United States Department of Labor
Employees' Compensation Appeals Board

JOSEPH A. MATAIS, Appellant	)	
and	)	**Docket No. 04-1745**
	)	**Issued: December 7, 2004**
FEDERAL EMERGENCY MANAGEMENT AGENCY, Portsmouth, RI, Employer	)	

Appearances:
Joseph A. Matais, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 30, 2004 appellant filed a timely appeal of a June 23, 2004 decision of the Office of Workers' Compensation Programs that denied his request for reconsideration of the merits of his claim. This appeal was also timely for a review of a February 11, 2004 decision of an Office hearing representative that found that the Office used the correct rate of pay in computing appellant's entitlement to compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case and over the Office's nonmerit decision.

ISSUES

The issues are: (1) whether the Office used the correct rate of pay in computing appellant's entitlement to compensation; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim.

FACTUAL HISTORY

On May 12, 1997 appellant, then a 59-year-old disaster assistance employee, filed a claim for compensation for a traumatic injury to his back and leg sustained on April 30, 1997 when his

vehicle was rearended by another vehicle. The Office accepted that appellant sustained a subluxation at L4-5. The employing establishment paid appellant continuation of pay from May 1 to June 14, 1997. The employing establishment reported that appellant's rate of pay on the date of his injury was $46,321.00 per year and that he worked in his position for 11 months prior to the injury. The Office began payment of compensation for temporary total disability on June 15, 1997, based on a rate of pay of $890.79 per week.

In a telephone conversation on September 30, 1997, the employing establishment advised the Office that disaster assistance employees were only required to work when needed. Effective December 7, 1997, the Office reduced appellant's compensation based on a rate of pay of $513.92 per week.

In a March 13, 1998 letter, the employing establishment advised the Office that appellant's position as a public assistance inspector involved inspection of public facilities damaged by disaster, that appellant was utilized at every opportunity, and that the nature of disaster response was unpredictable and intermittent. Beginning March 29, 1998, the Office paid appellant compensation based on a rate of pay of $228.36 per week. On May 18, 1998 the employing establishment advised the Office that appellant's appointment was intermittent, that his tour of duty was on call, that he did not work in federal employment for 11 months in the year prior to the injury, that the job held on the date of the injury would not have afforded employment for 11 months had he not been injured, and that, for the year immediately prior to his injury, he worked 16 weeks and earned $11,874.77. In response to the Office's request for the annual earnings of another employee with the same kind of appointment and working in a job with the same or similar duties who worked the greatest number of hours during the year immediately prior to the injury, the employing establishment stated: "Not available for disaster assistance employees. They work unscheduled, irregular tours based on availability, title and proficiency."

On October 2, 2000 appellant submitted a claim for compensation for the period June 15, 1997 to February 27, 1999 for the purpose of seeking review of the rate of pay used by the Office for the compensation already paid. In an October 10, 2000 letter, the employing establishment noted that disaster assistance employees do not have a fixed salary or work schedule. On March 13, 2001 the employing establishment provided appellant's pay information for the year prior to April 30, 1997, which showed that he worked during 13 two-week pay periods for a total of 521.25 hours, earning $11,536.88. The employing establishment reported that appellant's appointment was temporary, his tour of duty was intermittent, that he did not work for 11 months in the year prior to the injury, and that it was not certain due to the intermittent nature of his appointment whether the job held on the date of injury would have afforded employment for 11 months had appellant not been injured. In response to the Office's request for the annual earnings of another employee with the same kind of appointment and working in a job with the same or similar duties who worked the greatest number of hours during the year immediately prior to the injury, the employing establishment submitted pay information for Carl Henneman, a program officer with a temporary appointment and intermittent tour of duty in another geographic region, showing earnings of $10,478.40 for 472 hours of work in 7 pay periods prior to May 10, 1997, which is the end of the two-week pay period containing April 30, 1997.

In a March 19, 2001 letter, appellant asked the employing establishment why his pay was not compared to that of another inspector, such as Jeffrey Frohn or Andy Decorleto, and stating that he was not the only inspector in Region I. In a March 20, 2001 response, the employing establishment noted that appellant and Mr. Henneman "both functioned primarily as inspectors while on disaster assignment, during the one year prior to your on-the-job injury," even though they held different job titles: program officer -- public assistance for Mr. Henneman and senior public assistance engineer for appellant. The employing establishment stated:

> "[W]e determined that the job held by Mr. Henneman was most similar to the job you held one year prior to your injury. Specifically, Mr. Henneman's appointment type, grade, step, salary were identical to yours and his duties were similar. He was also the employee, meeting those characteristics that worked the greatest number of hours during the one year immediately prior to your injury. Messieurs Frohn and Decorleto were not selected as the employee working in similar employment because their grade, step and salary were significantly different than those you held, during the one year prior to your injury."

In a May 11, 2001 letter, the employing establishment stated that Mr. Henneman was not assigned to Region I, but that he functioned as an inspector while on disaster deployment and was found to have held the job most similar to the job held by appellant, and that 253 employees functioned as inspectors, six of them in Region I. In a June 27, 2001 letter, the employing establishment advised appellant that it had not developed nor assigned position descriptions for disaster assistance employees but rather had given them general functional titles. A list of inspection deployments for the period from June 1, 1996 to April 30, 1997 listed, in Region I, two project officers and three public assistance coordinators, four at a salary of $54,092.00 and one at a salary of $64,322.00, with the total number of days worked ranging from 170 to 200.

By decision dated February 8, 2002, the Office found that the correct rate of pay for appellant's compensation was $228.36 per week, which it derived by dividing the $11,874.77 he earned in the one year before his injury by 52 weeks. Appellant requested a hearing, which was held on October 25, 2002.

By decision dated February 6, 2003, an Office hearing representative found that appellant had been paid at an inappropriate rate, and that the correct rate was $640.93 per week, derived by dividing the $11,536.88 he earned in the year before his injury by the 18 weeks he worked in that year. The Office's District Director, in a March 5, 2003 memorandum, requested that the Office's Branch of Hearings and Review review the February 6, 2003 decision, as the method used there to compute appellant's rate of pay distorted his earning power and raised him to full-time status. The Office's District Director indicated that the correct rate of pay was $510.76 per week, derived by using the 150-day formula. By decision dated February 11, 2004, an Office hearing representative found that the correct rate of pay for appellant's compensation was $510.76 per week, derived by dividing the $11,536.88 he earned in the year before his injury by 521.25 hours he worked in that year times 8 hours in a day times 150 divided by 52 weeks in a year.

By letter dated March 20, 2004, appellant requested reconsideration, contending that disaster assistance employees were like military reservists, that all the listed Region I employees

were similar, and that his pay was not compared to another employee in similar employment in the same or neighboring place. By decision dated June 23, 2004, the Office found that appellant's request was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Sections 8114(d)(1) and (2) of the Federal Employees' Compensation Act[1] 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) of the Act 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 have afforded employment for substantially the whole year if the employee had not been injured.

Section 8114(d)(3) provides:

> "If either of the foregoing methods of 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 one year immediately preceding his injury."

For employees paid under section 8114(d)(3), the Office's procedure manual provides that the Office should determine earnings by taking the highest of the earnings of the employee in the year prior to the injury, the earnings of a similarly situated employee, or the pay rate determined by the "150 times" formula. Also addressed is how to determine the earnings of a similarly situated employee:

> "The earnings of another [f]ederal employee working the greatest number of hours during the year prior to the injury in the same or most similar class, in the same or neighboring locality, as obtained from the employing agency or another [f]ederal agency in the same or neighboring locality.
>
> "'Same or similar class' refers both to the kind of work performed and the kind of appointment held.…

[1] 5 U.S.C. § 8114(d)(1) and (2).

"If the 'same or similar class' contains more than one employee, the employing agency should be asked to state the earnings of the employee who worked the 'greatest number of hours,' and therefore had the highest earnings."[2]

ANALYSIS

Appellant did not work as a disaster assistance employee for substantially the whole year immediately preceding his injury. The evidence shows that he worked a total of 521.25 hours during 13 of the 26 pay periods in the year before his injury. Nor would his position have afforded him employment for substantially a whole year, as the employing establishment reported that the position of disaster assistance employee was one of irregular, unscheduled tours. None of the inspectors in appellant's region worked over 200 days in the year before appellant's injury. Thus sections 8114(d)(1) and (2) of the Act do not apply to appellant.

Given the inapplicability of sections 8114(d)(1) and (2) of the Act, it was appropriate for the Office to apply section 8114(d)(3) to determine appellant's pay rate for compensation purposes. In applying section 8114(d)(3), however, the Office did not adequately consider the factors delineated therein, particularly the earnings 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.[3]

The Office requested that the employing establishment provide the annual earnings of another employee with the same kind of appointment and working in a job with the same or similar duties who worked the greatest number of hours during the year immediately prior to the injury. This request incorporated most of the criteria for determining the earnings of a similarly situated employee but ignored the language of section 8114(d)(3) of the Act that the comparison should be to an employee "in the same or neighboring location." The employing establishment provided pay information on an employee not in appellant's region, and interpreted the Office's request as one to provide the pay of an employee at the same grade and step. This interpretation of "same or similar class" is contrary to that in the procedure manual, which states that this phrase refers "both to the kind of work performed and the kind of appointment held." Applying the correct definition, it appears that there were employees of the "same or similar class" in appellant's location, Region I. The titles of three employees -- public assistance coordinator -- are similar to appellant's title of senior public assistance engineer, and, more importantly, the employing establishment indicated all these employees did the same kind of work, namely disaster inspections. These employees also held the same kind of appointment as appellant. As these are the criteria by which employees are adjudged to be in the "same or similar class," the Office should have computed appellant's rate of pay by giving regard to the earnings of the employee performing inspections who worked the greatest number of hours in the employing establishment's Region I. The case shall be remanded to the Office for further development and an appropriate decision on appellant's pay rate under section 8114(d)(3).

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

[3] *Aquilline Braselman*, 49 ECAB 547 (1998).

CONCLUSION

The Office incorrectly calculated appellant's rate of pay.

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for action consistent with this decision of the Board.[4]

Issued: December 7, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[4] Given the Board's decision on the merits of appellant's claim, it is unnecessary for the Board to decide whether the Office properly refused to reopen the case for further merit review.