

**United States Department of Labor
Employees' Compensation Appeals Board**

J.G., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
BAY PINES MEDICAL CENTER,
Bay Pines, FL, Employer**

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**Docket No. 05-943
Issued: May 23, 2007**

Appearances:

*Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 15, 2005 appellant filed a timely appeal from a February 3, 2005 decision of the Office of Workers' Compensation Programs affirming her pay rate for compensation purposes. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly determined that appellant's wages from concurrent, similar private-sector employment are not to be included in calculating her pay rate for compensation purposes.

FACTUAL HISTORY

The Office accepted that on May 17, 2001 appellant, then a 53-year-old intensive care nurse, sustained a cervical strain while restraining an unruly patient. She began full-time work as a nurse at the employing establishment on January 19, 1999, in a fixed position within the

employing establishment at a fixed rate of pay. Appellant stopped work shortly after the May 17, 2001 injury. She received wage-loss compensation on the daily rolls for total disability beginning on July 16, 2001. The Office calculated appellant's pay rate for compensation purposes based on her full-time earnings as a nurse at the employing establishment, with an effective date of June 1, 2001.

In a February 21, 2002 letter, appellant requested reimbursement for her inability to work her second job as a private-sector intensive care nurse for StarMed Health Personnel Inc. She submitted pay stubs showing earnings from October 17, 2000 to May 13, 2001.

In a March 4, 2003 letter, the Office advised appellant that her concurrent private-sector employment did not entitle her to an expanded pay rate. The Office explained that, according to 5 U.S.C. § 8114, a full-time federal employee who has been "employed for 11 months prior to his/her approved injury [was] not entitled to an expanded pay rate which would include any concurrent employment." The Office found that, as appellant was employed full time at the employing establishment for more than 11 months prior to the May 17, 2001 injury, she was "not entitled to reimbursement of lost concurrent" private-sector employment.

Appellant returned to work in a part-time light-duty position on August 15, 2002. She received wage-loss compensation for intermittent absences through April 2004 and continuing. The Office continued to base appellant's wage-loss compensation on her earnings at the employing establishment.

In an August 19, 2003 letter, appellant's attorney representative asserted that she was entitled to an expanded pay rate for her concurrent, similar private-sector employment. On November 21, 2003 appellant filed a claim for compensation for "concurrent employment wage loss" from May 17, 2001 onward.

By decision dated December 9, 2003, the Office denied appellant's request for an expanded pay rate on the grounds that she performed her federal job for more than 11 months prior to the accepted May 17, 2001 injury. The Office found that appellant's pay rate was properly calculated under section 8114 of the Federal Employees' Compensation Act.

Appellant requested an oral hearing, held December 1, 2004. At the hearing, she stated that she worked concurrently as a nurse in the private sector and at the employing establishment for more than one year prior to the May 17, 2001 injury. Appellant did not resume her private-sector employment after the May 17, 2001 injury. She submitted federal tax documents and pay stubs showing that she earned \$3,981.00 in 2000 and \$4,239.44 in 2001 as a private-sector nurse.

By decision dated and finalized February 3, 2005, an Office hearing representative affirmed the December 3, 2003 decision. The hearing representative found that appellant's "employment with StarMed [Health Personnel, Inc] [was] both concurrent and similar" to her federal employment. However, according to the Office's procedures, "a pay rate based on full-time employment for at least 11 months prior to the injury may *not* be expanded to include the pay earned in concurrent employment, even if such employment is similar [Emphasis in original.]"

LEGAL PRECEDENT

The terms of the Act¹ 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 or to award benefits under any terms other than those of 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, sections 8114(d)(1) and (2) of the Act provide 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)(1) of the Act provides, in pertinent part, that average annual earnings are determined as follows: "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." 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.⁴

ANALYSIS

Appellant worked at the employing establishment as a full-time nurse beginning on January 19, 1999, at a fixed rate of pay. The Office accepted that she sustained a cervical strain on May 17, 2001. Appellant received wage-loss compensation for periods of total and partial disability from July 6, 2001 onward. As she worked full time at the employing establishment for more than the whole year prior to the May 17, 2001 injury, the Office computed her compensation pay rate using her actual earnings. Appellant contended that she was entitled to an expanded pay rate as she worked as an intensive care nurse in the private sector concurrently with her federal employment. By a December 9, 2003 decision affirmed on February 3, 2005, the Office denied appellant's request for an expanded pay rate as she had worked full time in her federal position for more than one year prior to the accepted May 17, 2001 injury.

The Board finds that the Office properly computed appellant's pay rate for compensation purposes. Appellant worked full time in the date-of-injury position during substantially the whole year before the injury. Her 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.

¹ 5 U.S.C. § 8114(d)(1), (2).

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

³ 5 U.S.C. § 8114(d)(1), (2).

⁴ *Id.* at § 8114(d)(3).

Appellant alleged that, to fairly compensate for her loss of income, the Office should include her earnings as a private sector nurse in computing her pay rate. However, in this case, subsection (d)(1) clearly applies, as explained above. Further, the Office's procedures provide: "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."⁵ Appellant was a full time, fixed employee who worked for the employing establishment during substantially the whole year prior to her injury. Her employing establishment earnings, therefore, constitute her average annual earnings for purposes of computing her pay rate. Thus, the Office's February 3, 2005 decision is proper under the law and facts of this case.⁶

CONCLUSION

The Board finds that the Office properly determined that appellant's wages from concurrent, similar private-sector employment are not to be included in calculating her pay rate for compensation purposes.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(a)(3)(a) (April 2002).

⁶ The Office's finding of similar private-sector employment distinguishes the present case from *Irwin E. Goldman*, 23 ECAB 6 (1971). *Pasqual Torna*, 35 ECAB 1110 (1984); and *Clifford F. Russell*, 37 ECAB 567 (1986), wherein each claimant's concurrent private-sector employment was found to be dissimilar from his federal employment. The present case may also be distinguished from *Daniel Shaw*, 50 ECAB 339 (1999). In *Shaw*, the Board found that transcript fees the employee received under employing establishment regulations constituted consideration for federal employment and must be included in his wage-basis calculation. However, the claimant did not have similar, concurrent private-sector employment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 3, 2005 is affirmed.

Issued: May 23, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board