1989 to the present. He found that appellant should avoid excessive repetitive hand work, heavy lifting with the right hand and wrist, including lifting over 10 pounds.

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 advised that appellant had returned to his usual employment without restrictions on January 14, 1989.

² Docket No. 99-727 (issued October 17, 2000); Docket No. 04-871 (issued July 16, 2004); Docket No. 13-1255 (issued December 3, 2013); Docket No. 15-1545 (issued October 28, 2015).

³ The claim form is not contained in the case record.

⁴ OWCP additionally accepted appellant's 2007 occupational disease claim for bilateral calcifying tendinitis of the shoulder, assigned OWCP File No. xxxxxx855. It administratively combined OWCP File No. xxxxxx855 with the current claim, OWCP File No. xxxxxx345, serving as the master file.

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 currently worked regular full-time employment.

In a letter dated October 4, 2005, the employing establishment advised that it would honor the higher level of pay that appellant would have received from March 5 to April 29, 1988 as a supervisor had he not been injured.

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 from January 17 to October 1989 and reasonable duties for his condition after October 1989. Appellant stopped work on November 17, 2005.

By letter dated July 6, 2006, OWCP noted that the employing establishment advised that appellant was working as a supervisor at the time of his March 4, 1988 employment injury. It requested that the employing establishment provide appellant's basic pay rate and any premium pay.

In a July 19, 2006 memorandum of telephone call (Form CA-110), the employing establishment asserted that appellant was working full time without restrictions as of November 19, 2006. It related that he had worked as a supervisor in 1988.

On September 12, 2006 appellant filed a claim for compensation (Form CA-7) beginning November 19, 2005. On the reverse side of the claim form, the employing establishment indicated that he had performed limited duty from 1988 to 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 advised that appellant had worked in a limited-duty capacity since the date of his 1988 MVA. It related that he had performed limited duties as a distribution clerk without complaint until 2005, when he alleged that his injuries had worsened such that he could no longer perform his limited-duty assignment.

On August 22, 2007 the Office of Personnel Management (OPM) approved appellant's application for disability retirement. On December 10, 2007 appellant elected to receive FECA benefits effective February 27, 2007 in lieu of benefits from OPM.

A notification of personnel action (Standard Form (SF)-50) dated August 27, 2007 indicated that appellant's pay rate effective August 27, 2007 was \$48,620.00.

In a memorandum to the file dated April 14, 2008, OWCP calculated appellant's pay rate based on the date disability began, December 3, 2005. It found his basic pay rate was \$45,997.00

with an additional \$5,289.65 in locality pay, which when divided by 52 yielded a weekly pay rate of \$996.28.

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, rather than December 3, 2005. OWCP found that appellant's pay rate in November 2005 was \$45,997.00 per year with a 11.5 percent cost-of-living adjustment (COLA), the same rate as December 3, 2005.

On April 30, 2021 appellant requested that OWCP clarify his pay rate, noting that his work schedule on December 5, 2005 was from 11:00 p.m. until 7:30 a.m. He requested night differential pay.

In a Form CA-110 dated February 1, 2022, OWCP informed appellant that his compensation payments were based on his pay rate effective November 17, 2005.

In correspondence dated February 14, 2022, OWCP advised appellant 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 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 with a COLA of \$5,289.66, which resulted in weekly compensation payments of \$986.28.

In letters dated March 6, 2022 and February 17, 2023, appellant asserted that his pay rate should be based on his pay rate as of August 27, 2007, the date of his retirement, rather than the date of his recurrence of disability.

On June 24, 2023 the employing establishment advised that appellant had retired on disability from the employing establishment on August 27, 2007.

OWCP, on July 19, 2023, informed appellant that it had based his wage-loss compensation on the date that he became disabled, November 17, 2005, rather than August 27, 2007, the date of his retirement. It provided its calculation of his pay rate based on the November 17, 2005 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 18, 2005. Appellant 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 the evidence failed 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.

On September 18, 2023 OWCP received an earnings and leave statement with a handwritten note referencing grade retention due to a national agreement from the end of 2004 to the end of 2006.

Following a preliminary review, by decision dated October 4, 2023, OWCP's hearing representative vacated the August 31, 2023 decision. The hearing representative found that appellant had submitted evidence suggesting that he may have received a retroactive pay increase and remanded the case for OWCP to request documentation from the employing establishment to verify his salary as of November 2005 and to confirm or negate any retroactive salary increase.

Appellant submitted a November 17, 2005 notice to report to a position as a mail processor effective November 26, 2005 for a position with a schedule from 11:00 p.m. to 7:30 a.m. He asserted that this meant he was entitled to night differential.

By letter dated October 12, 2023, OWCP advised the employing establishment that it appeared that appellant had stopped work on November 19, 2005, and not returned. It noted that the evidence supported that his salary on that date was \$45,997.00 per year with a COLA of 11.5 percent. OWCP noted that the employing establishment had indicated on February 27, 2023 that appellant's pay rate on the date of his retirement was \$48,620.00 and requested that it explain whether he had a retroactive pay adjustment that affected his salary on the effective pay rate date of November 17, 2005.

In a Form CA-110 dated 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.

By 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. He argued that OWCP did not need to withhold taxes, retirement, medical, or union dues from his pay rate. Appellant maintained that the information provided by the employing establishment was inaccurate and his pay rate should be August 27, 2007, the date that he separated from the employing establishment.

Appellant submitted a September 12, 2006 Form CA-7, which indicated that he had performed limited duty from 1988 to the present.

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).

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA⁵ 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.⁶ 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.⁷ 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.⁸

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.⁹

ANALYSIS -- ISSUE 1

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

Appellant stopped work on March 4, 1988, the date of injury, and received wage-loss compensation for total disability. He resumed work on January 17, 1989. Appellant stopped work again on November 17, 2005, and filed a Form CA-2a. OWCP accepted that he sustained a recurrence of disability and paid him wage-loss compensation using a recurrent pay rate date of November 17, 2005.

⁵ 5 U.S.C. § 8102.

⁶ *See id.* at §§ 8105-8107.

⁷ *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).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.9005a(3) (September 2011).

⁹ *See A.I.*, Docket No. 21-0248 (issued April 19, 2023); *Barbara A. Dunnivant*, 48 ECAB 517 (1997).

As discussed, OWCP found that appellant was entitled to recurrent pay rate date of November 17, 2005. However, 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.¹⁰ In this case the employing establishment provided conflicting information regarding whether appellant returned to his regular employment duties or modified employment on or after January 17, 1989. In a Form CA-3 dated October 7, 1997, it indicated that he had returned to his regular employment without restrictions on January 14, 1989. In CA-7 forms beginning June 7, 2001, however, the employing establishment advised that he had returned to limited-duty work on January 14, 1989. On June 30, 2005 it notified appellant of his involuntary reassignment and indicated that he currently worked regular full-time employment. In a statement dated June 26, 2007, however, the employing establishment asserted that he had performed limited-duty work since the time of his 1988 MVA, and that he had performed his modified distribution clerk duties without complaint until 2005, when he maintained that he could no longer perform his limited-duty assignment.

The case shall, therefore, be remanded to OWCP for further development to determine appellant's pay rate for compensation purposes. On remand, OWCP shall obtain information from the employing establishment regarding whether appellant resumed his regular full-time employment for six months following his injury.¹¹ After such further development as deemed necessary, it shall issue a *de novo* decision.¹²

CONCLUSION

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

¹⁰ *Supra* note 6; *see also* N.C., Docket No. 16-0441 (issued October 21, 2016).

¹¹ *See P.M.*, Docket No. 19-1150 (issued January 9, 2020).

¹² In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board. The February 28, 2024 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: September 18, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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