United States Department of Labor
Employees' Compensation Appeals Board

O.W., Appellant	)	
and	)	**Docket No. 08-1296**
	)	**Issued: November 21, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Woodbridge, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 31, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 13, 2008 regarding his pay rate. 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

The Office accepted that appellant sustained right ankle and foot sprains in the performance of duty on January 9, 1999. The reverse of the claim form stated that appellant was a part-time flexible carrier working two to four hours per day. A claim for compensation (Form CA-7) dated February 19, 1999 reported an hourly wage of $13.61 and stated that appellant had worked 25 hours per week. The employing establishment checked a box "no" as to whether

appellant had worked for the prior 11 months, and "no" as to whether the position would have afforded employment for the prior 11 months if not for the injury.

By decision dated July 20, 2005, the Office issued a schedule award for a 53 percent permanent impairment to the right lower extremity. The period of the award was February 12, 2002 to January 15, 2005. The pay rate was $340.25 per week, which represents an hourly wage of $13.61 at 25 hours per week.

By letter dated November 28, 2005, appellant requested reconsideration of the claim on the pay rate issue. His representative indicated that appellant worked 40 hours per week prior to his injury. Appellant submitted a pay stub from pay period 21 of 1998 that showed he worked 40 hours one week, and 36 hours another week of the pay period.

By decision dated March 9, 2006, the Office denied modification of the July 20, 2005 decision. It found appellant had not furnished enough information regarding his allegation of an incorrect pay rate.

Appellant requested an appeal before the Board. By order dated April 17, 2007, the Board remanded the case as the Office had not timely submitted the case record.[1] By decision dated March 13, 2008, the Office denied modification, mailing the same findings as provided in the March 9, 2006 decision.

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 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater.…" Office regulations state that "pay rate for compensation purposes" means the employee's pay as determined under 5 U.S.C. § 8114.[2]

5 U.S.C. § 8114(d) 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

[1] Docket No. 06-1955 (issued April 17, 2007).

[2] 20 C.F.R. § 10.5(s).

basis of a 6-day workweek, 280 if employed on the basis of a 5½ -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 as um 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 federal 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 that 150 times the average daily wage the employee earned in the employment during the days employed within 1 year immediately preceding his injury."

ANALYSIS

Appellant has raised the issue of whether his pay rate for compensation purposes was properly determined. The Office found appellant's pay rate as of January 9, 1999, the date of injury and the date disability began, was $340.25 per week. This represented a pay rate based on $13.61 per hour at 25 hours per week. The employing establishment indicated on a February 19, 1999 claim for compensation that appellant was working 25 hours per week. Appellant, however, alleged that he worked more than 25 hours per week and submitted a pay stub from 1998.

As noted, the issue must be properly determined pursuant to 5 U.S.C. § 8114. The Office did not explain how the pay rate was calculated under the relevant provisions of the Federal Employees Compensation Act. The record is not clear how long appellant was working in the position or how many hours he worked. If he did not work in the position for 11 months prior to January 9, 1999, and the position would not have afforded employment for the preceding 11 months, then 5 U.S.C. § 8114(d)(3) would apply. The Office would have to determine pay rate taking into account the relevant factors discussed in that section.

The Office must secure relevant evidence from the employing establishment and issue a decision with proper findings on the pay rate issue.[3] The case will be remanded to the Office for additional development and a clear explanation of how the pay rate for compensation purposes

[3] *See Paul M. Colosi*, 56 ECAB 294 (2005).

was determined under 5 U.S.C. § 8114. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The case will be remanded for a proper decision as to pay rate for compensation purposes as determined by the relevant provisions of 5 U.S.C. § 8114.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 13, 2008 is set aside and the case remanded for further action consistent with this decision.

Issued: November 21, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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