U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN L. RINEAR and DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, W. Richland, WA

Docket No. 01-1935; Submitted on the Record;
Issued May 13, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether appellant has received compensation based on a correct pay rate.

On May 17, 2000 appellant, then a 48-year-old census enumerator, filed a traumatic injury claim (Form CA-1), for injuries sustained when she was involved in a head-on collision by an oncoming vehicle while in the performance of duty. In a June 16, 2000 memorandum of conference, a claims examiner indicated that appellant had been working as a census enumerator for about 3 weeks and was earning $9.50 per hour. The memorandum further noted that appellant was also employed part time with Hope and Family Social Services as a social worker. Prior to July 1, 1999, appellant worked for Professional Network Inc. with similar duties to those performed for Hope and Family Social Services, which were bought out by Professional Network Inc. Appellant worked approximately 40 hours per week with Professional Network and 30 hours per week with Hope and Family Social Services. Appellant also worked as an employee for about three years and, prior to that, she performed similar work as an independent contractor.

The Office of Workers' Compensation Programs accepted that appellant sustained employment-related fractures of the right tibia, femur and patella; fracture of the left foot; and left pneumothorax. Appellant received continuation of pay for 45 days for the period May 18 through July 1, 2000 at the census enumerator pay rate and, thereafter, was placed on the periodic roll. The pay rate used to pay compensation was at the rate for a temporary worker, without evidence of a full year's prior nonfederal earnings.

By decision dated September 12, 2000, the Office determined that appellant was not entitled to a higher pay rate for compensation purposes based on her prior private sector wages. The Office advised that the period of employment considered for pay rate determination was limited to May 17, 1999 to May 17, 2000 as only earnings for the year prior to the injury could be considered. No consideration was given to overtime hours or mileage as it was not considered a salary component. The Office noted that appellant was employed with Hope and

Family Social Services from July 25, 1999 to mid-May 2000 and was employed with Professional Network, Inc. from January 1 to June 1999. The Office found that appellant worked a total of 916.19 hours for the year prior to her injury. This equated to a total of 73 hours for the employing establishment and 843.19 hours for other nonfederal employers. The 916.19 hours worked during the year prior to the May 17, 2000, work injury did not equate to full-time employment, considered to be 2,087 hours per annum, during substantially the whole year immediately preceding the work injury. The Office further found that appellant's work which she performed for Hope and Family Social Services and Professional Network, Inc., of transporting and supervising children during parental visitation was different from the duties she performed as a census enumerator. Accordingly, the Office denied appellant's claim to have prior private sector wages included in her pay rate for compensation purposes.

In a letter dated September 18, 2000, appellant, through her attorney, requested reconsideration regarding her wage calculation. Statements from appellant were submitted along with copies of paystubs from Professional Network, Inc.

By decision dated May 15, 2001, the Office denied modification of its previous decision. The Office found that appellant was unable to verify that she worked an entire year prior to the date of injury, for the period May 17, 1999 through May 17, 2000, and that the work she did perform during the prior year was not similar to the census enumerator job. The Office, therefore, found that appellant's continuing entitlement to compensation benefits was properly based on the established pay rate of $95.91 per week, which reflected her earnings as a temporary census enumerator.[1] The Office found that appellant's compensation was based on her hourly census enumerator wage of $9.50 per hour; she had worked 21 days and had logged 73 hours of work during those 21 days, which equaled 3.5 hours per day. The hourly rate of $9.50 was multiplied by the 3.5 hours per day, which equaled $32.25 hours per day as a temporary worker without proof of full-time employment for the entire year prior. The $32.25 hours per day was multiplied by the daily figure of 150 (average number of days allowed per year for compensation purposes for a temporary worker), which equaled $4,987.50 and divided by 52 (the number of weeks in a year) to derive at the $95.91 weekly rate. The Office found that appellant was entitled to three fourths of that weekly rate as she has dependents.

The Board finds that the Office utilized the proper procedure for determining appellant's compensation, however, the Office's pay rate determination is modified to reflect appellant's correct average daily wage using the factor of 6.5 hours as provided in Chapter 2.901.9(a)(2) of the Office's Procedure Manual.[2]

[1] The Office noted that although appellant was overpaid in the amount of $328.88 for the period May 2 through July 29, 2000, the overpayment was administratively terminated.

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.9(a)(2) (December 1995).

With respect to the calculation of appellant's pay rate for compensation purposes, the Federal Employees' Compensation 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 and would have been afforded employment for substantially a whole year, except for the injury.[3] 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 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 [s]he was employed at the time of h[er] 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 for the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place as determined under paragraph (1) of this subsection."[4]

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 [s]he was working at the time of injury having regard to the previous earnings of the employee in [f]ederal 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

[3] 5 U.S.C. § 8114(d)(1), (2); *see Billy Douglas McClellan*, 46 ECAB 208, 212-13 (1994).

[4] *Id.*

the employee earned in the employment during the days employed within 1 year immediately preceding his injury."

In this case, the evidence shows that appellant did not work in the employment in which she was injured substantially for the entire year immediately preceding the injury. Appellant worked a total of 916.19 hours in the year prior to her May 17, 2000 injury, 843.19 hours was spent working for other agencies doing different duties than that performed as a census enumerator also appellant would not have worked in the employment for substantially a whole year, except for the injury. For these reasons, sections 8114(d)(1) and (2) of the Act are not applicable to the computation of appellant's pay rate.

Given the inapplicability of sections 8114(d)(1) and (2) of the Act, the Office properly applied section 8114(d)(3) to determine appellant's pay rate for compensation purposes.[5] In applying section 8114(d)(3), the Office properly noted that the employment which appellant had during the year prior to the injury was not of a similar nature. Thus, the Office was not required to consider the factors delineated within section 8114(d)(3), which included appellant's previous 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. The Office calculated that appellant's average annual earnings from the formula delineated in the last sentence of section 8114(d)(3) to determine appellant's pay rate for compensation purposes. This formula from section 8114(d)(3) yielded a weekly pay rate of $95.91, a figure which was derived by multiplying appellant's hourly wage of $9.50 per hour times her average workday of 3.5 hours per day, multiplying the result times 150 and then dividing the result of this computation by 52.[6]

The calculation of appellant's pay rate is set forth in the Office procedure manual, which describes the rules for computing compensation to certain groups of employees, such as appellant, who worked on the census. The Office procedure manual states:

> "Enumerators and crew leaders ordinarily worked 6.5 hours per day, six days per week. Where disability extended beyond 90 days and the claimant had similar employment during the year prior to the injury, compensation should be paid according to section 5 U.S.C. § 8114(d)(1) and (2). Otherwise, it should be paid on a weekly basis using the following formula: 150 times the actual daily wage divided by 52 (the actual daily wage should be determined by multiplying the hourly pay rate by 6.5 hours)."[7]

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[5] *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).

[6] The record indicates that appellant earned $9.50 per hour and was working an average of 3.5 hours during the workweek at the time of her employment injuries. As previously noted, that appellant had worked 21 days and had logged in 73 hours of work, which equated to 3.5 hours of work per day. The hourly rate of $9.50 multiplied by 3.5 hours per day equates to $32.25 hours per day as a temporary enumerator.

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.9(a)(2) (December 1995).

The Board notes that the Office procedure manual specifically defines the actual daily wage of enumerators, which was appellant's job title when injured, to be 6.5 hours multiplied by the hourly pay rate.[8] As the Office calculated appellant's daily wage based on her average workday of 3.5 hours per day, the calculation did not conform with the procedure manual formula. Accordingly, in determining appellant's pay rate for compensation purposes, the Office should have multiplied appellant's hourly wage of $9.50 per hour by 6.5 hours, as set forth in the Office's procedures, multiplying the result (61.75) times 150 and then dividing the result (9262.50) by 52. This results in a pay rate of $178.13 for appellant's compensation purposes.

The May 15, 2001 and September 12, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed as modified.

Dated, Washington, DC
May 13, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[8] *Id.*