United States Department of Labor
Employees' Compensation Appeals Board

H.S., Appellant	)	
and	)	**Docket No. 06-1774**
	)	**Issued: May 10, 2007**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Hilo, HI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 28, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 31, 2006, with respect to his pay rate for compensation purposes. 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 the Office properly determined appellant's pay rate for compensation purposes.

FACTUAL HISTORY

Appellant filed a traumatic injury claim (Form CA-1) on February 27, 2005 alleging that he sustained a left knee injury in the performance of duty on January 1, 2005. He indicated that he worked as a security screener while handling heavy luggage. The reverse of the claim form

indicated that appellant worked from 1:15 p.m. until 8:00 p.m., five days a week, with Sunday a scheduled workday.

The Office accepted the claim for strain of the left medial collateral ligament and left medial meniscus tear. Appellant underwent left knee surgery on August 17, 2005 and stopped working. He began receiving compensation for wage loss as of August 17, 2005, with a pay rate of $536.40 per week. The record indicates that appellant returned to work at five hours per day on September 18, 2005.

A memorandum of telephone call dated December 28, 2005 reported that appellant stated that he was hired as a part-time employee, but worked 40 hours per week for the first three months during a training period. According to the memorandum, he was injured approximately two weeks after his employment began. By decision dated February 23, 2006, the Office found that appellant was not entitled to a pay rate based on full-time employment. The Office determined the date disability began was August 17, 2005.

Appellant requested reconsideration on March 3, 2006. The evidence of record included a memorandum from the employing establishment dated May 25, 2006, stating that appellant was hired at 32 hours per week. At the time of injury on January 1, 2005, appellant was in training, at 8 hours a day or 40 hours per week. An SF-50 (notification of personnel action) dated December 12, 2004 indicated that appellant was hired at a base pay of $23,600.00 per year. The form indicated that the appointment was subject to completion of a two-year trial period. An SF-50 dated January 9, 2005 stated that the base pay was increased to $24,190.00 per year.

By decision dated May 31, 2006, the Office reviewed the case on its merits. The Office stated that the pay rate on the date disability began was based on a base pay rate of $11.59 per hour at 32 hours per week, plus night differential and Sunday premium. According to the Office, "Total weekly pay rate = $536.40 @ 75 percent = $402.30/32 hrs a week = $12.57 per hour." The Office then stated that the Sunday premium was in error, as $2.90 had been multiplied by 32 hours, while appellant was only entitled to 6.25 hours of Sunday premium. With respect to the date of injury, the Office stated his pay rate was slightly higher because he was working 40 hours per week during training, but his "hourly wage is reduced." The Office stated: "Total weekly pay rate = $568.59 @ 75 percent = $426.44/40 hours per week = $10.66 per hour." In concluding the decision, the Office stated that appellant was entitled to a date-of-injury pay rate but he was not entitled to additional compensation because he was overpaid by $29.07.

LEGAL PRECEDENT

Under 5 U.S.C. § 8101(2), "'monthly pay' means the monthly pay at the time of injury, or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.…" The Office's implementing regulation state: "*Pay rate for compensation purposes* means the employee's pay, as determined under 5 U.S.C. § 8114.…"[1] (Emphasis in the original.)

[1] 20 C.F.R. § 10.5(s) (1999).

Section 8114(d) of the Federal Employees' Compensation 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 --
>
> > "(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.
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> "(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.
>
> "(3) 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 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."

ANALYSIS

In the present case, the issue is the pay rate for compensation purposes. As noted at section 10.5(s) of the implementing regulation, the relevant statutory authority is 5 U.S.C. § 8114. The Office did not cite to section 8114 or explain how it calculated the pay rate for

compensation purposes in accord with section 8114. In the May 31, 2006 decision, the Office found the date of injury (January 1, 2005) resulted in a higher pay rate than the date disability began (August 17, 2005), based apparently on appellant working 40 hours per week during a training period. Despite this finding, the Office then appeared to base the compensation owed by using the date-of-injury pay rate, indicating it would be less than the pay rate on the date disability began. None of these calculations were made with proper reference to 5 U.S.C. § 8114 or the relevant sections of the implementing regulation.

The case will be remanded to the Office for a proper determination on the pay rate issue presented. The Office should clearly explain how 5 U.S.C. § 8114 and 5 U.S.C. § 8101(2) were applied in this case. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Office did not properly determine the pay rate for compensation purposes in accord with 5 U.S.C. § 8114 and the case will be remanded for further development.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 31, 2006 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: May 10, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board