

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CARLA D. ALLEN and DEPARTMENT OF THE NAVY,  
PACIFIC MISSILE TEST CENTER, Point Mugu, Calif.

*Docket No. 96-306; Submitted on the Record;  
Issued November 6, 1998*

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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 determined that appellant's compensation should be based on her actual monthly pay at the time compensable disability recurred on March 4, 1994.

On March 10, 1986 appellant, a secretary (typing), sustained an injury in the performance of duty. The Office accepted her claim for sprain of the scapular fixators, herniated nucleus pulposus at C5-6, left radiculopathy, anterior discectomy with inner body fusion at C5-6, left carpal tunnel syndrome and left carpal tunnel release.

Appellant was totally disabled following her injury of March 10, 1986. On August 11, 1986 she returned to full-time duty as a secretary (typing) with a restriction of intermediate typing not to exceed an accumulative total of one and a half hours per day. She sustained recurrences of total disability on September 9, 1986, August 26, 1987 and February 27, 1989. She returned to light duty for 20 hours per week on June 12, 1989. Appellant then sustained another recurrence of total disability on March 4, 1994.

When appellant last became totally disabled on March 4, 1994, the Office paid compensation based on her date-of-injury pay rate, which was \$15,830.00 per year. The Office contacted the employing establishment to determine the current pay rate for appellant's date-of-injury position, which was \$22,617.00 per year as of March 5, 1994. Appellant sought to have her compensation based on her recurrent pay rate, which was \$36,313.00 per year for a full-time employee, \$18,156.50 per year for an employee working 20 hours a week.

In a decision dated October 4, 1994, the Office determined that appellant's compensation should be based on her date-of-injury pay rate because she had not returned to full-time duty for any six-month period following her date of injury. On November 16, 1994, however, the Office determined that appellant's compensation should be based on her recurrent pay rate as of March 4, 1994 and, specifically, on the wages she actually received working 20 hours a week.

In a decision dated August 24, 1995, the Office determined that appellant was entitled to compensation based on her recurrent pay rate as of March 4, 1994. The Office reasoned that appellant did return to full-time work and was therefore eligible for a recurrent pay rate because her earnings on March 4, 1994 were greater than her earnings on the date of injury.

The Board finds that the Office properly determined that appellant's compensation should be based on her actual monthly pay at the time compensable disability recurred on March 4, 1994.

Section 8105(a) of the Federal Employees' Compensation Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."<sup>1</sup>

Section 8101(4) of the Act defines "monthly pay" as "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...."<sup>2</sup>

With respect to the phrase "regular full-time employment" in section 8101(4), Chapter 2.900.5.a(4)(a) of the Office's procedure manual provides that "regular" means work that is established, rather than fictitious, odd-lot or sheltered.<sup>3</sup> In *Eltore D. Chinchillo*,<sup>4</sup> the Board defined what constitutes "regular" employment under section 8101(4) of the Act. In remanding the case to the Office for further development on the issue of whether the employee's return was to "regular" employment, the Board stated:

"It is not clear from the evidence whether appellant, during the period in question, was performing the duties of a regular position which would have been performed by another employee if appellant did not perform them, or whether the job was one which was created especially for him to fill until such time as it could be determined whether he could physically return to the duties of a shipfitter or would have to be retired on disability. It also is not clear whether a specific job classification covered the duties which appellant was performing during this period....

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<sup>1</sup> 5 U.S.C. § 8105(a); *see id.* § 8110(b) (a disabled employee with one or more dependents is entitled to have his basic compensation for disability augmented at the rate of 8 1/3 percent of his monthly pay if that compensation is payable under section 8105 or 8107(a)).

<sup>2</sup> *Id.* § 8101(4);

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(4)(a) (December 1995).

<sup>4</sup> 18 ECAB 647, 650-51 (1967).

“If the job was temporary and merely created for the purpose of keeping appellant on the payroll until his future ability to perform the duties of a shipfitter could be ascertained, the Board, under such circumstances, would find that he did not resume ‘regular’ full-time employment within the meaning of 5 U.S.C. § 8101(4). On the other hand, if appellant was placed in a regular classified position which normally would be filled by some other employee, (who perhaps was absent because of sickness or other reason), it would appear, under such circumstances, that appellant did resume ‘regular full-time employment’ within the meaning of the statute; if such be the fact, compensation should be recomputed on the basis of his pay rate as of the date of the recurrence of disability.”

Appellant returned to full-time duty as a secretary (typing) with a restriction of intermediate typing not to exceed an accumulative total of one and a half hours per day. Because she returned to the same position she held at the time of injury, which was a regular classified position, the Board finds that appellant returned to “regular full-time employment” on August 11, 1986.

Appellant’s monthly pay at the time compensable disability recurred on March 4, 1994, more than six months after she resumed regular full-time employment, was greater than her monthly pay at the time of injury, which was also the date her disability began. Although the current pay rate of the date-of-injury position was greater than the recurrent pay rate, the Board finds that the Office correctly determined that appellant’s compensation should be based on her monthly pay at the time compensable disability recurred on March 4, 1994. In the case of *Gerald A. Karth*,<sup>5</sup> the claimant argued that the Office, in comparing pay rates under section 8101(4) of the Act, should adjust monthly pay at the time of injury to the current monthly pay for that position. The Board found that the Act does not provide for such an adjustment and stated: “The ‘current’ salary or pay rate for the job held at time of injury must be utilized when determining loss of wage-earning capacity for partial disability as contemplated by regulation, but is not otherwise the basis for calculation of pay rate as provided for by 5 U.S.C. §§ 8101(4) and 8114, the pay rate provisions of the Act.” (Footnote omitted.)

Appellant seeks compensation based on the pay rate of a full-time employee, not on the pay she actually earned working 20 hours a week. She also notes that all of her cost-of-living increases have been taken away.

The Office’s procedure manual addresses these concerns directly. Chapter 2.900.5.a(7) states that “the recurrent pay rate should be considered the actual weekly amount the claimant earned.”<sup>6</sup> Although a recurrent pay rate may be lower than the pay rate at the time of injury, as can occur when the employee was working full time at the time of injury and only part time at the time of recurrence, when the date of recurrence is remote and the employee’s pay rate has increased substantially, the recurrent pay rate of the employee, even working part time, may be greater than the pay rate at the time of injury, as in the present case. In such a situation,

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<sup>5</sup> 48 ECAB \_\_\_ (Docket No. 94-950, issued November 14, 1996).

<sup>6</sup> *Id.*, Chapter 2.900.5.a(7).

compensation must be paid on the basis of the actual weekly amount the employee earned at the time of recurrence.

Chapter 2.900.5.a(8) of the Office's procedure manual further provides: "Due to application of cost-of-living increases, compensation based on the date-of-injury pay rate may exceed the amount payable using the recurrent pay rate. However, if the recurrent pay rate was higher than the date-of-injury pay rate, the recurrent pay rate should be used, even if a lower payment of compensation will result."<sup>7</sup>

As the Office's August 24, 1995 decision with respect to appellant's recurrent pay rate is consistent with the applicable provisions of the Act, Office procedures and Board precedent, the Board will affirm the Office's decision in the matter.

The August 24, 1995 decision of the Office of Workers' Compensation Programs is affirmed on the issue of recurrent pay rate.<sup>8</sup>

Dated, Washington, D.C.  
November 6, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>7</sup> *Id.*, Chapter 2.900.5.a(8).

<sup>8</sup> The Office also made findings with respect to an overpayment occurring as a result of having paid compensation based on the current pay rate of the date-of-injury position, which was higher than the recurrent pay rate to which appellant was entitled. Appellant has explained on appeal, however, that the overpayment decision was "recently" waived because of an error in the Office's decision, and for this reason she appeals only the issue of recurrent pay rate.