U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AQUILLINE BRASELMAN and U.S. POSTAL SERVICE, POST OFFICE, St. Louis, Mo.

Docket No. 96-348; Submitted on the Record;
Issued June 8, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the position of hotel housekeeper fairly and reasonably reflected appellant's wage-earning capacity effective July 23, 1995; and (2) whether the Office properly determined that appellant received a $4,905.65 overpayment in compensation.

The Board has duly reviewed the case record in the present appeal and finds that the case is not in posture for decision, regarding whether the Office properly determined that the position of hotel housekeeper fairly and reasonably reflected appellant's wage-earning capacity effective July 23, 1995.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[2]

Section 8115(a) of the Federal Employees' Compensation Act provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity."[3] The Board has stated, "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."[4]

---

[1] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[2] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[3] 5 U.S.C. § 8115(a).

[4] *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

The Office's regulations at section 10.303[5] codify the Board's case law promulgated in the cases of *Albert C. Shadrick*[6] and *Johnny A. Muro*,[7] to accommodate the statutory amendments to section 8101(4) of the Act. The regulations define three basic terms which are used in formulating an employee's entitlement to compensation based on his or her wage-earning capacity. These terms are: (1) "Pay Rate for Compensation Purposes"; (2) "Current Pay Rate"; and (3) "Earnings." As defined in section 8101(4), "Pay Rate for Compensation Purposes" is the greater of the employee's pay as of the date of injury, the date disability begins or the date of recurrence of disability if more than 6 months after returning to work.[8] "Current Pay Rate" is defined as the current, or updated, salary or pay rate for the job the employee held at the time of injury.[9] "Earnings" is defined as the employee's actual earnings, or the salary or pay rate of the job selected as representative of his or her wage-earning capacity.[10]

In reaching its August 1, 1995 determination of appellant's wage-earning capacity, the Office properly calculated appellant's earnings based on her actual earnings as a hotel housekeeper.[11] The Office noted that appellant had received actual earnings as a hotel housekeeper for more than 60 days in that she had been working in the position since November 1, 1991.[12] Appellant worked as a hotel housekeeper for a private employer from November 1, 1991 until at least through the end of 1994. The record does not contain any evidence showing that the hotel housekeeper position constitutes part-time, sporadic, seasonal or

[5] 20 C.F.R. § 10.303.

[6] 5 ECAB 376 (1953).

[7] 17 ECAB 537 (1966).

[8] *See* 5 U.S.C. § 8101(4); *see also* 20 C.F.R. § 10.5(a)(20).

[9] *See* 20 C.F.R. § 10.303(b).

[10] *Id.*

[11] By decision dated August 1, 1995, the Office adjusted appellant's compensation based on its determinations regarding her wage-earning capacity. Although the Office indicated in its August 1, 1995 decision that it adjusted appellant's compensation effective June 13, 1991, other documents show that appellant's compensation was actually adjusted effective July 23, 1995.

[12] Office procedure provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

temporary work.[13] Moreover, the record does not reveal that the position is a make-shift position designed for a claimant's particular needs.[14]

With respect to the calculation of appellant's pay rate for compensation purposes, the Act provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment, in which she was injured substantially for the entire year immediately preceding the injury[15] and would have been afforded employment for substantially a whole year, except for the injury.[16] Section 8114(d) of the Act provides:

"Average annual earnings are determined as follows:

> (1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --
>
> > (A) was fixed, the average annual earnings are the rate of pay; or
> >
> > (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week, and 260 if employed on the basis of a 5-day week.
>
> (2) If the employee did not work in employment, in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (December 1993). Appellant had worked sporadically for several months prior to November 1, 1991 and the Office properly did not base its wage-earning capacity determination on this sporadic work.

[14] *But see, e.g., Michael A. Wittman*, 43 ECAB 800 (1992) (where the Board found that the evidence did not support a finding that a position with the National Guard fairly and reasonably represented the claimant's wage-earning capacity based on the fact that the claimant only performed limited duties and did not appear every month as normally required).

[15] *See John D. Williamson*, 40 ECAB 1179, 1181-83 (1989), wherein the employee had worked in a part-time position for a period of over one year, but had not demonstrated the capacity to earn wages concurrently as a full-time employee for one year prior to the employment injury.

[16] 5 U.S.C. § 8114(d)(1), (2); *see Billy Douglas McClellan*, 46 ECAB 208, 212-13 (1994).

> the same or neighboring place, as determined under paragraph (1) of this subsection."[17]

In the present case, the evidence shows that appellant did not work in the employment, in which she was injured during substantially the whole year immediately preceding her June 11, 1990 employment injury[18] and that she would not have been afforded employment for substantially a whole year, except for the injury. Appellant did not work during substantially the whole year immediately preceding her injury in that she began working for the employing establishment on July 17, 1989 and was off work for notable periods between January and May 1990 before she stopped work on June 11, 1990 due to her injury. Appellant would not have been afforded employment for substantially a whole year, except for the injury, in that she worked as a casual mail carrier for the employing establishment and was not eligible to work for more than 180 days per year. For these reasons, sections 8114(d)(1) and (2) of the Act are not applicable to the computation of appellant's pay rate.

If sections 8114(d)(1) and (2) of the Act are not applicable, section 8114(d)(3) provides as follows:

> "If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of injury having regard to the previous earnings of the employee in Federal employment, and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within 1 year immediately preceding his injury."

Given the inapplicability of sections 8114(d)(1) and (2) of the Act, it would be appropriate for the Office to apply section 8114(d)(3) to determine appellant's pay rate for compensation purposes.[19] In applying section 8114(d)(3), however, the Office did not adequately consider the factors delineated therein, including appellant's previous federal earnings; the earnings of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location; and appellant's other previous employment. According to Office procedure, the Office is responsible

[17] *Id.*

[18] The Office accepted that appellant sustained a dog bite on her left arm and a phobia to dogs as a result of the bite.

[19] *See Randy L. Premo*, 45 ECAB 780, 782 (1994) (holding that section 8114(d)(3) of the Act provides an alternative method for determination of the pay rate to be used for compensation purposes when the methods provided in sections 8114(d)(1) and 8114(d)(2) cannot be applied reasonably and fairly).

for obtaining information from the employing establishment concerning these factors.[20] In response to an information request from the Office, the employing establishment indicated that it did not have any information regarding the earnings of casual employees during the year prior to appellant's June 11, 1990 employment injury, because this information had been destroyed. It does not appear, however, that the Office obtained information from the employing establishment regarding the earnings of the employees working in the same class and employment in the neighboring location, *i.e.* casual mail carriers, or the earnings of the employees working in the most similar class and employment in the same or neighboring location. Nor does it appear that the Office considered appellant's earnings prior to her federal employment.[21] The Office appears to have based its determination of appellant's pay rate for compensation purposes on the assumption that appellant would have worked an average of 8 hours per day for 180 days in the year prior to her injury at a rate of $7.00 per hour, the rate she earned at the time of her June 11, 1990 employment injury. However, the Office did not adequately explain the basis for choosing these assumed figures to calculate her pay rate for compensation purposes.

Moreover, the Office appears to have erred in the calculations it made using these figures. For example, the Office premised its calculations on the assumption that the figure of 180 days was equal to approximately 26 weeks. This statement would be true if one assumed that appellant worked seven days per week, but the other figures used by the Office were premised on the assumption that appellant worked five days per week. The Office multiplied $7.00 per hour times 40 hours per week; multiplied this product times 26 weeks; and then divided the resulting product by 52 weeks to reach appellant's pay rate for compensation purposes of $140.00 per week.[22] One would obtain a much higher sum for appellant's pay rate for compensation purposes by multiplying $7.00 per hour times 8 hours per day; multiplying this product by 180 days; and then dividing the resulting product by 52 weeks. For these reasons, the Office's final determination regarding appellant's wage-earning capacity is set aside and the case remanded to the Office for further development of this issue in accordance with the relevant standards.

[20] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.9d(1)-(3) (September 1990). Office procedure provides, *inter alia*, that information should be obtained from the employing establishment regarding the earnings of the federal employee working the greatest number of hours during the year prior to the injury in the same or most similar class and in the same or neighboring locality. *Id.* at 2.900.9d(3)(b).

[21] The record contains some evidence regarding such nonfederal employment.

[22] The Office then compared the figure of $140.00 per week to the figure derived from the formula delineated in the last sentence of section 8114(d)(3). This formula from section 8114(d)(3) yielded a weekly pay rate of $161.53, a figure which was derived by multiplying $7.00 per hour times 8 hours per day; multiplying this product times 150 days, and then dividing the resulting product by 52 weeks. The Office then determined that, according to 8114(d)(3), the figure of $161.53 per week should represent appellant's pay rate for compensation purposes because it was higher than the figure of $140.00 per week. The Office determined that the current pay rate for the position appellant held when injured was $8.00 per hour or $172.13 per week; it then applied the determinations it made regarding appellant's earnings, pay rate for compensation purposes, and current pay rate to the formula developed in the *Shadrick* and *Muro* cases.

The Board further finds that the Office improperly determined that appellant received a $4,905.65 overpayment in compensation.

On June 2, 1994 the Office issued a preliminary determination that appellant received a $4,905.65 overpayment comprised of an $865.55 overpayment for the period June 13, 1991 to December 31, 1992 and a $4,040.10 overpayment for the period January 1 to December 31, 1993.[23] The Office indicated that appellant was not entitled to wage-loss compensation for these periods, because she had an extant surplus from a third-party action. In its August 1, 1995 decision, the Office finalized its preliminary overpayment determination without additional explanation. The Board notes, however, that the Office did not adequately explain the basis for its determination that appellant received a $4,905.65 overpayment. It should be noted that the question whether appellant has a third-party surplus which should be offset against compensation payments is distinct from the question whether appellant was entitled to receive $4,905.65 in wage-loss compensation during the period June 31, 1991 to December 31, 1993. The Office did not adequately explain why appellant was not entitled to receive $4,905.65 during this period. It appears that the Office's determination of the $4,905.65 overpayment was based on wage-loss compensation calculations, which were later set aside in a March 23, 1995 decision of the Office. For these reasons, the Office improperly determined that appellant received a $4,905.65 overpayment.

The decision of the Office of Workers' Compensation Programs dated August 1, 1995 is set aside with respect to the wage-earning capacity issue and reversed with respect to the overpayment issue. The case is remanded to the Office for further proceedings consistent with this decision of the Board, to be followed by the issuance of a relevant decision.

Dated, Washington, D.C.
June 8, 1998

George E. Rivers
Member

David S. Gerson
Member

[23] The Office indicated that appellant was without fault in the creation of the $865.55 overpayment but not at fault in the creation of the $4,040.10 overpayment.

Michael E. Groom
Alternate Member