U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICARDO HALL and U.S. POSTAL SERVICE,
POST OFFICE, Birmingham, Ala.

Docket No. 95-2327; Submitted on the Record;
Issued March 11, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's pay rate pursuant to 5 U.S.C. § 8114(d) based on his federal and nonfederal earnings during the year prior to his employment-related injury.

On September 26, 1986 appellant, a temporary general mechanic, was injured in a traffic accident while in the performance of duty. The Office subsequently determined that he was totally disabled and on May 18, 1989 awarded him compensation in the amount of $503.00 every 28 days. The record reflects that appellant had served a temporary 89-day appointment with the employing establishment from May 24 to August 20, 1986 and sustained injury during a second 89-day appointment which began on August 21, 1986.

In an August 26, 1992 record of telephone contact, the Office stated that appellant had inquired about wage loss from his second, nonfederal job, as a result of his employment-related injury.

On September 8, 1992 the Office notified appellant that in order to support his claim for an adjusted wage-loss determination, he would need to submit proof of earnings including copies of contracts for the "full year prior to [September 26, 1986]." The Office also stated that "a signed affirmation of earnings may be submitted if copies of the contracts are not available. Tax returns or other tax documents could be submitted to support your affirmation."

On October 1, 1992 appellant submitted 14 contract proposals for work scheduled to be performed by his home repair business from September 26, 1985 through September 16, 1986, and income earned for such work. The contracts totaled approximately $9,000.00 in value. Based on a monthly average, appellant would have averaged approximately $770.00 in monthly income based on these submissions.

On November 19, 1992 appellant submitted a copy of his federal income tax return, Form 1040, Business Profit for 1985 indicating that he earned $1,525.00 in business income during that reporting year and his 1986 return indicating that he earned $4,950.00 in business income in that reporting year. Also on November 19, 1992 appellant submitted an affidavit, stating that he "never earned less that $2,000.00 per month from … side work." On November 28, 1992 appellant submitted a different copy of his 1040 for 1985 which indicated that he had $5,849.00 in business income that year.

The Office requested an investigation by the Wage and Hour Division of the Department of Labor, and the Office received an April 21, 1993 report of the investigation noting that appellant was able to establish earnings other than those received from the employing establishment in 1985 and 1986. In a four-page report, the investigator found that all the persons "listed on the contracts submitted by [appellant] verify that the contracts were valid and appeared to be as [appellant] claimed." He noted that half the people he attempted to contact were not at home. He also noted that since all of those people with whom he had contact verified the accuracy of appellant's contracts, "the majority and most probably all of the submitted contracts [were] valid." However, he noted that the total amount of money for completion of the contracts was not sufficient to prove the amount of earnings prior to the onset of his disability which appellant claimed to be $2,000.00 per month. Based on the "dollar amounts of the contracts submitted and the income tax forms included with the file," he concluded that appellant earned approximately $550.00 per month for the year prior to his employment-related injury.[1]

On July 15, 1993 the Office, in a letter decision, awarded appellant an increase of $340.00 in his compensation amount from $591.00 to $931.00 every 28 days beginning on June 27, 1993. In addition, the Office indicated that appellant would receive a retroactive adjustment in the amount of $25,653.23 covering December 1, 1986, the date of appellant's first compensation check, through June 26, 1993. The Office noted that the calculations were based on information provided by appellant but did not include contracts and alleged amounts that were not supported by evidence.

On July 28, 1993 appellant, via facsimile transmission, submitted a copy of his 1986 income tax return which indicated that he had $4,950.00 in self-earnings. On August 25, 1993 appellant, through counsel, filed a request for reconsideration of the Office's July 15, 1993 decision establishing appellant's adjusted pay rate.

On September 8, 1993 the Office, in a decision, denied appellant's request for reconsideration on the grounds that appellant failed to submit probative evidence to support his claim for additional compensation. In an accompanying memorandum, the Office stated that its September 8, 1992 memorandum did state that appellant should "submit a signed affirmation regarding his earnings," but that it also said that appellant should "submit tax returns and other documents to support his affirmation." The Office noted that since appellant's tax documents concerning his 1985 income were internally inconsistent, that he submitted no proof of his earnings (no work sheets to substantiate his claims), and that none of the documents supported his assertion that he never earned less than $2,000.00 a month, it had referred the claim to the

[1] The date of appellant's employment-related injury in the report is incorrectly listed as September 26, 1993.

Wage and Hour Division, Department of Labor, which determined after an investigation that appellant had established an additional $550.00 income per month.

On September 12, 1993 appellant filed a request for reconsideration of the Office's September 8, 1993 decision. In support of his request for reconsideration, appellant submitted proposed work contracts, and notarized statements from people with whom he had contracted work from September 1985 through September 1986 attesting to the type of work that he performed and the amount of payment tendered to him. Appellant alleged that the amount of payment he received during the time period in question for this work was approximately $21,000.00.[2]

In a November 1, 1993 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence he submitted was insufficient to support his claim. In an accompanying memorandum, the Office stated that appellant failed to submit "appropriate documentation … to refute the July 15, 1993 decision."

On June 15, 1994 appellant sent, via facsimile transmission, a copy of his August 23, 1993 request for reconsideration. The Office, on July 21, 1994, responded to appellant's letter by advising him that it had previously denied his requests for reconsideration of Office decisions dated July 15, September 8 and November 1, 1993. The Office stated that an affidavit regarding his earnings was not a sufficient ground to adjust the rate of compensation, and offered its regret that appellant had received an incorrect understanding from the Office.

On July 25, 1994 appellant filed, via facsimile transmission, another request for reconsideration of the Office's July 21, 1994 decision.[3] In his narrative, appellant requested that the Office disregard his prior 1985 tax return which indicated that he had received $15,505.00 in income. In support of his request, appellant submitted new evidence consisting of a September 1, 1993 letter from the Internal Revenue Service (IRS) indicating that it needed additional information to support appellant's claimed income listed on his 1985 return, an April 17, 1993 letter from the IRS indicating that the statute of limitations for legally collecting taxes based on his 1986 income tax return had expired on April 15, 1989, a December 27, 1993 letter from the IRS indicating that he owed $632.03 based on his 1985 tax return, a copy of the canceled check in satisfaction of the 1985 tax obligation, a copy of appellant's 1985 and 1986 tax return cover sheet, and a copy of appellant's 1985 social security self-employment tax form.

In a decision dated July 27, 1994, the Office denied modification of the prior decision, after merit review. The Office noted that the IRS letters failed to substantiate appellant's self-employment income, noting that the 1985 IRS tax form enclosure was only the front page of his return, that the 1986 letter failed to address appellant's income for that year, and that copies of checks paid in satisfaction of appellant's past taxes were not relevant regarding his earned income for those years.

[2] Appellant also submitted statements that certain work projects were completed in September 1985 but these assignments may have been finished before September 26, 1985.

[3] The Board notes that appellant's request for reconsideration is dated April 26, 1994; however, the record copy is time stamped as received by the Office on July 25, 1994.

The Office received via facsimile transmission on October 19, 1994 a copy of appellant's 1986 tax return, Form 1040x, which reflected an income of $14,397.00 and an indebtedness to the IRS of $1,551.00.

On November 2, 1994 appellant filed a petition for reconsideration on the Office's July 27, 1994 decision. Appellant attached copies of his 1985 and 1986 contracts and notarized statements in support of his earned income assertions for those years.

On December 14, 1994 the Office denied appellant's application for review on the grounds that the information he had submitted in support of his petition had been previously considered by the Office and thus contained no new and relevant evidence. The Office also found that the petition did not raise substantive legal questions.

On December 21, 1994 appellant filed a request for reconsideration and submitted a December 5, 1994 letter from the IRS. That letter informed appellant that his 1985 income tax liability for business income had been corrected which resulted in an increase in his tax liability of $1,336.00, and that he also owed a late filing fee of $274.50 and interest of $3,628.24. The Office denied appellant's application for review on January 31, 1995.

The Board finds that the case is not in posture for decision.

Sections 8114(d)(1) and (2) of the Federal Employees' Compensation Act[4] provide methodology for computation of pay rate for compensation purposes, by determination of average annual earnings at the time of injury. Sections 8114(d)(1) and (2) of the Act specify methods of computation of pay for employees who worked in the employment for substantially the whole year prior to the date of injury and for employees who did not work the majority of the preceding year, but for whom the position would be available for a substantial portion of the following year. Section 8114(d)(3) of the Act provides an alternative method for determination of pay to be used for compensation purposes when the methods provided in the foregoing sections of the Act cannot be applied reasonably and fairly.[5]

In this case, appellant did not work in his temporary employment with the employing establishment substantially for the whole year prior to his employment injury and was not in a position that would have been available for substantially the whole year following. Furthermore, appellant did have concurrent private employment for the year preceding his injury which the

[4] 5 U.S.C. §§ 8114(d)(1) and (2).

[5] 5 U.S.C. § 8114(d)(3).

Office has determined to be similar in nature to his temporary federal employment. Appellant's pay rate therefore would be computed under the third alternative of section 8114(d) which states:

> "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 the 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."

The Board has previously held that the language in section 8114(d)(3) provides that "earnings from concurrent employments [would] be combined in determining the pay rate for compensation purposes only if the concurrent employments were related."[6] The Office's Procedure Manual explains that concurrent employment cannot be included in determinations made under subsection 8114(d)(1) and (2); however, it can be included in those determinations made under subsection 8114(d)(3). Therefore, for example, under (1) 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 on concurrent employment, even if that employment is similar to the federal duties. Likewise, under (2) a pay rate based on career seasonal employment may not be expanded to include the pay earned "off season."[7] The Office properly determined in this case that as appellant had not worked in his federal employment for substantially the whole year prior to injury and as the position would not have been available to appellant for substantially the whole year following the injury, that appellant's pay rate should be determined pursuant to subsection 8114(d)(3) with inclusion of earnings from concurrent employment.

In this case, the Office retroactively adjusted appellant's pay rate based on the results of a Department of Labor investigation that found that appellant had earned an average of $550.00 a month as a private home repair contractor in the year prior to the work-related injury. Although the investigator stated that he based his conclusion on the "dollar estimates of the contracts submitted and the income tax forms submitted with the file," the record contains neither copies of the contracts, tax returns or work sheets which the investigator relied on to reach his conclusion.

The Board does concur in the Office's finding that appellant's tax documents for 1985 and 1986, which were prepared in 1993, were inconsistent in nature and were therefore of limited probative value.

On the other hand, appellant submitted copies of signed proposals and notarized contracts from his previous employers for the year prior to his employment-related injury which appellant alleges totaled over $20,000.00 in value, and represented approximately $1,600.00 in monthly

[6] *See Michael A. Wittmen*, 43 ECAB 800 (1992).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4.

income. The Office refused to consider the additional contracts and notarized statements submitted by appellant from his employers. The Office's Procedure Manual discusses the type of evidence which will be considered in determining pay rate. The section of the manual entitled *Sources of Evidence to Establish Pay Rate* states:

> "Evidence is not required from any other source where the pay rate is determined on the basis of the employee's actual daily wage or the provisions of 5 U.S.C. § 8114(d)(1) or (d)(2). Where the provision of 5 U.S.C. 8114(d)(3) or (d)(4) are used in determining the pay rate, it may be necessary to obtain information about the employee's work and earnings in private employment from the private employers or the Social Security Administration. For such purpose, the [claims examiner] may use one or more of the following: (a) Forms CA-1003, 1026, 1027, 1030, 1036; or (b) an appropriate dictated letter."[8]

Regarding discrepancies found in pay rate documentation, the procedure manual further states that "All material discrepancies which are not otherwise explained in the record must be adequately clarified. This can be done by the release of Form CA-1003, a narrative letter, or a telephone call followed by written confirmation."[9] The Office did not seek to clarify the discrepancy between the contract amounts investigated by the Wage and Hour Division in April 1993 and the subsequent documentation appellant submitted from his employers in September 1993. While appellant continues to assert that the Office should accept his own notarized statement of earnings during the time period in question, the Office's procedures require that the Office clarify any discrepancies by seeking additional information from the sources of income.

Given the significant difference in monthly income asserted and supported by appellant with signed contracts and notarized statements prepared by his private employers, and the amount found by the Office based upon the investigation by the Wage and Hour Division, based upon contracts that are not of record, the Board finds that it cannot independently review appellant's earnings for the year prior to injury to determine the proper pay rate for compensation purposes. The case will therefore be remanded for further development to clarify the discrepancy in earnings reported by appellant's private employers. After further development as it may find necessary, the Office should issue a *de novo* decision.

[8] *Supra* at Chapter 2.900.3(a).

[9] *Supra* at Chapter 2.900.3(b).

The decisions of the Office of Workers' Compensation Programs dated January 31, 1995 and December 14 and July 27, 1994 are hereby set aside and the case remanded for further action as set forth in this decision.

Dated, Washington, D.C.
March 11, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member