U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MONTE FULLER and DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, Carson City, NV

Docket No. 98-1635; Submitted on the Record;
Issued June 27, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant had no loss of wage-earning capacity effective May 1, 1997; (2) whether appellant received an overpayment in the amount of $37,554.74 and, if so, whether the Office properly refused to waive recovery of this overpayment; and (3) whether appellant received an overpayment in the amount of $2,124.00 and, if so, whether appellant was at fault in the matter of this overpayment of compensation.

The Office accepted that appellant's August 23, 1994 employment injury occurring while he was working as an emergency fire fighter resulted in a fracture of the left ankle. He received continuation of pay from August 23 to October 7, 1994, after which the Office began paying him compensation for temporary total disability.

On March 27, 1997 the Office issued appellant a notice of proposed reduction of compensation, stating that his wage-earning capacity was represented by the position of building inspector and that the earnings for this position exceeded the rate of pay of the position he held when injured. By decision dated May 1, 1997, the Office found that the position of building inspector represented appellant's wage-earning capacity and terminated his compensation effective that date on the basis that he had no loss of wage-earning capacity. By letter dated September 9, 1997, appellant requested reconsideration. By decision dated October 9, 1997, the Office denied modification of its prior decision and explained the basis on which appellant's pay rate as an emergency fire fighter was calculated. Appellant again requested reconsideration by letter dated February 24, 1998; the Office, by decision dated March 5, 1998, found that the additional evidence was not sufficient to warrant review of its prior decisions.

On March 5, 1998 the Office issued a preliminary determination that appellant had received an overpayment of compensation in the amount of $37,554.74 that occurred because he was paid at an incorrect rate of pay from October 8, 1994 to April 26, 1997. The Office preliminarily found that appellant was without fault in the matter of this overpayment of

compensation. On March 11, 1998 the Office issued a preliminary determination that appellant had received an overpayment of compensation in the amount of $2,124.00 that occurred because he was issued three checks, each in the amount of $708.00, in his case file for a previous injury.[1] The Office preliminarily determined that appellant was at fault in the matter of this overpayment, for the reason that he should have been aware that he was not entitled to these payments.[2]

By decision dated April 7, 1998, the Office found that appellant had received an overpayment of compensation in the amount of $37,554.74 that occurred because he was paid at an incorrect rate of pay from October 8, 1994 to April 26, 1997. The Office found that appellant was without fault in the matter of this overpayment of compensation, but refused to waive recovery of this overpayment. By decision dated April 14, 1998, the Office found that appellant had received an overpayment of compensation in the amount of $2,124.00 that occurred because he was issued three checks, each in the amount of $708.00, in his case file for a previous injury. The Office determined that this overpayment of compensation could not be waived, as appellant was at fault in the matter of this overpayment, for the reason that he should have been aware that he was not entitled to these payments.

The Board finds that the case is not in posture for decision on the issues of whether the Office properly found that appellant had no loss of wage-earning capacity effective May 1, 1997 and whether appellant received an overpayment of compensation in the amount of $37,554.74.

Section 8115 of the Federal Employees' Compensation Act,[3] titled "Determination of Wage-Earning Capacity" states in pertinent part:

> "In determining compensation for partial disability….
>
> "if the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to --
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> (1) the nature of his injury;
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> (2) the degree of physical impairment;
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> (3) his usual employment;
>
> (4) his age;

[1] The Office had accepted that appellant sustained a right inguinal hernia on September 24, 1986 while working at the Bureau of Land Management as a temporary fire fighter. On June 22, 1993 the Office found that appellant received an overpayment of compensation in the amount of $10,745.75 that occurred because he received compensation for partial disability from May 19, 1991 to September 19, 1992, a period during which he was not entitled to compensation.

[2] These preliminary determinations were reissuances of ones sent earlier but returned by the U.S. Postal Service.

[3] 5 U.S.C. § 8115.

(5) his qualifications for other employment;

(6) the availability of suitable employment; and

(7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."

In the present case, appellant agrees that the position of building inspector fairly and reasonably represents his wage-earning capacity. An Office rehabilitation specialist concluded that this position was consistent with appellant's education and experience and ascertained that the position of building inspector was available in appellant's area at a pay rate of $10.00 per hour. Appellant's attending physician, Dr. Eric Boyden, stated that this position "looks like this should fall within what [appellant] is able to perform."

Appellant contends, however, that the rate of pay calculated for the position of emergency fire fighter he held when injured on August 23, 1994 was in error. In an October 11, 1994 memorandum, the Office concluded that appellant's pay rate was $714.06 per week, which it calculated by dividing the $8,566.70 appellant earned between June 5 and August 23, 1994 by the 932 hours he worked during this 12-week period, for an average wage of $9.19 per hour. The Office then multiplied this hourly rate by the average of 77.67 hours that appellant worked per week, resulting in the weekly pay rate of $714.06. This is the pay rate the Office used to pay appellant compensation from October 8, 1994 to April 26, 1997.

In its March 27, 1997 notice of proposed reduction of compensation and the October 9, 1997 denial of modification, the Office found that appellant's pay rate for his position of emergency fire fighter had been improperly calculated and that the Office's procedure manual required that the weekly pay rate for emergency fire fighters be calculated by multiplying the hourly wage by the number of hours worked per day, then multiplying this daily rate by 150 and dividing by the number of weeks in a year, 52. Applying this formula to appellant's hourly wage of $9.19 and 12.95 hours worked per day, the Office concluded that appellant's weekly rate of pay was $343.30. In determining that appellant had no loss of wage-earning capacity, the Office used a current hourly pay rate of $10.40 for an emergency fire fighter at appellant's former grade, which it indicated it obtained by telephone. Using the same "150 times" formula, the Office concluded that the current weekly pay rate of an emergency fire fighter was $388.50, which was less than the $400.00 per week appellant could earn as a building inspector.

To calculate the average annual earnings of emergency fire fighters, the Board is not convinced that the Office's procedure manual requires the use of the "150 times" formula to the exclusion of any other considerations. The procedure manual states: "On an actual daily basis, the daily pay rate is the number of hours actually worked times the hourly pay rate reported and compensation will be computed on the workweek reported. In other cases, the minimum weekly pay rate is determined by the following formula: Hourly wage x no. of hours per day x 150

days/52."[4] The phrase "In other cases" preceding the "150 times" formula implies that this formula is not to be used in all cases.

Section 8114(d)(3) of the Federal Employees' Compensation Act[5] provides for the calculation of average annual earnings in situations where the employee did not work substantially the whole year prior to the injury and was not employed in a position that would have afforded employment for substantially a whole year. This was appellant's situation as an emergency fire fighter. Section 8114(d)(3) provides: "[T]he 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. 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 1 year immediately preceding his injury."

The purpose of section 8114(d)(3) is to determine the annual earning capacity for an employee that closely approximates his or her true preinjury earning capacity. The Board has held that the Office must consider the factors listed in section 8114(d)(3) prior to application of the 150 times statutory minimum calculation.[6] As there is no indication the Office considered these factors in the present case before applying the "150 times" formula, the case will be remanded to the Office for such consideration, to be followed by an appropriate decision on appellant's rate of pay and his loss of wage-earning capacity. The Board also notes that the record does not reveal the source of the current hourly pay rate of $10.40 per hour for an emergency fire fighter, as the memorandum showing this rate only indicates it was obtained by telephone. It is also not clear if this pay rate takes into account any premium pay appellant may have earned while employed as an emergency fire fighter.

The rate of pay of $343.30 obtained by using the "150 times" formula was also used to determine that appellant had received an overpayment of compensation in the amount of $37,554.74. The amount of compensation appellant would have received using a pay rate of $343.30 was deducted from the amount of compensation appellant received using a pay rate of $714.60 and the difference was $37,554.74. As the case is being remanded to the Office for further consideration of this rate of pay, the overpayment in the amount of $37,554.74 will also be set aside and the case remanded to the Office for recalculation of the amount of this overpayment, if necessary and for an appropriate decision on this issue.

The Board further finds that appellant received an overpayment in the amount of $2,124.00. The record indicates and appellant acknowledges on appeal, that he received three

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.9b(2) (December 1995).

[5] 5 U.S.C. § 8114(d)(3).

[6] *Robin Bogue*, 46 ECAB 488 (1995).

checks, each in the amount of $708.00, in his case file for a previous injury. There is no indication and appellant has advanced no credible argument that these checks, which were issued on April 4, 26 and May 24, 1997, were legitimate payments. Rather the Board finds that they were issued by mistake, as noted by the Office. The Office had determined that appellant was not entitled to compensation for the previous injury after May 19, 1991.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."[7] No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or, alternatively, "with fault," section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

"An individual is with fault in the creation of an overpayment who:

> "(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
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> "(2) Failed to furnish information which the individual knew or should have known to be material; or
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> "(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[8]

The Board finds that appellant was at fault in the matter of the overpayment in the amount of $2,124.00 for the reason that he accepted a payment he knew or should have known was incorrect. On June 22, 1993 the Office determined that appellant received an overpayment of compensation in the amount of $10,745.75 which arose because he received compensation from May 19, 1991 to September 19, 1992, a period during which he was not entitled to compensation. Appellant subsequently did not receive any compensation under this case file until April 1997. He knew or should have known that the resumption of payments in April 1997 was incorrect and for this reason is at fault in the matter of the overpayment in the amount of $2,124.00.

[7] 5 U.S.C. § 8129.

[8] 20 C.F.R. § 10.320(b).

The decision of the Office of Workers' Compensation Programs dated April 14, 1998 is affirmed. The decisions of the Office dated April 7, 1998 and October 9, 1997 are set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
June 27, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member