United States Department of Labor
Employees' Compensation Appeals Board

CYNTHIA E. CLURE, Appellant	)	
and	)	**Docket No. 04-881**
	)	**Issued: June 24, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Jasper, GA, Employer	)	

Appearances:
Cynthia E. Clure, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On February 17, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 21, 2004 finding appellant was not entitled to compensation for the wage loss she sustained from her position in the U.S. Naval Reserve. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant's wages as a member of the Naval Reserve should be included in her pay rate for compensation purposes.

FACTUAL HISTORY

On December 14, 2001 appellant, then a 40-year-old letter carrier, filed a traumatic injury claim alleging that she fell on slippery pavement on that day and injured her left arm and knee.[1]

[1] The record indicates that appellant began work at the employing establishment on August 14, 1999 in a full-time, fixed position.

In a March 29, 2002 decision, the Office accepted the claim for left shoulder bursitis and elbow sprain. Appellant returned to regular duty but continued to complain of shoulder pain. On March 6, 2003 the Office approved surgery to repair appellant's rotator cuff in her left shoulder as well as arthroscopic surgery and subacromial decompression. Appellant returned to light-duty work but missed intermittently due to pain and medical treatments.

On December 30, 2003 appellant submitted a claim for compensation (Form CA-7) for the period February 1 to December 31, 2003 for wages lost as a member of the Naval Reserve because she could not perform the physical requirements of the position due to her accepted work condition. In support of her claim, appellant submitted W-2 forms that showed she was paid $5,403.00 in 2001 by the Department of the Navy. She also submitted a January 12, 2003 document from the Branch Medical Clinic, Naval Air Station, Atlanta, Georgia, that stated that appellant was temporarily not physically qualified to drill. The file also contains an October 4, 2003 letter from the Naval Air Station to the employing establishment stating that appellant is on medical hold status.

In a January 21, 2004 decision, the Office denied appellant's wage-loss request finding that membership in the Naval Reserve was not a condition of her employment with the employing establishment and therefore wage loss for field training and drills should not be included in computing appellant's pay rate for compensation purposes under the Federal Employees' Compensation Act.

LEGAL PRECEDENT

The terms of the Act 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. 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.[2]

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 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 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 --

[2] *Gerald A. Karth*, 48 ECAB 194, 197 (1996).

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

(A) was fixed, the average annual earnings are the annual rate of pay…."

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 the injury."

ANALYSIS

In the present case, appellant began work for the employing establishment on August 14, 1999 and her injury occurred on December 14, 2001. Appellant did work full time in the employment in which she was injured during substantially the whole year prior to the injury. Also, appellant's employment was in a fixed position with the employing establishment. Therefore for calculation of appellant's pay rate section 8114(d)(1) of the Act does apply. Appellant's average annual earnings in her position as a letter carrier constitute her rate of pay.

Appellant has alleged that to fairly compensate for her loss of income, her wage loss from the Naval Reserve should be added to her Postal Service earnings for computation of pay rate. While section 8114(d)(3) references a method of determining average annual earnings if other methods of determining average annual earnings cannot be applied reasonably and fairly, (d)(3) does not apply in this case. This subsection (d)(3) of 8114 only applies when the first two subsections do not apply. In this case, subsection (d)(1) does clearly apply, as explained previously. Further, as noted in the procedure manual: "A pay rate based on full-time federal employment for at least 11 months prior to the injury may not be expanded to include the pay earned in concurrent employment, even if that employment is similar to the federal duties."[4] As appellant was a full-time, fixed employee who had worked for the Postal Service during substantially the whole year prior to her injury, her Postal Service earnings constitute her average annual earnings for purposes of computation of pay rate.

The Board also notes that appellant has not argued, nor does the record support, that her civilian employment with the employing establishment was contingent on, or a condition of, her membership in the Naval Reserve.

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4c(3)(c) (March 1996).

This case is similar to *Cecilie Barrett*[5] in which appellant argued that her deceased spouse's pay as a Colonel in the Army Reserve should be included in calculating his work-related death benefit compensation. The deceased in that case was a professor of economics at the Industrial College of the Armed Forces, Department of Defense. In that case, as in the present case, the employee was not required to be a member of the reserves in order to hold the job he was performing at the time of his injury and therefore reserve pay was not included in appellant's wage-loss computation.

In the present case, when appellant returned to her light-duty position she received the same pay as she did in the position she held when injured. As she did not have an employment-related loss of wage-earning capacity within the meaning of the Act, she is not entitled to wage-loss compensation. The Board finds that the Office properly held that appellant's wages in the military reserves are not included in calculating her rate of pay for compensation purposes.

CONCLUSION

The Office properly determined that appellant's wages for membership in the Naval Reserves are not to be included in calculating her pay rate for compensation purposes.

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[5] 26 ECAB 112 (1972); *see also Adelbert E. Broderick*, 24 ECAB 62 (1972).