U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TIMOTHY A. LIESENFELDER and DEPARTMENT OF THE INTERIOR, MOUNT RANIER NATIONAL PARK, Ashford, WA

Docket No. 97-2815; Oral Argument Held May 4, 2000; Issued July 27, 2000

Appearances: *Timothy Liesenfelder, pro se*; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs has properly computed appellant's pay rate for compensation purposes for the period May 11, 1991 through March 31, 1992 and commencing October 1, 1993.

Appellant sustained an injury in the performance of duty on June 11, 1990 and he became disabled for work on May 11, 1991 through March 31, 1992 and again on October 1, 1993.[1] At the time of his injury, he was employed as a temporary seasonal laborer, Wage Grade 3, Step 2, earning an hourly rate of $10.62.[2] The Office accepted the claim for thoracic strain, herniated discs at C5-6, T-7 and authorized surgery.

By letter dated August 23, 1994, appellant, for the first time, alleged that he was entitled to hazard pay. Appellant attached a copy of his Interagency Fire-Job Qualification card issued by the employing establishment in support of his contention that he was entitled to hazard pay as he "fought fires and received hazardous duty pay in the summer of 1990."

By letters dated August 17 and September 2, 1994, appellant contended that the Office erred in its computation of his pay rate by utilizing his pay rate as a laborer. Appellant argued that the correct pay rate should be computed upon his loss of salary as an attorney at the GS-10

[1] Appellant's temporary appointment ended September 6, 1990.

[2] Appellant, in a letter dated February 3, 1992, stated that he had "assisted the park mason for three summers" and indicated that his job "involved heavy lifting, pounding and transporting large rocks and boulders."

or 11 level. In the August 17, 1994 letter, appellant also contended that hazard pay should be included in his pay rate computation.

In a November 14, 1994 letter, the employing establishment, in response to an October 3, 1994 inquiry, indicated that appellant did not receive any hazard pay during the one-year period prior to the date his disability began on May 11, 1991 and that appellant's seasonal employment was terminated on September 6, 1990.

In letters dated February 13, April 27, May 22 and June 12, 1995, appellant argued that his pay rate should be based upon a GS-12 or 13 salary due to his professional and educational experience and not based upon the GS-3 pay rate for a laborer.

In a letter decision dated June 27, 1995, the Office noted that appellant had been paid temporary compensation for the period May 11, 1991 through March 31, 1992 and for the period October 1, 1993 and continuing.[3] The Office advised appellant as to the regulations concerning pay rate determination and informed him that the record contained no evidence that he had returned to work with the government subsequent to September 6, 1990 and that he was not entitled to a pay rate based upon his earnings as an attorney.

By letter dated July 7, 1995, appellant disagreed with the Office's decision and requested reconsideration.

By decision dated July 18, 1995, the Office denied appellant's request for modification of the prior decision.

By letters dated August 5 and 8, 1995, appellant requested an oral hearing.

A hearing was held on April 30, 1996 at which appellant testified. Appellant testified that he worked as an unpaid rule 9 intern with the Spokane County Public Defender's Office while he was in law school and working as a temporary laborer. Regarding his professional status, appellant testified that he passed the Washington State Bar Examination and was admitted to practice in November 1991. Next, appellant stated that the Office failed to consider that he had received hazard pay in computing his pay rate, that he had submitted his red card to support that he was qualified to fight a fire and that the employing establishment's statement that he had not received hazard pay during the summer of 1990 was erroneous.

By decision dated June 27, 1996, the hearing representative found that the Office correctly used the date of appellant's injury as the date appellant's pay rate should be computed for compensation purposes. The hearing representative also found that appellant was not entitled to hazard pay or step increases to be included in appellant's pay rate computation.

[3] In May 1991 appellant graduated from law school and he informed the Office that he was not claiming compensation for the period April 1992 to September 1993 as he was gainfully employed during this period. By letter dated July 20, 1994, appellant advised the Office that in October 1993 he stopped working as a Deputy Prosecuting Attorney with the Colville Confederated Tribes due to his neck pain. Appellant indicated that while working as an attorney he paid $14.00 per hour, working an average of 40 hours per week.

In a June 13, 1996 letter, appellant argued that the pay rate of a GS-12 to 14 should be the pay rate used to compute his compensation based upon his loss of wages and income as an attorney.

By letters dated July 15 and August 8, 1996, appellant requested reconsideration and argued that the Office had made a procedural error in that the hearing representative had based his opinion upon incomplete information in his file.

By decision dated October 9, 1996, the Office denied appellant's request for modification of the June 7, 1996 decision. In the attached memorandum, the Office rejected appellant's argument that his pay rate should have been computed based upon his salary as an attorney. The Office noted that, at the time of his injury, appellant had not been earning wages as a lawyer and thus the Office properly computed his pay rate for compensation purposes based upon his salary as a temporary laborer.[4]

The Board finds that the Office properly computed appellant's pay rate for compensation purposes.

The terms of the Federal Employees' Compensation Act[5] are specific as to the method and amount of payment of compensation. Neither the Office nor the Board has 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.[6] The applicable provisions of the Act specify that compensation for disability shall be computed on the basis of the employee's monthly pay as defined in the Act.[7]

The Act provides for payment of total disability benefits as follows:

> "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."[8]

The term "monthly pay" is defined by the Act as "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

[4] Subsequent to the Office's October 9, 1996 decision, appellant, by letter dated March 15, 1997, submitted additional factual evidence regarding his entitlement to hazard pay. The Board's review is limited to the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board, therefore, cannot consider the evidence submitted after the Office's decision.

[5] 5 U.S.C. §§ 8101-8193.

[6] *Dempsey Jackson, Jr.*, 43 ECAB 942 (1989).

[7] *Estelle J. Boimah*, 42 ECAB 871 (1991).

[8] 5 U.S.C. § 8105(a). Pursuant to section 8110(b) of the Act, a disabled employee with a dependent is entitled to augmented compensation equal to three quarters of his monthly pay.

disability recurs, if the recurrence begins more than 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater…."[9]

On appeal, appellant continues to allege that his pay rate should be that paid to an attorney and not the pay rate he received as a temporary seasonal laborer at a WG-3/2 and cites to the Board's decision in *Michael A. Wittman*[10] in support of his contention. The Board does not find support for appellant's legal argument in the case cited.

In the present case, appellant sustained an injury on July 11, 1990, he stopped work on September 6, 1990 when his temporary appointment ended and filed for total disability beginning May 11, 1991.

While appellant alleges that hazard pay should be added to his pay, the Board finds that the record contains no information to support that appellant was given hazard pay during his temporary employment. The only evidence appellant submitted was a copy of his Interagency Fire-Job Qualification card in support of his request.[11] This evidence shows that appellant was qualified to fight a fire, but fails to show that appellant actually fought a fire during his federal employment or that he was paid hazard pay for fighting any fire. Furthermore, appellant, at the time he initially filed his claim, did not allege that he was entitled to hazard pay.

Appellant disagrees with use of the GS-3/2 pay rate as he alleges it does not reflect his earning capacity at the time of recurrence of disability. Appellant alleges that he is entitled to the pay rate of an attorney since that was the position he had been working in at the time his recurrence of disability began and would more fairly compensate him for his lost wages.

The record contains no evidence establishing that, prior to sustaining a recurrence of disability on May 11, 1991 and again on October 1, 1993, appellant had resumed "regular full-time employment with the United States" for the requisite six-month period. Therefore, the Board finds that the Office properly determined appellant's monthly pay rate based on his date-of-injury position, which was as a seasonal laborer at a WG-3/2, which was the same as his pay rate on the date disability began.[12]

[9] 5 U.S.C. § 8101 (4).

[10] 43 ECAB 800 (1991) (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 appellant only performed limited duties and did not appear every month as normally required).

[11] The Board notes that appellant submitted additional information on appeal regarding his argument that he was entitled to hazard pay subsequent to the October 9, 1996 decision. The Board may not consider this evidence. However, the Board notes that the pay stub appellant submitted would not have supported his allegation as it indicated that he had been paid overtime and not hazard pay. *See* 20 C.F.R. § 501.2(c).

[12] *See Dr. Alan T. Webb*, 47 ECAB 395 (1996)

The decision of the Office of Workers' Compensation Programs dated October 9, 1996 is hereby affirmed.

Dated, Washington, D.C.
July 27, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member