U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JASON A. CLARK and U.S. POSTAL SERVICE,
POST OFFICE, Hermiston, OR

Docket No. 01-1393; Submitted on the Record;
Issued May 20, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's rate of pay.

On April 6, 1999 appellant, then a 36-year-old part-time flexible letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2). The Office accepted that appellant sustained right knee loose bodies, and aggravation of preexisting chondromalacia patella. The reverse of the claim form indicated that appellant stopped working on January 16, 1999.

By decision dated December 1, 1999, the Office determined that appellant's pay rate for compensation purposes was $399.46 per week. The Office acknowledged that appellant had not worked from January 17 to April 10, 1998, but found that appellant had been substantially employed for the year prior to the date disability began because "the only reason [appellant was] in an LWOP [leave without pay] status was by choice."[1] According to the Office, appellant earned $20,772.03 during the actual period worked for the year prior to disability; dividing by 52 resulted in a weekly pay rate of $399.46.

In a decision dated March 20, 2001, an Office hearing representative affirmed the December 1, 1999 Office decision. The hearing representative determined that appellant's pay rate for compensation purposes should be calculated pursuant to 5 U.S.C. § 8114(d)(1)(B). He found that pursuant to this section the correct pay rate was $399.45 per week.

The Board finds that the Office did not properly calculate appellant's pay rate.

[1] It appears from the record that appellant was off work due to a medical condition unrelated to his federal employment.

Section 8114(d) of the Federal Employees' Compensation Act provides:

"(d) 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 annual rate of pay; or

"(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for 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 51/2-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 the same or neighboring place, as determined under paragraph (1) of this subsection."

In this case, the Office determined that appellant was employed "during substantially the whole year immediately preceding the injury," and therefore section 8114(d)(1) was applicable in this case. The Office found that appellant had earned $20,772.03 during the approximately 8 months that he worked; dividing the actual earnings by 52 weeks at 5 days per week results in a daily wage of $79.89. Under section 8114(d)(1)(B), if the annual rate of pay is not fixed, the daily wage is multiplied by 260 if employed on the basis of a 5-day week. The Office then determined that appellant's pay rate was $399.45 per week.

The Board finds that the Office erred in determining that appellant was employed "during substantially the whole year immediately preceding the injury." The basis for the Office's pay rate determination finding is that, although appellant did not work from January 17, 1998 to April 10, 1998, during this period he was in an LWOP status by "choice." According to the Office, he therefore should be considered as having substantially worked the year prior to injury.

There is no provision in section 8114(d)(1) that indicates an intent to consider the reasons an employee did not work as relevant to the meaning of "substantially the whole year immediately preceding the injury." The Office's own procedures clearly state that "substantially" means that an employee worked at least 11 months in the year prior to the injury.[2] Appellant did not work at least 11 months prior to the injury in January 1999, and therefore the

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rate*, Chapter 2.900.4(a) (December 1995).

Board finds that he cannot be considered to have been employed for substantially the whole year prior to the injury.

5 U.S.C. § 8114(d)(2) is specifically designed to apply to an employee that did not work substantially the whole year prior to the injury, but "the position was one which would have afforded employment for substantially the whole year." This is the situation presented in this case, as the record indicates that the position would have been available to appellant had he not been in an LWOP status. Appellant had worked in the position prior to January 1998 and the Office found that he would have worked had he not been in a leave status. Under section 8114(d)(2), average annual earnings are 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 the same or neighboring place, as determined under paragraph (1) of this subsection." The Office should therefore determine appellant's pay rate by using an employee of the same class that did work substantially the whole year preceding the injury.

The case will be remanded to the Office for a proper determination of appellant's pay rate pursuant to section 8114 (d)(2). After such further development as the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated March 20, 2001 is set aside and the case remanded for further development consistent with this decision of the Board.

Dated, Washington, DC
May 20, 2003

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member