United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 06-357**
	)	**Issued: August 25, 2006**
DEPARTMENT OF HOMELAND SECURITY, FEDERAL EMERGENCY MANAGEMENT AGENCY, Albany, NY, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 2, 2005 appellant, through counsel, filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 22, 2005 concerning her pay rate for compensation purposes. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office used the correct rate of pay in determining her loss of wage-earning capacity effective March 24, 2003; and if so, (2) whether the Office properly reduced appellant's compensation benefits to zero on the grounds that her actual earnings as a modified core-disaster operations and recovery specialist fairly and reasonably represented appellant's wage-earning capacity.

FACTUAL HISTORY

On February 5, 1998 appellant, a 52-year-old disaster assistance employee special needs, filed a traumatic injury claim alleging that on February 2, 1998 she injured her neck, shoulder and chest when her automobile was struck from behind by another vehicle.[1] The Office accepted the claim for cervical sprain which later was expanded to include post-concussive syndrome.[2]

On March 19, 1998 appellant filed a claim for compensation (Form CA-7) for the period March 20 to April 3, 1998. On the back of the form, the employing establishment noted appellant's base pay as of February 1, 1998 was $50,545.00 per year. The employing establishment checked "no" to the question of whether appellant's position "would have afforded employment for 11 months but for the injury."

In a letter dated October 29, 1998, the Office requested the employing establishment to provide the total number of hours appellant worked for the period February 2, 1997 to February 1, 1998 and the pay received for this period since appellant was "on call to respond to emergency situations."

On February 8, 1999 appellant started work in a temporary position as an on-call response and recovery employee offered by the employing establishment, which was located in Philadelphia, Pennsylvania or Region III.

On October 1, 2001 the employing establishment faxed personnel information on appellant containing information on wages earned and hours worked.

In a letter dated October 15, 2001, the employing establishment indicated that appellant worked intermittent hours and did not work a 40-hour per week schedule prior to her injury.

The record contains evidence that appellant's base pay was $21,717.22 and overtime was $7,084.38 for the year 1997 with an average of 39.07 hours per week.

On November 9, 2001 the Office issued a loss of wage-earning capacity decision which found that appellant had been reemployed as a core-disaster operations and recovery specialist effective March 15, 1999 with weekly wages of $602.16. The Office informed appellant that her wage-loss benefits had been reduced to zero pursuant to 5 U.S.C. § 8115 as her actual wages met or exceeded the wages of her date-of-injury position.

In a letter dated December 3, 2001, appellant, through counsel, requested an oral hearing, which was held on June 19, 2003.

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[1] On the back of the form appellant's duty station was listed as Albany, New York. A June 17, 1998 letter from the employing establishment indicates that appellant was in Region II. In a letter dated April 27, 1999, the Office was informed that appellant was currently an employee of Region III.

[2] On May 4, 1998 appellant filed a recurrence claim alleging a recurrence of disability beginning February 7, 1998.

In a decision dated September 12, 2003, an Office hearing representative set aside the September 9, 2001 decision and remanded the case for further development of appellant's pay rate pursuant to 5 U.S.C. § 8114(d)(1) and (2). The hearing representative found that the Office failed to consider "the earnings of other employees" in similar employment.

In a letter dated December 11, 2003, the Office requested the employing establishment to provide information to assist in determining her pay rate.[3] It requested the employing establishment to provide information on "the annual earnings, exclusive of overtime, of another similar on-call disaster assistance employee who worked the greatest number of hours" for the year preceding appellant's injury on February 2, 1998 and whether appellant "was a level D, number three in her position." If appellant was confirmed as employed as a level D, number 3, the employing establishment was requested to provide information on the "person with the greatest number of hours during the period" in question.

On January 30, 2004 the Office received a faxed copy of an e-mail from Suzi Nowosadko, with the employing establishment, to Kenya Hughes. The fax number was 703-941-9420. Ms. Hughes' email address listed her at lifecare-usa.com. In the January 29, 2004 email, Ms. Nowosadko informed Ms. Hughes that "total wages for the year prior to the accident are $40,022.10" with hours worked of 1,936.50. This information was based on "another employee doing similar work as [appellant]."

On March 19, 2004 the Office issued a loss of wage-earning capacity decision which found appellant had no lost wages in her modified position. The Office determined that her weekly pay rate at the time of injury was $769.95 and updated was $1,141.77 effective March 24, 2003. Her current pay rate in the modified position was $1,271.60.

In a letter dated March 23, 2004, appellant, through counsel, requested an oral hearing and a subpoena for the employing establishment to provide documentation to properly calculate her pay rate. In a letter dated August 3, 2004, appellant's counsel requested the hearing representative to subpoena specific personnel reports from the employing establishment that would show the hours worked by the disaster assistance employees for the period February 1997 to February 1998. A hearing was held on December 1, 2004 at which appellant was represented by counsel.

In a July 19, 2005 decision, the Office hearing representative set aside the March 19, 2004 loss of wage-earning capacity decision and remanded the case for the Office to determine appellant's pay rate pursuant to 5 U.S.C. § 8114(d)(3).[4] Once appellant's pay rate was properly calculated, the hearing representative instructed the Office to issue a new decision on whether her actual evidence fairly and reasonably represented her wage-earning capacity.

[3] The address listed on the letter was in Alexandria, Virginia.

[4] The Board notes that the hearing representative's decision did not address the issue of appellant's request for a subpoena. As the Office did not address this issue in a final decision, the Board may not address this issue for the first time on appeal. 20 C.F.R. § 501.2(c); *see Karen L. Yaeger*, 54 ECAB 323 (2003).

On September 1, 2005 the Office received an August 29, 2005 Office form regarding compensation completed by Shirley Kuhn, Human Resources Assistant. The form was faxed to the Office on August 29, 2005 from telephone number 301-447-1202. Ms. Kuhn indicated that appellant was a temporary employee who worked intermittently at the time of her injury, February 2, 1998. She indicated that appellant's gross pay for the year prior to the injury was $23,161.00 and that she worked 935 hours. Ms. Kuhn noted that the actual wages for a disaster employee working the same position and period covered was $40,021.30 based on 1936.50 hours worked.

By decision dated November 22, 2005, the Office issued a loss of wage-earning capacity decision which reduced her wage-loss compensation to zero. The Office determined that the current pay rate for the job appellant held when injured was $1,141.75, that her weekly pay rate as of February 2, 1998 was $769.64 and that her current pay was $1,271.60, thereby, resulting in no loss of wage-earning capacity. The Office found that appellant demonstrated she could work in the position for two or more months and that the position was suitable to her partially disabled condition.

LEGAL PRECEDENT

Sections 8114(d)(1) and (2) of the Federal Employees' Compensation Act[5] provide methodology for computation of pay rate for compensation purposes, by determining average annual earnings at the time of injury. Section 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

[5] 5 U.S.C. § 8114(d)(1) and (2).

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.
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> "'Same or similar class' refers both to the kind of work performed and the kind of appointment held....
>
> "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."[6]

ANALYSIS

Appellant did not work as a disaster assistance employee for substantially the whole year immediately preceding her injury. The evidence shows that she worked a total of 935 hours in the year before her injury, nor would her position have afforded her employment for substantially a whole year, as the employing establishment reported that the position of disaster assistance employee was one of irregular, unscheduled tours. The record does not contain any evidence as to whether inspectors in appellant's region worked over 200 days in the year before appellant's injury. Thus section 8114(d)(1) and (2) of the Act do not apply to appellant.

Given the inapplicability of section 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 of determining her loss of wage-earning capacity. In applying section 8114(d)(3), however, the Board finds that 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.[7]

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. At the time of appellant's injury she was working in Region II and subsequently accepted a position with the employing establishment in Region III. 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 record contains pay information on an employee, but contains no

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

[7] *Dale Mackelprang*, 57 ECAB ___ (Docket No. 05-1401, issued October 24, 2005); *Aquilline Braselman*, 49 ECAB 547 (1998).

evidence as to whether this employee was in appellant's region or the region the employee was located. The employing establishment apparently 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." The record is unclear as to whether there were employees of the "same or similar class" in appellant's location and grade. The record contains no evidence regarding any other employees in Region II. 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 Region II. The information relied upon by the Office to compute appellant's pay rate was sent by Ms. Kuhn, Human Resources Assistant from the number 301-447-1202. The form completed by Ms. Kuhn contains no identifying information of the employment establishment. In addition, when the Office requested the employing establishment to submit the requested information, it sent the letter to an address in Alexandria, Virginia. It is not readily apparent that these office's of the employing establishment are in Region II or provide support for Region II. 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).

CONCLUSION

The Board finds that the Office incorrectly calculated appellant's rate of pay in determining her loss of wage-earning capacity.[8]

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[8] In view of the disposition of the first issue, the second issue is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 22, 2005 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: August 25, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board