

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALTER L. NEITZEL and DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS, Washington, D.C.

*Docket No. 98-1442; Submitted on the Record;
Issued April 26, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

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

On October 15, 1996 appellant, then a 58-year-old field representative, sustained an employment-related neck strain and left shoulder impingement. He received continuation of pay during the period October 16 to November 29, 1996 and received compensation for total disability during the period January 21 to March 30, 1997.¹ Appellant returned to part-time work beginning April 1, 1997 and continued to receive compensation.

By decision dated March 11, 1998, the Office provided a formal decision regarding appellant's pay rate for compensation purposes. The Office noted that it had been determined that he was a permanent part-time worker and that to calculate the weekly earnings for such workers the Office uses the annual earnings, including night differential, for the year prior to the injury in question.² The Office indicated that appellant's earnings for the year prior to his October 15, 1996 injury divided by 52 yielded the weekly pay rate for compensation purposes, *i.e.*, appellant's earnings of \$11,972.82³ divided by 52 yielded a weekly compensation rate of \$230.25.⁴

¹ Appellant applied for leave buy back for leave used intermittently between December 1996 and January 1997.

² Office procedure provides that night or shift differential is included in computing an employee's pay rate; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7b(1) (December 1995).

³ Appellant's night differential of \$62.98 was included in this figure.

⁴ The Office also indicated that it did not use a pay rate equivalent to that of a full-time worker in the same

By letters dated December 17, 1997, the Office had instructed the employing establishment and appellant to complete portions of a Form CA-1030. The Office received information from the employing establishment, including a Form CA-1030, indicating that appellant was a permanent part-time flexible employee who worked 27 weeks in the year prior to his October 15, 1996 injury; it noted that appellant was “employed” the entire year but only worked as assignments were available. The employing establishment did not complete the portion of the form requesting information regarding the annual earnings of another employee with the same kind of appointment and working in a job with the same or similar duties. The employing establishment provided information regarding appellant’s earnings during that period. Appellant did not respond to the Office’s request.

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 he 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.⁵ 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 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 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.”⁶

position because appellant had not shown a “demonstrated ability to work full time.”

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

⁶ *Id.*

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

The Board finds that the Office did not adequately apply the standards of the section 8114(d) of the Act in determining appellant’s pay rate and therefore the case should be remanded to the Office for further evidentiary development.

In the present case, the evidence shows that appellant did not work in the employment in which he was injured substantially for the entire year immediately preceding the injury in that he only worked for 27 weeks in the year prior to his October 15, 1996⁷ and that he would not have worked in the employment for substantially a whole year, except for the injury.⁸

Given the inapplicability of sections 8114(d)(1) and (2) of the Act, the Office should have applied section 8114(d)(3) to determine appellant’s pay rate for compensation purposes.⁹ It does not appear, however, that the Office properly applied section 8114(d)(3) in its entirety. The Office did not adequately consider the factors delineated therein, including appellant’s previous earnings in federal employment; 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 prior nonfederal employment. For example, the Office did not adequately consider whether appellant’s pay rate should be based on 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.¹⁰ The Office did not fully comply with

⁷ The phrase “substantially for the entire year” has been interpreted to mean at least 11 months; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(a) (December 1995).

⁸ The employing establishment responded “yes” in response to a question regarding whether the job appellant held on the date of injury would have afforded employment for 11 months had appellant not been injured. However, the Office appears to have misinterpreted this question to mean that the 11-month period could include periods when appellant was “employed” but did not actually work.

⁹ *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).

¹⁰ The employing establishment’s failure to complete the portion of the CA-1030 requesting this information appears to have been inadvertent and should not be interpreted as a determination that no such class of persons

its procedural requirements to obtain adequate information concerning the factors delineated in section 8114(d) of the Act.¹¹

In addition to the fact that the Office did not adequately consider all the relevant information in deriving a figure for appellant's average annual earnings, it did not comply with the last sentence of 8114(d). When the Office calculated appellant's average annual earnings based on information it received from the employing establishment regarding actual earnings in the year prior to injury, it apparently did not compare this figure for average annual earnings to that which would be obtained from the formula delineated in the last sentence of 8114(d). This sentence dictates that the greater of the two figures should be used to determine a claimant's pay rate for compensation purposes.¹²

Given that the Office failed to properly consider the relevant factors of section 8114(d) of the Act in determining appellant's pay rate for compensation purposes, the case should be remanded to the Office for further evidentiary development to be followed by an appropriate decision.¹³

exists.

¹¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c)(3) (March 1996). Office procedure provides, *inter alia*, that information should be obtained from the employing establishment regarding the earnings of the federal employee working the greatest number of hours during the year prior to the injury in the same or most similar class and in the same or neighboring locality. *Id.* at Chapter 2.900.4(c)(3)(b). The information concerning the claimant's prior nonfederal employment is obtained from the claimant. *Id.* at Chapter 2.900.4(c)(3)(c).

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c)(4), (5) (March 1996).

¹³ See *Robin Bogue*, 46 ECAB 488, 490-91 (1995); *Estelle J. Boimah*, 42 ECAB 871, 881-82 (1991). It also remains unclear whether the Office adequately considered whether appellant had other employment in the year prior to his injury. Where a part-time or short-term employee has demonstrated the ability to work full time, the pay rate of an employee working full time in the job held by the injured employee should be used to compute compensation. In some cases, the Board has found that full-time work performed in another job during the year prior to an injury demonstrated an ability to perform full-time work in the job in which the injury occurred. Therefore, a claimant who can establish that he or she worked for substantially the entire year prior to the injury is entitled to receive compensation on the same basis as a regular employee working in the same type of job; see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c)(1) (December 1995).

The decision of the Office of Workers' Compensation Programs dated March 11, 1998 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
April 26, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member