

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BILLY D. McCLELLAN and TENNESSEE VALLEY AUTHORITY,  
Chattanooga, Tenn.

*Docket No. 97-618; Submitted on the Record;  
Issued February 10, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's rate of pay; (2) whether the Office properly determined that appellant received an overpayment of compensation.

In the present case, on June 10, 1985 appellant was working as a laborer when he sustained a sprain of the left knee and torn left medial meniscus. Appellant's supervisor completed a CA-7 form indicating that appellant had not been employed in the date-of-injury position for the past 11 months and that the position would not have provided appellant employment for 11 months, except for the injury. The evidence of record establishes that appellant began his federal employment on April 15, 1979 and that he began his employment with his employing establishment on March 1, 1983. Appellant was hired by the employing establishment for work as a crew foreman. Appellant has testified that as a foreman he generally earned \$400.00 weekly, but had earned as much as \$528.00 weekly. The evidence of record also indicates that after working as a foreman, appellant was employed by the employing establishment in a number of temporary appointments. On the date of injury appellant was employed as a laborer earning \$7.95 per hour. By decisions dated July 16, 1990 and March 19, 1993, the Office found that appellant's pay rate was \$318.20 per week and as he had been paid benefits based on a pay rate of \$528.80 per week, an overpayment had been created in the amount of \$15,022.79.

This is the second appeal before the Board. By decision dated November 8, 1994, the Board remanded the case to the Office for further development of evidence relating to appellant's pay rate and issuance of a *de novo* decision.<sup>1</sup> By decision dated and finalized on August 27, 1996, the Office found that appellant's rate of pay should be based upon the average yearly income of another employee working in the same or similar position on the date of injury.

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<sup>1</sup> Docket No. 93-1745 (issued November 8, 1994).

The Office concluded that appellant's pay rate was \$271.20 weekly and that overpayment had been created due to payment of benefits based upon a higher pay rate in the amount of \$33,763.12.

The Board finds that the Office has not properly determined appellant's pay rate.

In the decision dated November 8, 1994, the Board noted that it was unable to ascertain appellant's average annual earnings on the date of injury and during his federal employment from the evidence of record. The Board noted that as appellant had not worked on the date-of-injury position for substantially the entire year preceding the injury, and appellant would not have worked in the position for substantially a whole year, except for the injury, sections 8114(d)(1) and (2) of the Federal Employees' Compensation Act were inapplicable in determining appellant's pay rate.

The Board instructed the Office to determine appellant's pay rate pursuant to 5 U.S.C. § 8114(d)(3) which provides as follows:

“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 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.”

The Board advised the Office that as pay rate data was not available concerning appellant's previous earnings during his federal employment, the Board was not able to ascertain appellant's average annual earnings pursuant to the Act. The Board instructed the Office to obtain further information, including pay rate information, regarding appellant's employment during the year preceding the injury, as well as during appellant's previous federal employment. The Board directed the Office to thereafter determine the applicable pay rate applying the principles enunciated by 5 U.S.C. § 8114(d).

On remand the Office requested that the employing establishment provide appellant's gross pay for the year preceding the date of injury, and information regarding the annual earnings for the year immediately preceding the date of injury of another employee of the same class working in similar employment. The Office obtained information from the employing establishment regarding appellant's date of injury weekly rate of pay, his dates of employment, and the average yearly income of an employee working in a position similar to that worked by appellant in 1985, which was stated to be \$14,102.24. The Office also obtained from the Social Security Administration an itemized statement of earnings for appellant for the period April 1984 through June 1985, which indicated that appellant had earnings of \$11,374.55 during the applicable period in 1984 and \$8,583.31 during the applicable period in 1985.

The Office thereafter calculated that from June 10, 1984 to June 10, 1985, appellant worked a total of 18 weeks earning \$318.20 per week; that appellant had earned \$20,046.60 in

federal employment commencing April 14, 1983 until June 9, 1985 at an average weekly pay rate \$192.76; that an average yearly income of an employee working in similar position was \$14,102.24, with a weekly pay rate of \$271.20.

By preliminary decision dated September 5, 1995, the Office informed appellant that an overpayment had been created in the amount of \$15,493.30 because he was paid compensation at an incorrect pay rate from October 7, 1985. The Office advised appellant that his proper pay rate was \$271.20. Appellant thereafter requested a prerecoupment hearing. At the hearing, appellant testified that he was hired in a foreman position by the employing establishment, that he worked as a foreman for 85 percent of the time he was employed by the employing establishment, and that he had only worked as a laborer for a short time prior to his injury. By decision dated August 26, 1996, the Office hearing representative affirmed the Office's September 5, 1995 decision. The Office hearing representative stated that the Office had obtained additional evidence as directed by the Board. The hearing representative stated that this information revealed that appellant's rate of pay on the date of injury would be based on the average yearly income of another employee working in the same or similar position. As another employee working in the same or similar position as a laborer would have earned \$14,102.24 annually, appellant's rate of pay for the date of injury was established to be \$271.20.

The Board is still unable to ascertain appellant's average annual earnings pursuant to section 8114 (d) (3) of the Act.

In the present case, the Office in its August 26, 1996 decision determined that appellant's pay rate would be based upon the average annual earnings of an employee of the same class working substantially the whole preceding year in the same or similar employment. Average annual earnings are to be determined in this manner, pursuant to section 8114 (d)(2), if the employee did not work in the 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. In the prior appeal, the Board found that section 8114(d)(2) was not applicable to appellant because his supervisor had indicated that the date-of-injury position would not have afforded appellant employment for substantially a whole year. The Board therefore instructed the Office to determine appellant's average annual earnings pursuant to section 8114(d)(3). While the Office did obtain some information from the Social Security Administration and the employing establishment regarding appellant's previous earnings in his federal employment, the Office did not fully develop the record in this regard. The record indicates that the Office only obtained from the Social Security Administration appellant's earnings from April 1984, instead of all of his previous earnings in federal employment. The record also indicates that while the Office obtained the periods of appellant's employment from the employing establishment, the Office did not request and did not obtain information regarding appellant's pay in the different positions appellant performed in his federal employment. Appellant has twice testified that he was employed by the federal government primarily as a foreman, however, on the date of injury he was performing work as a laborer. The record indicates that the Office only extrapolated the \$7.95 hourly/\$318.20 weekly pay rate of a laborer to determine all of appellant's earnings during the periods of his federal employment. The Board is unable to discern from the record whether or not appellant actually did receive higher pay during his employment as a foreman during his federal employment,

which should be evaluated pursuant to section 8114(d)(3) to reasonably and fairly determine appellant's average annual earnings.

As the Office did not fully develop the record pursuant to section 8114(d)(3) of the Act, this case must again be remanded to the Office. After such further development as necessary, the Office shall issue a *de novo* decision.<sup>2</sup>

The decision of the Office of Worker's Compensation Programs dated and finalized on August 26, 1996 is hereby set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.  
February 10, 1999

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>2</sup> The issue of overpayment of compensation is moot until the Office correctly computes appellant's pay rate.