U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH K. CHRISTENSEN and U.S. FOREST SERVICE, BITTERROOT NATIONAL FOREST, Hamilton, MT

Docket No. 02-1872; Submitted on the Record;
Issued December 31, 2002

DECISION and ORDER

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

The issue is whether the pay rate used for compensation purposes is correct.

On August 8, 1961 appellant, then a 23-year-old engineering trainee, who was working as a firefighter, sustained an employment-related fracture of the thoracic vertebra at T5 through T8 when a tree fell on him while he was fighting a fire. He returned to regular duty in September 1961 and transferred to the Bureau of Reclamation in 1966, where he continued to work until he retired in December 1988. Following retirement, appellant was self-employed from 1989 to March 1995 when he began work with Tharaldson Property Management, Inc., where he worked until October 1998. On January 5 and 15, 1999 he filed recurrence claims, stating that the date of recurrence was December 16, 1998.

By letter dated January 22, 1999, the Office of Workers' Compensation Programs accepted that appellant sustained a recurrence of disability and accepted the employment-related conditions of nerve root/lexus disc and somatoform dysfunction of the pelvic region.

In a March 4, 1999 letter, appellant requested $1,800.00 a week in compensation, stating that this was based upon his past self-employment building houses. On June 1, 1999 the Office informed appellant that the date-of-injury pay rate would be used for compensation purposes, which was calculated as $1,636.00 every 28 days. The Office further informed appellant that he needed to elect between wage-loss compensation under the Federal Employees' Compensation Act and his retirement benefits under the Office of Personnel Management (OPM). This was formalized in a decision dated August 18, 2000.

By letter dated September 15, 2000, appellant requested a hearing that was held on September 25, 2001. At the hearing, he testified regarding self-employment, stating that he began building a house on speculation in November 1999, that in the past he had done much of the physical labor himself but, due to the employment injury, he was no longer able to do the work. Appellant argued that, therefore, he should be compensated at the rate of at least $30.00 an hour as a construction manager. In a decision dated December 18, 2001 and finalized

December 19, 2001, an Office hearing representative affirmed the prior decision. The instant appeal follows.

The Board finds that this case is not in posture for decision.

The Act[1] defines monthly pay at section 8101(4), as follows:

> "'[M]onthly pay' means the 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, except when otherwise determined under section 8113 of this title with respect to any period."[2]

Contrary to appellant's contention, there is no provision under the Act to use his prospective earnings building houses on speculation as a basis of establishing pay rate. FECA Program Memorandum No. 268, however, provides that a private industry pay rate may be utilized if otherwise appropriate under section 8101(4), including that the claimant has returned to full-time federal employment. In the instant case, appellant's compensation benefits were calculated utilizing his August 8, 1961 date-of-injury pay rate. The facts indicate, however, that he had returned to full-time regular duty with the employing establishment in September 1961 and continued in federal employment until he retired in 1988. He, therefore, resumed regular full-time employment with the United States.[3] In 1995, appellant obtained private employment with Tharaldson Property Management, Inc., and continued working there until October 1998. As he returned to private employment and then sustained a recurrence of disability, the third date, *i.e.*, date of recurrence, if greater than the rate of pay for the date of injury, would be the proper basis for computation of pay rate. The Office has not considered the date of recurrence pay rate to determine whether it would be greater than the date-of-injury pay rate. Because appellant was working in private industry at the time the recurrence of disability occurred,[4] his private employment pay rate could be use to compute benefits.[5] The case will, therefore, be remanded to the Office to determine whether appellant is entitled to a pay rate based upon his date of recurrence of disability and, after such further development as the Office deems necessary, the Office shall issue a *de novo* decision regarding the issue of pay rate.

[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8101(4).

[3] *Compare Thomas M. Schuerman*, 51 ECAB 336 (2000); *Dr. Alan T. Webb*, 47 ECAB 395 (1996).

[4] *See Andrew Aaron, Jr.*, 48 ECAB 141 (1996).

[5] FECA Program Memorandum No. 268 (issued December 15, 1980); *see Andrew Aaron, Jr., supra* note 4.

The decision of the Office of Workers' Compensation Programs dated December 18, 2001 and finalized December 19, 2001 is hereby vacated and the case is remanded to the Office for proceedings consistent with this decision.

Dated, Washington, DC
December 31, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member