United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 09-1684**
	)	**Issued: April 12, 2010**
DEPARTMENT OF AGRICULTURE, U.S. FOREST SERVICE, TONASKET RANGER DISTRICT, Tonasket, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 12, 2009 appellant filed a timely appeal from a May 13, 2009 decision of the Office of Workers' Compensation Programs that found that he received an overpayment in compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant received an overpayment in compensation in the amount of $733.23 had been created for the period December 16, 2008 to January 16, 2009 because appellant's compensation was based on an incorrect pay rate; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On January 5, 2006 appellant, then a 31-year-old temporary, seasonal forestry technician, sustained an employment-related right knee and leg sprain when his foot slipped between two

logs.[1] He continued to work. An August 29, 2008 magnetic resonance imaging (MRI) scan of the right knee demonstrated an old medial collateral ligament injury and on October 31, 2008 Dr. R. Craig Brownlee, an attending Board-certified orthopedic surgeon, recommended arthroscopic surgery. By report dated November 24, 2008, an Office medical adviser advised that the recommended surgery was medically appropriate and necessary, and the procedure was authorized on December 1, 2008. Dr. Brownlee performed capsular debridement of the lateral gutter of the right knee on December 16, 2008, and appellant filed CA-7 forms, claims for disability, beginning that day. An employing establishment human resource specialist advised that his date-of-injury pay rate was based on Grade 4, Step 1 or $25,338.00 per year, and that the pay rate on the date he stopped work was based on Grade 5, Step 1 or $14.24 per hour.

By letter dated January 13, 2009, the Office asked that the employing establishment provide pay rate information, noting that appellant had apparently not worked for a full year and/or on a full-time basis. Its memorandum dated January 13, 2009 indicated that appellant would be paid compensation on a temporary basis using the 150 formula or $410.77, noting that appellant did not work 11 months prior to the injury and the position would not have afforded employment for 11 months regardless of the injury.[2] Appellant was paid augmented monetary compensation at that rate beginning on December 16, 2008. On January 16, 2009 a presale forester at the employing establishment informed the Office that on the date of injury appellant was a temporary seasonal employee who worked four 10-hour days weekly, and that there was an expectation of recurrent employment in future seasons, with a weekly pay rate of $568.40. The Office adjusted his pay rate for compensation based on that rate.

A notification of personnel action, effective April 28, 2006, indicated that appellant was appointed as a temporary seasonal employee with an annual base pay including locality adjustment of $25,338.00. An April 1, 2007 notification of personnel action provided an annual base pay, including locality adjustment, of $28,862.00. Appellant continued to submit claims for compensation[3] and he received compensation based on a $568.40 weekly pay rate. On February 9, 2009 an employing establishment human resources specialist advised that on the date of injury appellant was a full-time temporary seasonal employee with no expectation of employment in subsequent seasons, that in 2008 he worked 160 days or 1280 hours at an annual rate of $18,227.00. An attached wage-loss worksheet indicated that appellant worked four 10-hour days weekly for 32 weeks, receiving a base pay of $1,139.20 every two weeks. An Office memorandum dated February 11, 2009 utilized the pay rate information provided by the employing establishment on February 9, 2009 and, found that, under the 150 formula, appellant's pay rate for compensation purposes would be $328.61.[4] The Office also determined that dividing appellant's annual earnings of $18,227.00 by 52 yielded a weekly rate of $350.52. Beginning January 17, 2009, appellant was paid compensation based on a weekly pay rate of $350.52.

[1] The injury occurred when appellant was detailed to Mississippi to work in Hurricane Katrina clean-up efforts.

[2] The Office calculated the weekly pay rate based on an hourly rate of $14.24 times 10 hours to equal $142.40, the average daily wage, times 150 divided by 52 to equal $410.77, the weekly pay rate for compensation purposes.

[3] On January 19, 2009 he submitted a direct deposit form.

[4] The Office noted that appellant earned $18,227.00 for 160 days work, yielding average daily earnings of $113.92 which, when multiplied by 150 and divided by 52 yielded $328.61. The Board notes that appellant actually worked one hundred and twenty-eight 10-hour days, the equivalent of one hundred and sixty 8-hour days.

An overpayment worksheet advised that for the period December 16, 2008 to January 16, 2009 appellant was paid $2,046.24 in compensation when he should have been paid $1,313.00, yielding an overpayment in compensation of $733.23. Appellant returned to work on March 16, 2009.[5] On March 19, 2009 the Office issued a preliminary determination that an overpayment in compensation in the amount of $733.23 had been created because appellant was paid compensation based on an incorrect pay rate for compensation purposes for the period December 16, 2008 to January 16, 2009. The Office provided calculations of the overpayment and found appellant not at fault. Appellant was provided an overpayment questionnaire, instructed regarding appropriate responses to the preliminary finding, and given 30 days to respond. The preliminary determination was mailed to appellant's address of record.[6] Appellant did not respond, and by decision dated May 13, 2009, the Office finalized the overpayment and requested repayment in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act[7] provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[8] When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.[9]

Section 8101(4) defines "monthly pay" for purposes of computing compensation benefits as follows: 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.[10]

Section 8114(d)(3) of the Act provides that, if an employee did not work substantially the whole year immediately preceding the injury nor was employed in a position that would have afforded employment for substantially a whole year, 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 federal 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

[5] By report dated March 6, 2009, Dr. Brownlee advised that appellant could return to full-duty without restrictions on March 16, 2009.

[6] The Office advised that the weekly pay for compensation purposes at the augmented rate under the 150 formula should have been $262.89 but that, as the compensation rate fell below the minimum rate of pay to be used for compensation under the Act, the $262.89 was raised to the minimum of $276.42.

[7] 5 U.S.C. §§ 8101-8193.

[8] *Id*. at § 8102(a).

[9] *Id.* at § 8129(a).

[10] *Id.* § 8104(4); *E.G.*, 59 ECAB ___ (Docket No. 07-1562, issued July 2, 2008).

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 one year immediately preceding his injury.[11] In determining a pay rate under section 8114(d)(3), Office procedures provide that the Office should determine earnings by taking the highest of the earnings of the employee in the year prior to the injury, the earnings of a similarly situated employee, or the pay rate determined by the 150 times formula. In considering earnings of a similarly situated employee, the procedures refer to the earnings of another federal employee working the greatest number of hours during the year prior to the injury in the same or most similar class, in the same or neighboring locality, as obtained from the employing establishment or another federal agency in the same or neighboring locality. "Same or most similar class" refers both to the kind of work performed and the kind of appointment held. If the injured employee's term of employment is less than a year, the earnings of a similarly-situated employee should be prorated to represent the same term of employment. If the "same or most similar class" contains more than one employee, the employing establishment should be asked to state the earnings of the employee who worked the greatest number of hours and therefore had the highest earnings.[12]

ANALYSIS -- ISSUE 1

The Board finds this case is not in posture for decision regarding whether an overpayment in compensation was created and, if so, the amount of overpayment. Appellant injured his left knee at work on January 5, 2006. He, however, did not stop work until December 16, 2008 when he underwent corrective knee surgery. Thus, appellant's pay rate would be based on his monthly pay at the time the disability began.[13]

A pay rate determination must be made in accordance with the provisions of section 8114 of the Act. Appellant, a temporary seasonal employee, did not work substantially the whole year immediately preceding January 5, 2006, the date his disability began. The record also supports that the position in which he was employed at the time of this injury would not have afforded him employment for substantially the whole year. Thus sections 8114(d)(1) and (2) of the Act do not apply. His pay rate must therefore be determined in accordance with section 8114(d)(3).[14]

To properly determine pay rate under section 8114(d)(3), Office procedures provide that the Office should determine earnings by taking the highest of the earnings of the employee in the year prior to the injury, the earnings of a similarly situated employee, or the pay rate determined by the 150 times formula. In this case, the Office only used the latter provision without making a determination of which of the three provisions demonstrated the highest earnings. The record includes an employing establishment worksheet showing appellant's earnings for 32 weeks in 2008 at a weekly pay of $569.60. The record does not show that the Office attempted to determine the earnings of a similarly situated employee, and under the 150 times formula, a

[11] 5 U.S.C. § 8114(d)(3); *H.S.*, 58 ECAB 511 (2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4c (5) (April 2002).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(a)(3) (April 2002); *see L.C.*, 60 ECAB ___ (Docket No. 08-224, issued December 23, 2008).

[13] *Supra* note 10.

[14] *Supra* note 11.

weekly pay rate for compensation purposes of $276.42 was found.[15] The case will therefore be remanded to the Office to determine which provision of section 8114(d)(3) would afford appellant the highest earnings on which to base his pay rate for compensation purposes. After such further development, the Office shall determine whether an overpayment or underpayment in compensation was created and issue an appropriate decision.[16]

CONCLUSION

The Board finds this case is not in posture for decision because the Office did not make adequate findings in accordance with section 8114(d)(3) of the Act in determining appellant's pay rate for compensation purposes.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 13, 2009 be set aside and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: April 12, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[15] *Supra* note 6.

[16] In light of the Board's determination regarding issue 1, a determination regarding issue 2 is premature.