

**United States Department of Labor
Employees' Compensation Appeals Board**

ROBERT A. FLINT, Appellant)	
)	
and)	Docket No. 05-1106
)	Issued: February 7, 2006
DEPARTMENT OF THE INTERIOR,)	
NATIONAL PARK SERVICE, Crater Lake, OR,)	
Employer)	

Appearances:
Robert A. Flint, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 19, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 23, 2005 merit decision concerning his pay rate for compensation purposes. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly calculated appellant's pay rate for compensation purposes.

FACTUAL HISTORY

On July 14, 1999 appellant, then a 48-year-old maintenance worker, filed a traumatic injury claim alleging that he tripped that day on a loose board on the bottom step leading up to a compactor. He hit his head and right elbow on the cement. The Office accepted appellant's claim for right eyebrow laceration, nondisplaced coronoid process fracture of the right elbow, and post-traumatic arthritis. The Office authorized debridement surgery which was performed

on May 1, 2000 and paid compensation for periods of disability.¹ By award of compensation dated May 25, 2001, the Office granted appellant a schedule award for a seven percent permanent impairment of his right arm.

The record contains personnel documents which indicate that appellant's appointment as a maintenance worker was temporary and that his tour of duty was seasonal on a full-time work schedule (40 hours per week).² In several CA-7 forms completed beginning in August 1999, appellant's supervisor indicated that his position would not have afforded him employment for 11 months but for the July 14, 1999 employment injury.

By decision dated April 3, 2002, the Office adjusted appellant's compensation based on its determination that the selected position of hotel clerk represented his wage-earning capacity. By decision dated January 3, 2003, the Office affirmed its January 3, 2003 decision.

Appellant appealed these decisions to the Board. By decision dated October 14, 2003, the Board reversed the Office's determination that the selected position of hotel clerk represented his wage-earning capacity.³ The Board indicated that the Office had not shown that appellant was physically capable of performing the position.

In a letter dated November 21, 2003, appellant argued that he received an improper pay rate for compensation purposes. Appellant acknowledged that he did not work the whole year before his July 14, 1999 employment injury, but argued that his pay rate should be based on the earnings of a maintenance worker who worked full time. He asserted that such a worker would earn \$25,584.00 per year, an amount he derived by multiplying the daily wage of \$98.40 (\$12.30 per hour times 8 hours) times 260 workdays per year.⁴ Appellant claimed that he had the ability to work full time for a year as a maintenance worker and asserted that this ability was demonstrated by the intermittent work he performed for the employing establishment on a full-time schedule and by his intermittent self-employment.

Appellant further argued that the fact that he had a current Federal Aviation Administration (FAA) mechanic's license in 1999 showed that he had a high ability to earn wages and therefore should receive a higher rate of pay for compensation purposes. He also cited a portion of the Office procedure manual which indicated that in some circumstances a part-time or short-term injured federal employee who concurrently worked full time in private employment would have his compensation based on the pay rate of someone who performed the job of the injured employee on a full-time basis.⁵ Appellant asserted that this portion of the

¹ In September 2000 appellant began participating in a vocational rehabilitation program, but his participation in this program did not result in him being placed in a job.

² Appellant worked for the employing establishment during two periods, August 28 to October 7, 1998 and June 28 to September 29, 1999. He started off earning \$12.30 per hour and beginning August 29, 1999, *i.e.*, a time after his July 14, 1999 employment injury, he earned \$12.75 per hour.

³ Docket No. 03-1148 (issued October 14, 2003).

⁴ Appellant indicated that this calculation was dictated by the strictures of 5 U.S.C. § 8114(d)(1).

⁵ Appellant cited the following: Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4c(1) (December 1995).

Office procedure manual supported his contention that he should receive a greater amount of compensation.

In a letter dated February 17, 2004, appellant stated that, if 5 U.S.C. § 8114(d)(1) and (2) were not applicable for calculating pay rate in a given case, the provisions of 5 U.S.C. § 8114(d)(1) would serve as a “catch all” for calculating such pay.⁶ He asserted that, if the standards of 5 U.S.C. § 8114(d)(3) were applied to his case, his pay rate would be based on the earnings of the federal employee working the greatest number of hours during the year prior to his July 14, 1999 employment injury in the same or most similar class and working in the same or most similar employment in the same or neighboring location. Appellant claimed that the application of this standard would yield average yearly earnings of \$26,609.25 per year, a figure he derived by multiplying the hourly wage of \$12.75 times 2087 work hours per year.⁷

In April 2004 the Office requested that the employing establishment provide information relevant to the calculation of appellant’s pay rate for compensation purposes. Cheryl M. Gibson, a human resources assistant for the employing establishment, indicated that appellant worked for 46 days at the employing establishment and had \$4,043.00 in earnings during the year prior to his July 14, 1999 employment injury.⁸ She noted that there was no expectation that appellant would have recurrent employment with the employing establishment in subsequent seasons. Ms. Gibson indicated that \$8,856.00 was the figure for the federal employee working the greatest number of hours in the same class as appellant and working substantially the whole year immediately preceding July 14, 1999 in the same or similar employment in the same or neighboring place.⁹

By decision dated May 25, 2004, the Office determined that it properly calculated appellant’s pay rate for compensation purposes. The Office indicated that appellant did not work in the employment in which he was injured substantially for the whole year immediately preceding the injury and that he would not have been afforded employment for substantially a whole year, except for the injury, and therefore it was appropriate to apply section 8114(d)(3) of the Federal Employees’ Compensation Act to compute his pay rate. The Office stated that appellant did not

⁶ Appellant suggested that application of 5 U.S.C. § 8114(d)(1) and (2) would not be appropriate in his case, but he also provided a calculation under 5 U.S.C. § 8114(d)(1) that yielded a pay rate of \$25,584.00 per year.

⁷ Appellant argued that 5 U.S.C. § 8114(d)(3) dictated that the \$26,609.25 figure should be used because it was higher than the actual wages he earned at the employing establishment in the year prior to July 14, 1999. He also claimed that 5 U.S.C. § 8114(d)(3) required that other relevant factors be considered, including his self-employment, FAA mechanic’s license, commercial driver’s license, educational level and family background. In a letter dated April 21, 2004, appellant noted that he had an associate degree in aircraft mechanics.

⁸ Ms. Gibson indicated appellant worked at the employing establishment full time from June 28 to September 29, 1999. Although she appears to have inadvertently left off appellant’s employment from August 28 to October 7, 1998, her indication that appellant worked 46 days in the year prior to July 14, 1999 appears accurate as the periods August 28 to October 7, 1998 and June 28 to July 14, 1999 would contain about 46 workdays.

⁹ Ms. Gibson stated that this employee worked 720 hours at \$12.30 per hour during this period. She initially indicated that the earnings figure for such an employee was \$26,609.25, but after a discussion with an Office claims examiner who explained the standards for calculating the figure she indicated that the proper figure was \$8,856.00.

provide information about his prior nonfederal employment of a similar nature.¹⁰ The Office then applied the formula from the last sentence of 5 U.S.C. § 8114(d)(3) to calculate that appellant's weekly pay rate for compensation purposes was \$283.85.¹¹ It obtained this figure by multiplying \$12.30 (appellant's hourly wage at the time of injury) times 8 (the average hours worked per day), multiplying the resultant \$98.40 figure by 150, and then dividing the resultant \$14,760.00 figure by 52.¹²

Appellant submitted an August 7, 2004 statement in which he argued that his prior nonfederal employment was not adequately considered in his pay rate. He asserted that between July 13 and August 26, 1998 he was self-employed for 38 days developing an airplane wing fuel tank "at an industry replacement rate of \$12,000.00." Appellant noted that it would cost an estimated \$1,613.33 per week to contract Skystar Aircraft or Monarch Air Development to perform this same work. He stated that, between August 28 and October 23, 1998, he was self-employed rebuilding the table on a Caterpillar Grader at an "estimated industry cost of \$2,500.00" or \$62.50 per hour, the rate that a local Caterpillar dealer would have charged for the same work.

Appellant submitted a resume which indicated that he had previously held a variety of positions including aircraft refueler, seaman surveyor, vehicle operator and rotax engine operator. He indicated that between August 1997 and October 1998 he worked as an evacuating equipment mechanic for a private firm and that between May 1995 and August 1998 he was self-employed as an experimental aviation technician. The resume listed his education, including an associate degree (A.A.S.) as an aviation maintenance technician, and various licenses, including an FAA mechanic's license and a commercial driver's license.

Appellant requested a hearing before an Office hearing representative which was held on January 4, 2005. At the hearing, appellant provided arguments that were similar to those contained in his previously submitted statements.¹³

By decision dated and finalized March 23, 2005, the Office hearing representative affirmed the Office's May 25, 2004 decision. The Office hearing representative explained that the Office properly applied sections 8114(d)(3) and considered all the appropriate factors delineated therein, including appellant's federal and nonfederal employment in the year prior to his July 14, 1999 employment injury and the earnings of the federal employee working the greatest

¹⁰ The employing establishment reported the figure \$8,856.00 for the federal employee working the greatest number of hours in the same class as appellant and working substantially the whole year immediately preceding July 14, 1999 in the same or similar employment.

¹¹ Appellant actually received compensation at 66 2/3 of this figure because he was single with no dependents. See 5 U.S.C. §§ 8105(a), 8110(b).

¹² A December 6, 2004 Office decision adjusted appellant's wage-earning capacity. This matter came before the Board in Docket No. 05-796. By decision dated December 2, 2005, the Board affirmed that appellant's actual earnings represented his wage-earning capacity.

¹³ Appellant later submitted January 23 and February 16, 2005 statements which contained arguments that were similar to those contained in his previously submitted statements.

number of hours during the year prior to July 14, 1999 in the same or most similar class and working in the same or most similar employment.

LEGAL PRECEDENT

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."¹⁴ Section 8101(4) of the Act defines "monthly pay" for 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...."¹⁵

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."¹⁶

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 whole year immediately preceding the injury and would have been afforded employment for substantially a whole year, except for the injury.¹⁷ Sections 8114(d)(1) and 8114(d)(2) of the 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 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 rate of pay; or

¹⁴ 5 U.S.C. § 8105(a). 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. 5 U.S.C. § 8110(b).

¹⁵ 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

¹⁶ See *Charles P. Mulholland, Jr.*, 48 ECAB 604, 606 (1997).

¹⁷ 5 U.S.C. §§ 8114(d)(1), (2).

(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.

(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.”¹⁸

If the evidence shows that an employee did not work in the employment in which he was injured substantially for the whole year immediately preceding the injury and that he would not have been afforded employment for substantially a whole year, except for the injury, sections 8114(d)(1) and (2) of the Act are not applicable to the computation of the employee’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

¹⁸ 5 U.S.C. §§ 8114(d)(1), (2). The phrase “substantially the whole year” has been interpreted to mean at least 11 months. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4a (December 1995).

employee earned in the employment during the days employed within one year immediately preceding the injury.”¹⁹

ANALYSIS

The Office accepted that appellant sustained a right eyebrow laceration, nondisplaced coronoid process fracture of the right elbow and post-traumatic arthritis due to a July 14, 1999 employment injury. The record reflects that appellant’s appointment as a maintenance worker was temporary and that his tour of duty was seasonal with a full-time work schedule.²⁰ The evidence of record, including several personnel documents and statements from employing establishment officials, shows that appellant did not work in the employment in which he was injured substantially the whole year immediately preceding the July 14, 1999 employment injury and that he would not have been afforded employment for substantially a whole year, except for the injury.²¹ During the year prior to his July 14, 1999 injury, appellant worked in his temporary seasonal position from August 28 to October 7, 1998 and from June 28 to July 14, 1999.²²

The Board finds that the Office correctly calculated appellant’s pay rate for compensation purposes.

Because appellant did not work in the employment in which he was injured substantially for the whole year immediately preceding the July 14, 1999 employment injury and that he would not have been afforded employment for substantially a whole year, except for the injury, the Office

¹⁹ 5 U.S.C. § 8114(d)(3). According to Office procedure, the phrase “the same or most similar class working in the same or most similar employment” refers to both the kind of work held and the kind of appointment held. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(3)(b) (March 1996). When collecting information about an employee’s prior federal and nonfederal employment wages and the wages of other employees of the United States in the same or most similar class and working in the same or most similar employment in the same or neighboring location, the wage information is generally collected for the year prior to the employee’s employment injury. See *Ricardo Hall*, 49 ECAB 390, 394-95 (1998); *Billy Douglas McClellan*, 46 ECAB 208, 212-13 (1994); *Wendell Alan Jackson*, 37 ECAB 118, 121-22 (1985). With regard to nonfederal employment, “[o]nly earnings in employment which is the same as, or similar to, the work the employee was doing when injured may be considered.” Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4c(3)(c) (March 1996).

²⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.3 (December 1995) for a discussion of different kinds of appointment and tour-of-duty classifications for nonpostal workers.

²¹ Appellant worked about 3 months in the year prior to July 14, 1999 and the phrase “substantially the whole year” from section 8114(d)(1) of the Act has been interpreted to mean at least 11 months. See *supra* note 17.

²² He earned \$12.30 per hour at the time of his injury and worked 46 days with earnings of \$4,043.00 during the year prior to July 14, 1999.

properly found that sections 8114(d)(1) and (2) of the Act are not applicable to the computation of his pay rate.²³

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.²⁴ 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 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; appellant's prior nonfederal employment; and "other relevant factors." The Office complied with its procedure by obtaining information from the employing establishment and appellant concerning these factors.

The evidence revealed that appellant had \$4,043.00 in earnings from his federal employment during the year prior to his July 14, 1999 employment injury and that he did not have any earnings from private employment during the prior year. Appellant argued that he had intermittent self-employment and employment with a private firm in the year prior to his July 14, 1999 injury that was not adequately considered by the Office. However, the record does not contain any indication that he had earnings from this claimed private employment.²⁵

The evidence also revealed that \$8,856.00 was the figure for the federal employee working the greatest number of hours in the same class as appellant and working substantially the whole year immediately preceding July 14, 1999 in the same or similar employment in the same or neighboring place. Appellant argued that this figure should be \$26,604.25 which was his calculation of the wages of the maintenance worker at the employing establishment who worked the greatest number of hours on a full-time basis for an entire year. However, Office procedure dictates that the phrase "the same or most similar class working in the same or most similar employment" refers to both the kind of work held and the kind of appointment held.²⁶ Therefore, it was appropriate for the Office to use the figure for the local maintenance worker with the greatest number of hours whose appointment was similar to that of appellant, *i.e.*, temporary and seasonal in nature. Considering all the factors delineated in the first portion of section 8114(d)(3),

²³ Appellant suggested that section 8114(d)(1) of the Act should be applied to his case and that application of this section would show that the salary of a maintenance worker who worked full time for a year was an appropriate amount upon which to base his pay rate. He claimed that his ability to work full time for a year as a maintenance worker was demonstrated by the intermittent work he performed for the employing establishment on a full-time schedule and by his intermittent self-employment, but he did not provide citation to authority to support his contentions.

²⁴ 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).

²⁵ Appellant indicated that this self-employment included work on an aircraft fuel tank and a land grader. He provided estimated figures for the wages which would be paid if the work was contracted out, but he did not indicate that he had earnings or otherwise support his claims with documentation. Appellant also indicated that he worked as an evacuating equipment mechanic for a private firm during the year prior to July 14, 1999, but he did not detail any wages he might have earned.

²⁶ See *supra* note 19.

the Office reasoned that the figure of \$8,856.00, being the highest, represented the average yearly earnings to be derived from this portion of section 8114(d)(3).²⁷

The Office complied with its procedure by comparing the above-described figure for average annual earnings derived from this information to that which would be obtained from the formula delineated in the last sentence of section 8114(d)(3).²⁸ It determined that the figure derived from the formula delineated in the last sentence of section 8114(d)(3) was greater and therefore was the appropriate figure for pay rate for compensation purposes. The Office correctly applied the formula from the last sentence of section 8114(d)(3) to find that appellant had a weekly pay rate of \$283.85, a figure which was derived by multiplying appellant's hourly wage of \$12.30 per hour times his average workday of 8 hours per day, multiplying the result times 150 and then dividing the result of this computation by 52. The Board finds that the Office properly determined that appellant's pay rate for compensation purposes was \$283.85 per week and that he was correctly been paid compensation based on this 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.²⁹ For the reasons detailed above, the Office used the correct pay rate to calculate appellant's benefits.

CONCLUSION

The Board finds that the Office properly calculated appellant's pay rate for compensation purposes.

²⁷ Appellant argued that his education, licenses, and work background were not adequately considered under the "other relevant factors" language of section 8114(d)(3), but he did not adequately explain how this information would result in a higher pay rate. Appellant also cited a portion of the Office procedure manual and argued that it showed that his compensation should be based on full-time wages for a year. However, this aspect of Office procedure would not apply to appellant as he did not work full time in private employment concurrently with his federal employment. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4c(1) (December 1995).

²⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4c(4), (5) (March 1996).

²⁹ *Gerald A. Karth*, 48 ECAB 194, 197 (1996).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 23, 2005 and May 25, 2004 decisions are affirmed.

Issued: February 7, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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