U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANMARIE K. BRANHAM and U.S. POSTAL SERVICE,
POST OFFICE, Bend, OR

Docket No. 97-2703; Submitted on the Record;
Issued January 12, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's pay rate for compensation purposes; and (2) whether the Office properly determined that appellant had no loss of wage-earning capacity.

In the present case, the Office accepted that appellant sustained injuries to her right arm in the performance of duty on October 15, 1993.[1] By decision dated May 20, 1997, the Office determined that appellant's pay rate for compensation purposes was $211.34 per week. The Office also determined that appellant was not entitled to continuing compensation for wage loss, because her actual earnings were greater than the current pay rate for the date-of-injury job and therefore she had no loss of wage-earning capacity.

The Board has reviewed the record and finds that the Office did not properly calculate appellant's pay rate for compensation purposes.

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 rate of pay; or

[1] The accepted conditions are right arm tendinitis, partial rupture of right distal biceps, right rotator cuff tendinitis and right elbow epicondylitis.

"(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the 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 5 1/2-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 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 federal employment and of other employees of the United States in the same or similar class working in the same or 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 one year immediately preceding his injury."[2]

In the present case, the record indicates that, with respect to the year prior to the date of injury on October 15, 1993, appellant had been on maternity leave from October 1992 through March 5, 1993. From March 6, 1993 to the date of injury, appellant worked as a part-time rural carrier. According to the employing establishment, she worked 63 days, for a total of 545 hours. Appellant's hourly pay rate on the date of injury was $12.41.

The Office determined that appellant's pay rate was her average weekly rate during the period worked; she averaged 17.03 hours a week, at $12.41 per hour, for a pay rate of $211.34 per week. There are no references to the provisions of 5 U.S.C. § 8114 in the May 20, 1997 Office decision. The Board will therefore apply the statute to the facts presented in this case.

The initial question presented under section 8114(d) is whether employee worked in the employment in which she was employed during "substantially the whole year" immediately preceding the injury. The term "substantially" is defined as "essentially"[3] and the Office's procedures appear to consider "substantially" as requiring at least 11 months of employment

[2] 5 U.S.C. § 8114(d).

[3] *Black's Law Dictionary* (5th ed. 1979).

during the year preceding the injury.[4] In this case, the record indicates that appellant worked approximately seven months of the year preceding the injury as a part-time rural carrier, following her return from maternity leave. The Board therefore finds that appellant did not work in employment in which she was employed at the time of injury for substantially the whole year. There is, however, every indication that the position would have afforded employment for substantially a whole year, since the reason appellant did not work was that she had taken maternity leave.

Under these facts, the applicable section is 8114(d)(2), which covers the situation where an employee did not work substantially the whole year, but the position would have afforded employment for substantially a whole year. Section 8114(d)(2) states in pertinent part: "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*." (emphasis added). In other words, appellant's earnings are those of a similar employee, working approximately 17 hours per week as a rural carrier, as determined under 8114(d)(1). This section, however, does not provide for an employee with no fixed annual rate of pay working less than 5 days per week. Section 8114(d)(1)(B) is clearly limited to employees working 5, 51/2 or 6 day work weeks. In this regard, the Board notes that the Director argues that section 8114(d)(1)(B) was applied in this case[5] and cites an Office procedure manual provision that earnings for a part-time position performed substantially the whole year are determined under section 8114(d)(1)(B).[6] The average annual earnings of a part-time position that is based on a 5 day work week (e.g. an employee working 4 hours per day, 5 days a week) may be calculated under section 8114(d)(1)(B), but that is not the situation presented here. Appellant generally worked two days per week, for approximately seventeen hours. There is no language in section 8114(d)(1)(B) that can be construed as providing a method of determining average annual earnings for an employee who is employed on the basis of a two day week.[7] It refers only to employees that are employed on the basis of at least a five day work week, and the Board finds that section 8114(d)(1)(B) cannot reasonably be applied in this case.

Since appellant's average annual earnings cannot be determined under section 8114(d)(1) or (2), section (d)(3) must be applied in this case. Under this section average annual earnings are determined with regard to previous earnings of the employee, other similarly situated employees,

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[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rate*, Chapter 2.900.9(a) (December 1995).

[5] There is no explanation as to how this section was applied, or how it should be applied, to the facts in this case.

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rate*, Chapter 2.900.4(c)(2) (December 1995) (stating in pertinent part: "the pay rate of a part-time flexible employee of the [employing establishment] who works substantially the entire year prior to injury would be computed under section 8114(d)(1)(B), not section 8114(d)(3), even if the earnings fluctuated considerably from week to week, because an annual rate of pay can be established.")

[7] Under the principle of statutory construction known as *expressio unis est exculsio alterius,* the inclusion of specific provisions for 5, 5½ and 6-day work weeks implies that other work weeks were intended to be excluded.

or other relevant factors. Section 8114(d)(3) concludes with the provision that: "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 one year immediately preceding his injury." This represents a statutory minimum amount of average annual earnings under section 8114(d)(3).[8] In this case the average daily wage, multiplied by 150 and then divided by 52, would result in a higher weekly pay rate than the $211.34 calculated by the Office.[9]

The Board further finds that the Office did not properly determine that appellant had no loss of wage-earning capacity.

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[10] has been codified at 20 C.F.R. § 10.303. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate.

In this case, the record indicates that the current hourly rate, at the time of the wage-earning capacity determination, was $14.56 per hour. Applying the minimum pay rate calculations of 150 times the average daily rate results in a current pay rate for the date-of-injury position that is greater that the actual earnings of $320.00 per week, on which the Office made its determination that appellant had no loss of wage-earning capacity.

The case, therefore, will be remanded to the Office for a proper determination of appellant's pay rate for compensation purposes, as well as for a determination as to loss of wage-earning capacity.

[8] *See Robin Bogue*, 46 ECAB 488 (1995); *Edward Douglas Killebrew*, 31 ECAB 196 (1979).

[9] For example, using 8.5 hours a day at $12.41 per hour results in a daily pay rate of $105.48 and when multiplied by 150 and divided by 52 results in a pay rate of $304.27 per week.

[10] 5 ECAB 376 (1953).

The decision of the Office of Workers' Compensation Programs dated May 20, 1997 is set aside and the case remanded or further action consistent with this decision of the Board.

Dated, Washington, D.C.
January 12, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member