

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CYNTHIA A. BARNES and DEPARTMENT OF DEFENSE,
DEPENDENT SCHOOLS, Arlington, VA

*Docket No. 01-2034; Submitted on the Record;
Issued February 24, 2003*

DECISION and ORDER

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

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

On October 10, 1997 appellant filed an occupational claim (Form CA-2) alleging that she sustained an injury causally related to factors of her federal employment as a teacher. Appellant noted that she had initially sustained an employment injury on November 8, 1994,¹ and employment factors such as prolonged standing had aggravated her condition. She indicated that she had filed a recurrence of disability as of August 28, 1996 with respect to the prior injury. The Office accepted the claim for aggravation of lumbar subluxation.

In a decision dated August 31, 1999, the Office found that the pay rate for compensation purposes was \$787.12 per week, based upon appellant's annual earnings of \$40,930.00 as of August 28, 1996. In a decision dated February 10, 2000, the Office determined that appellant's pay rate did not include living quarters allowance and post differential. By decision dated May 25, 2001, the Office denied modification.

The Board finds that the case is not in posture for decision and requires further development of the evidence.

Under 5 U.S.C. § 8101(2), “‘monthly 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 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater....”

¹ OWCP File No. 25-460035; this claim was administratively combined with the current file.

Section 8114(d) of the Federal Employees' Compensation Act 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 annual rate of pay; or

(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 5½-day week, and 260 if employed on the basis of a 5-day week.”

The Board will first address appellant's argument that her pay rate should be based on an hourly rate for the actual time worked. In this case, the Office determined that the date disability began was August 28, 1996. To determine appellant's pay rate at that time, 5 U.S.C § 8114(d) must be applied. The record indicates that appellant worked as a teacher; the employing establishment indicated that appellant had an annual salary that was paid over the entire year, although appellant actually worked only during the school year (approximately 190 days or 1520 hours). The employing establishment noted that if an employee were on leave without pay (LWOP) during the school year, her pay would be deducted based on an hourly rate for 190 days, not a full year of 260 days. Appellant therefore argues that her pay rate should be based on an hourly rate reflecting the time she actually worked during the school year, rather than her annual salary.

The only proper method for determining appellant's pay rate, however, is the provisions of 5 U.S.C. § 8114(d). In this case, appellant received a fixed annual rate of pay, for a position that provided employment for substantially the whole year preceding the injury.² The Act, at 5 U.S.C. § 8114(d)(1)(A) unequivocally provides that the average annual earnings are the rate of pay. The employing establishment reported that appellant's salary as of August 28, 1996 was \$40,930.00 per year, or \$787.12 per week. The Board finds that appellant's argument is not supported by section 8114(d) of the Act and the Office properly used the annual rate of pay.

The record, however, requires further development with respect to the inclusion of living quarters allowance and post differential in determining appellant's pay rate as of

² The employing establishment stated that appellant was a career seasonal employee. The Office's procedure manual notes that career seasonal employees are considered to have worked substantially the whole year; see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(a)(1) (December 1995). The Board notes that current Office procedures, not in effect at the time of the Office's May 25, 2001 decision, indicate that teachers are not to be considered to fall under the procedural provisions for career seasonal employment. See *id.*, at 2.900.4(a)(2) (April 2002).

August 28, 1996. In a letter dated January 18, 2000, the employing establishment indicated that, during the year prior to August 1996, “LQA [living quarters allowance] and [p]ost [a]llowance was paid under Department of State Standardized Regulations.” In the February 10, 2000 decision, the Office determined that living quarters allowance and post differential were not included in computing pay rate, based on 5 U.S.C. § 8114(e)(2): “account is not taken of ... additional pay or allowance authorized outside the United States because of differential in cost of living or other special circumstances....”

The Board notes that Office procedures have administratively included the following elements in computing an employee’s pay rate:

“(10) Quarters allowances for personnel serving overseas, paid pursuant to section 901(1) of the Foreign Service Act of 1946 and Executive Order No. 10011, dated October 22, 1948....”

* * *

“(18) Post differential paid under Title II, Part D of the Overseas Differential and Allowances Act (Pub. Law 86-707). This is regarded as a special recruitment and retention allowance granted because of the overall environmental conditions or rigors of the particular post. It is not a cost-of-living differential or economic equalization factor, which would be excluded from pay rate for compensation purposes....”³

The Office did not address the administrative inclusions provided in its procedure manual. On remand, the Office should make an appropriate determination as to whether the living quarters allowance and post allowance received by appellant should be included in computing her pay rate for compensation purposes. After such development as the Office deems necessary, it should issue an appropriate decision.

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7(b) (December 1995).

The decision of the Office of Workers' Compensation Programs dated May 25, 2001 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
February 24, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member