U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID E. COSTA and DEPARTMENT OF THE NAVY, NAVAL EDUCATION & TRAINING CENTER, Newport, RI

Docket No. 98-1971; Submitted on the Record;
Issued July 25, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's rate of pay for compensation purposes.

On June 20, 1988 appellant, then a 52-year-old police officer, sustained multiple abrasions, temporary aggravation of cervical spondylosis and a right shoulder impingement syndrome in the performance of duty. He returned to regular work on June 23, 1988 but stopped work on July 29, 1988. Appellant commenced his position at the employing establishment on June 5, 1988. He performed part-time police work for the East Providence Police Department commencing in June 1978 and continued to perform the work concurrent with his federal employment. Subsequent to his June 20, 1988 employment injury, he worked limited duty at the nonfederal police job due to his employment injury. The record shows that the employing establishment terminated appellant effective August 6, 1988, during his one-year probationary period. He stopped his nonfederal police work on May 8, 1989. The Office denied appellant's requested recomputation of his pay rate by decisions dated July 27, 1995 and December 3, 1996. On December 18, 1997 a hearing was held before an Office hearing representative at which time appellant testified.

By decision dated May 13, 1998, the Office hearing representative affirmed the Office's December 3, 1996 decision.[1]

The Board finds that the Office properly determined appellant's rate of pay for compensation purposes.

[1] This record contains additional evidence which was not before the Office at the time it issued its May 13, 1998 decision and therefore the Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

Sections 8114(d)(1) and (2) of the Federal Employees' Compensation Act[2] provide methodology for computation of pay rate for compensation purposes, by determination of average annual earnings at the time of injury. Sections 8114(d)(1) and (2) specify methods of computation of pay for employees who worked in the employment for substantially the whole year prior to the date of injury and for employees who did not work the majority of the preceding year, but for whom the position would be available for a substantial portion of the following year. Section 8114(d)(3) of the Act provides an alternative method for determination of pay to be used for compensation purposes when the methods provided in the foregoing sections of the Act cannot be applied reasonably and fairly.[3]

In this case, appellant did not work in his position with the employing establishment for substantially the whole year prior to his employment injury but he was in a position that would have been available for a substantial portion of the following year. The record shows that appellant was employed by the employing establishment as a police officer with a probationary period of one year. The Office's procedure manual provides that an affirmative answer to the question on Office Form CA-7 as to whether the position held on the date of injury would have provided employment for 11 months except for the injury "is sufficient to show that the employee's position would have afforded employment for substantially a whole year had it not been for the injury."[4] In this case, in a copy of Office Form CA-7 dated April 25, 1989, the employing establishment checked the block marked "yes" in answer to the question as to whether appellant's position held on the date of injury would have provided employment for 11 months except for the injury. Therefore, the Office properly applied subsection 8114(d)(2) in determining appellant's rate of pay for compensation purposes.

Appellant asserts that his concurrent part-time nonfederal employment as a police officer should be considered in determining his pay rate for compensation purposes and that subsection 8114(d)(3) should be applied. Concurrent employment can be included in those determinations made under subsection 8114(d)(3).[5] In *Ricardo Hall*,[6] the employee did not work in his temporary employment with the employing establishment for substantially the whole year prior to the date of his employment injury and he was not in a position that would have been available for substantially the whole year following. The Board held in *Ricardo Hall* that subsection

[2] 5 U.S.C. §§ 8114(d)(1) and (2).

[3] 5 U.S.C. § 8114(d)(3).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(b) (December 1995).

[5] 5 U.S.C. § 8114(d)(3) states that, "If either of the foregoing methods [8114(d)(1) and (2)] 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 [f]ederal 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."

[6] 49 ECAB __ (Docket No. 95-2327, issued March 11, 1998).

8114(d)(3) was therefore properly applied and earnings from concurrent similar employment could be considered. However, in the instant case, appellant was in a position that would have been available for substantially the whole year following the employment injury. The Office's procedure manual provides that subsection 8114(d)(3) "is to be used only where sections 8114(d)(1) and (2) cannot be applied."[7] The Office's procedure manual explains that concurrent employment cannot be included in determinations made under subsection 8114(d)(1) and (2) with the exception that concurrent employment can be included under subsection 8114(d)(1) to the extent that it establishes the ability to work full time.[8]

In the instant case, the record shows that at the time of the employment injury appellant held a full-time position at the employing establishment which would have provided employment for 11 months except for the injury. Therefore, the Office properly applied section 8114(d)(2) in determining his rate of pay and properly excluded his part-time concurrent nonfederal earnings in its determination.

The May 13, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
July 25, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] *Supra* note 4 at Chapter 2.900.4(c)(2).

[8] *Supra* note 4 at Chapter 2.900.4(a)(2); *see Irwin E. Goldman*, 23 ECAB 6 (1971) (employee's full-time nonfederal employment established that, although he was a part-time federal postal clerk, he had the capacity to earn wages as a full-time postal clerk).