U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRY W. STOVALL and TENNESSE VALLEY AUTHORITY,
Chattanooga, TN

Docket No. 98-937; Submitted on the Record;
Issued May 1, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs used the correct pay rate to calculate appellant's benefits.

On January 21, 1986 appellant, then 38-year-old unskilled laborer,[1] sustained an employment-related lumbar strain and permanent aggravation of degenerative lumbar disc disease. He began working in a light-duty position after the occurrence of the January 21, 1986 injury and he was terminated from the employing establishment effective March 12, 1986 because his temporary term of employment had ended.[2]

By notice dated July 20, 1994, the Office advised appellant of its preliminary determination that he received a $12,732.58 overpayment of compensation because he had received total disability compensation for the period April 11, 1991 to March 31, 1992 despite the fact he worked during that period. The Office also made a preliminary determination that he was at fault in the creation of the overpayment. Appellant requested a hearing before an Office hearing representative regarding the Office's preliminary overpayment determination. Prior to the hearing, he alleged that the Office had improperly calculated his pay rate for compensation purposes.

By decision dated and finalized June 9, 1995, the Office hearing representative remanded the case to the Office with respect to the calculation of appellant's pay rate for compensation purposes. The Office hearing representative directed the Office to obtain further information regarding appellant's work at the employing establishment during the year prior to his injury.

[1] Appellant's position was temporary in nature and involved construction and clean-up work.

[2] On January 26, 1990 appellant was notified that his claim for employment-related disability due to his January 21, 1986 employment injury had been accepted retroactive to September 16, 1986. He received disability compensation for periods beginning effective September 16, 1986.

The Office hearing representative further indicated that the Office should consider whether appellant's pay rate should be based on his earnings as a skilled worker and whether an allowance for medical and health insurance should be included in the pay rate.

The Office obtained additional information from appellant and the employing establishment. By decision dated January 4, 1996, the Office determined that his pay rate for compensation purposes was $321.40 per week. The Office indicated that the evidence revealed appellant earned $8.35 per hour or $321.40 per week at the time of his January 21, 1986 injury. The Office noted that it was appropriate to base his pay rate for compensation purposes on this figure because he would have earned the same wages at the time disability started on September 16, 1986 and he did not sustain a recurrence of disability after his January 21, 1986 injury. The Office indicated that since appellant had not worked for the employing establishment for substantially the whole year prior to his injury it had considered whether his pay rate should be based on the salary of a similar employee. The Office found that the salary of a similar employee was lower than appellant's at the time of his January 21, 1986 injury and concluded that his pay rate should be based on his salary on January 21, 1986. The Office indicated that appellant's pay rate should not include allowances for health and life insurance because he was not enrolled in federal health and life insurance programs at the time of his injury.

By letter dated January 18, 1996, the Office advised appellant of its new preliminary overpayment determination. The Office determined that appellant received a $12,732.58 overpayment of compensation because he had received total disability compensation for the period April 11, 1991 to March 31, 1992 despite the fact he worked during that period. The Office also determined that he was not at fault in the creation of the overpayment.

By decision dated and finalized November 22, 1997, an Office hearing representative affirmed the Office's earlier determination that appellant's pay rate for compensation purposes was $321.40 per week. The Office hearing representative further found that he received a $12,732.58 overpayment and was not at fault in the creation of the overpayment, but that he was entitled to waiver of the overpayment on the grounds that recovery of it would be against equity and good conscience.[3]

The Board finds that the Office used the correct pay rate to calculate appellant's benefits.

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 monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[4] Section 8101(4) of the Act defines "monthly pay" for

[3] Appellant has not appealed any aspect of the Office's overpayment determination and the matter is not currently before the Board. After he filed his appeal with the Board on January 29, 1998, the Office issued a February 26, 1998 decision in which it adjusted his wage-earning capacity based on his actual earnings as a horse trainer. The issue of appellant's wage-earning capacity is not currently before the Board.

[4] Section 8110(b) of the Act provides that total disability compensation will equal three-fourths of an employee's monthly pay when the employee has one or more dependents.

purposes of computing compensation benefits as follows: "[T]he 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."[5]

The word "disability" is used in several sections of the Act. With the exception of certain sections where the statutory context or the legislative history clearly shows that a different meaning was intended, the word as used in the Act means "Incapacity because of injury in employment to earn wages which the employee was receiving at the time of such injury." This meaning, for brevity, is expressed as "disability for work."[6]

In the present case, the Office properly based appellant's pay rate for compensation purposes on his earnings as an unskilled laborer at the time of his January 21, 1986 employment injury. His earnings at the time when he sustained employment-related disability on September 16, 1986 were no higher than his earnings on January 21, 1986 and therefore it was appropriate to refer to appellant's earnings at the time of injury.[7] Appellant began working in a light-duty position after his January 21, 1986 injury until the time he was terminated effective March 12, 1986. Therefore, he did not sustain a recurrence of disability and it would not be appropriate for the Office to calculate a pay rate based on a recurrence of disability.

With respect to the calculation of appellant's pay rate for compensation purposes, the Act provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment in which he was injured substantially for the entire year immediately preceding the injury and would have been afforded employment for substantially a whole year, except for the injury.[8] Section 8114(d) of the Act provides:

> "Average annual earnings are determined as follows:
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> "(1) If the employee worked in the employment in which he was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --
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>> (A) was fixed, the average annual earnings are the rate of pay; or
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>> (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.

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[5] 5 U.S.C. § 8101(4).

[6] *See Charles P. Mulholland, Jr.*, 48 ECAB 604, 606 (1997).

[7] Appellant earned $8.35 per hour or $321.40 per week on January 21, 1986 and would have earned the same rate of pay on September 16, 1986.

[8] 5 U.S.C. § 8114(d)(1), (2); *see Billy Douglas McClellan*, 46 ECAB 208, 212-13 (1994).

> "(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 for 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."[9]

In the present case, the evidence shows that appellant did not work in the employment in which he was injured substantially for the entire year immediately preceding the injury. He began working in his position as an unskilled laborer for the employing establishment on November 14, 1985; therefore he only worked for about two months prior to the January 21, 1986 injury.[10] The evidence also shows that appellant would not have been afforded employment for substantially a whole year, except for the injury.[11] For these reasons, sections 8114(d)(1) and (2) of the Act are not applicable to the computation of appellant's pay rate.

If sections 8114(d)(1) and (2) of the Act are not applicable, section 8114(d)(3) 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 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 the injury."

Given the inapplicability of sections 8114(d)(1) and (2) of the Act, the Office properly applied section 8114(d)(3) to determine appellant's pay rate for compensation purposes.[12] In applying section 8114(d)(3), the Office properly considered the factors delineated therein, including appellant's previous earnings in federal employment; the earnings of other employees

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[9] *Id.*

[10] The phrase "substantially for the entire year" has been interpreted to mean at least 11 months; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(a) (December 1995).

[11] Appellant was terminated from the employing establishment effective March 12, 1986 because his temporary term of employment had ended.

[12] *See Randy L. Premo*, 45 ECAB 780, 782 (1994) (holding that section 8114(d)(3) of the Act provides an alternative method for determination of the pay rate to be used for compensation purposes when the methods provided in sections 8114(d)(1) and 8114(d)(2) cannot be applied reasonably and fairly).

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; and appellant's prior nonfederal employment. The Office complied with its procedure by obtaining information from the employing establishment and appellant concerning these factors.[13]

The evidence reveals that appellant earned $8.35 per hour or $321.40 per week while working for the employing establishment prior to his injury on January 21, 1986. The evidence further reveals that an employee working in a similar position, of the type detailed in section 8114(d)(3), earned $15,885.28 per year or $305.49 per week at the time of appellant's injury. The Office compared these two pay rates and properly determined that appellant was entitled to the higher pay rate of $321.40 per week.

Appellant alleged that the calculation of his pay rate should have been based on higher wages that he earned in positions other than the one he held when he was injured on January 21, 1986. He indicated that he had otherwise performed work in various skilled positions, including work as an electrician for the employing establishment in 1980 at $11.43 per hour, as a superintendent for a private employer between 1983 and 1985 at $17.00 per hour and as a boilermaker superintendent for a private employer in 1985 at $20.00 per hour. Section 8114(d)(3) of the Act and Office procedure provide that, in certain circumstances, an injured employee's earnings in employment other than the date-of-injury employment is one factor to be considered in determining employment earnings. However, "[o]nly earnings in employment which is the same as, or similar to, the work the employee was doing when injured may be considered."[14] Appellant worked as an unskilled laborer at the time of his January 21, 1986 employment injury and therefore this work was not similar to the skilled work of the various other jobs he held. Consequently, the Office properly did not consider these other jobs in its calculation of appellant's pay rate.

The terms of the Act are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to enlarge the terms of the Act nor to make an award of benefits under any terms other than those specified in the statute. The applicable provisions of the Act specify that compensation for disability shall be computed on the basis of the employee's monthly pay as defined in the Act.[15] For the reasons detailed above, the Office used the correct pay rate to calculate appellant's benefits.

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[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c)(3) (March 1996). Office procedure provides, *inter alia*, that information should be obtained from the employing establishment regarding the earnings of the federal employee working the greatest number of hours during the year prior to the injury in the same or most similar class and in the same or neighboring locality. *Id.* at Chapter 2.900.4(c)(3)(b). The information concerning the claimant's prior nonfederal employment is obtained form the claimant. *Id.* at Chapter 2.900.4(c)(3)(c). It is further noted that the Office complied with the last sentence of 8114(d) in that its calculation of appellant's average annual earnings is greater than that which would be obtained from the formula delineated in the last sentence of 8114(d); *see id.* at Chapter 2.900.4(c)(4), (5) (March 1996).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates,* Chapter 2.900.4(c)(3)(c) (March 1996).

[15] *Gerald A. Karth*, 48 ECAB 194, 197 (1996).

The decision of the Office of Workers' Compensation Programs dated November 22, 1997 is affirmed.

Dated, Washington, D.C.
May 1, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member