United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 07-948**
	)	**Issued: September 25, 2007**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Columbus, OH, Employer	)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 23, 2007 appellant filed a timely appeal from a March 24, 2006 merit decision of the Office of Workers' Compensation Programs finding an overpayment of compensation and denying waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of $15,626.46, because the Office paid her at an inaccurate rate from June 29, 2000 to April 19, 2003; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On January 8, 2000 appellant, then a 60-year-old casual mail handler, filed a claim for an injury to her left knee occurring on that date in the performance of duty. The Office accepted the claim for a left knee strain and contusion, bilateral shoulder strain, a rotator cuff tear of the left shoulder, rotator cuff tendinitis of the right shoulder and a medial meniscus tear of the left knee.

The employing establishment indicated on the claim form that appellant worked eight hours per day Monday through Saturday.

Appellant stopped work on January 9, 2000 and returned to sedentary work on January 16, 2000. She began performing her regular duties on May 16, 2000. The employing establishment informed the Office that appellant's temporary appointment ended June 27, 2000. The Office noted that appellant earned $456.00 per week working eight hours per day Monday through Saturday. On January 26, 2001 it began paying her compensation retroactive to June 29, 2000 based on a pay rate of $456.00 per week.

By letter dated February 7, 2003, the Office requested that the employing establishment indicate whether appellant worked either substantially the whole year or on a full-time basis prior to her January 8, 2000 employment injury. It further asked that the employing establishment provide the annual earnings of the employee working the greatest number of hours in similar employment in the year preceding her injury.

On February 11, 2003 the employing establishment indicated that appellant earned $19,047.10 working as a temporary mail handler in the year prior to the injury not including overtime and $2,614.00 in premium pay. The employing establishment stated that a mail handler employed from January 2, 1999 to December 31, 2000 worked the greatest number of hours in similar employment.

On February 25, 2003 the employing establishment related that appellant was a casual or seasonal, mail handler and that her final appointment ended June 27, 2000. Appellant earned $9,880.00 the year prior to the injury, excluding overtime and $2,614.00 in premium pay. The employing establishment submitted her earnings during the pay periods one year prior to January 8, 2000. Appellant did not work from pay period 15 to pay period 25 during the year prior to her employment injury because she was between appointments. The record shows that she earned $11,134.77, for the year prior to the injury plus $1,237.03, in night differential.

On April 18, 2003 the Office calculated that appellant earned $12,176.80 per year, with a base salary of $11,134.77 and $1,052.03 for night differential. It divided this amount by 52 weeks and found that she earned $234.36 per week. Using the formula provided by 5 U.S.C. § 8114(d)(3), the Office calculated appellant's pay rate as $253.85 per week. It obtained this amount by multiplying $11.00, her hourly rate at the time of injury, by 8, the average hours worked per day and then multiplying the resulting $88.00 by 150 and dividing this amount, $13,200.00, by 52. The Office maintained that it was unable to use the average annual earnings of a similar employee because appellant was a causal employee appointed for a term of employment. In a memorandum of the same date, the Office noted that appellant received an overpayment because it paid her compensation based on a pay rate of $456.00 instead of the correct rate of $253.85.[1]

[1] In a decision dated April 18, 2003, the Office reduced appellant's compensation to zero based on its finding that she had the capacity to perform the selected position of surveillance systems monitor. On February 18, 2004 an Office hearing representative affirmed the April 18, 2003 wage-earning capacity determination.

On October 5, 2005 the Office advised appellant of its preliminary determination that she received an overpayment of compensation in the amount of $15,626.46, because it paid her compensation at an incorrect rate for the period June 20, 2000 to April 19, 2003.[2] It explained that it initially calculated appellant's pay rate by multiplying her hourly rate of $9.50 by 48, the hours appellant worked per week, to find a weekly pay rate of $456.00. The Office noted that it erroneously included overtime in its calculation of her pay rate even though overtime was legislatively excluded from pay rate calculations. It also determined that, as an irregular employee who did not demonstrate the ability to work full time, appellant's pay rate should be calculated by either dividing her salary with night differential but excluding overtime by 52 or by multiplying her hourly wage by 8 and then multiplying this amount by 150 and dividing by 52. The Office stated:

> "It took investigation and time with your [employing establishment] to determine your average earnings the year prior to your injury, excluding overtime. The final figures used for calculating your prior pay rate are as follows: the year prior to the injury, your base salary was $11,134.77 and your night differential was $1,052.03, for a total of $12,186.80. Applying formula a, $12,186.80/52 = $234.36. Your average hourly pay rate on the date of injury was reported as $11.00 per hour ($440.00 per week). Applying formula b, $11.00 x 8 x 150 [divided by] 52 = $253.85."

The Office asserted that it could not compare the average earnings of a similarly situated employee as she worked as a seasonal temporary worker and similar earnings were thus not obtainable. It used $253.85 as appellant's pay rate because it was the higher rate. The Office explained that from June 20, 2000 to April 19, 2003 she received $50,428.72, based on the incorrect pay rate of $456.00. Appellant should have received $34,802.26, which constituted an overpayment of $15,626.46. The Office advised her of its preliminary determination that she was without fault in the creation of the overpayment and requested that appellant complete and submit an enclosed overpayment recovery questionnaire.

In a telephone call dated March 24, 2006, appellant related that she did not believe that she owed money to the Office and could not repay the overpayment because she had retired.

By decision dated March 24, 2006, the Office finalized its finding that appellant received an overpayment of $15,626.46 and that she was not at fault in its creation. The Office determined that appellant was not entitled to wavier and noted that she had not responded to its request for financial information. The Office determined that appellant should submit a monthly check in the amount of $434.07 from May 1, 2006 to June 1, 2009 to repay the overpayment.

[2] By decision dated December 2, 2004, the Office granted appellant a schedule award for a 48 percent total impairment of the right and left lower extremity. By decision dated January 7, 2005, the Office finalized a finding that she received an overpayment of $1,663.86, because she initially received a schedule award at an inaccurate rate and that she was not entitled to waiver.

LEGAL PRECEDENT -- ISSUE 1

Section 8105(a) of the Federal Employees' Compensation Act[3] 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 [her] monthly pay, which is known as [her] basic compensation for total disability."[4] 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] Pay rate for compensation purposes is defined in section 8101(4) as the monthly pay at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.[6]

Section 8114(d)(1) and (2) of the Act,[7] provide methodology for computation of pay rate for compensation purposes by determining 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 of 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 the 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 the injury.[8]

For employees paid under section 8114(d)(3), the Office's procedure manual provides that the Office consider the following factors in determining pay rate for compensation purposes under section 8114(d)(3).

---

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U .S.C. § 8105(a).

[5] 5 U.S.C. § 8110(b).

[6] 5 U.S.C. §§ 8101(4); 8114; *see also* 20 C.F.R. § 10.5(s).

[7] 5 U.S.C. § 8114(d)(1) and (2).

[8] 5 U.S.C. § 8114(d)(3).

"The factors to be considered and the sources of evidence are as follows:

(a) The injured employee's earnings in [f]ederal employment, as obtained from the employing agency or other federal agency where the employee worked;

(b) 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 federal agency in the same or neighboring locality.

'Same or most similar class' refers both to the kind of work performed and the kind of appointment held. If the injured employee's term of employment is less than a year, the earnings of the similarly-situated employee should be prorated to represent the same term of employment.

If the 'same or most 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."[9]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a left knee strain and contusion, bilateral shoulder strains, a left shoulder rotator cuff tear, rotator cuff tendinitis of the right shoulder and a tear of the medial meniscus of the left knee due to a January 8, 2000 employment injury. The employing establishment indicated that appellant worked eight hours per day Monday through Saturday. The Office paid her compensation beginning June 29, 2000 based on a pay rate of $456.00 per week. It determined that she received an overpayment of compensation from June 29, 2000 to April 19, 2003 because it paid her at an inaccurate pay rate. The Office explained that it had erroneously included overtime in calculating appellant's pay rate and also used an incorrect method to calculate her pay rate. It found that appellant's correct hourly rate was $253.85 and that she should have received $34,801.26 in compensation for the period June 29, 2000 to April 19, 2003. Appellant received instead $50.428.72, creating an overpayment of $15,626.46.

Appellant did not work in her date-of-injury employment for substantially the whole year immediately preceding her January 8, 2000 employment injury. She did not work the preceding year during pay periods 15 through 25. Appellant also would not have been afforded employment for substantially the whole year except for the injury as her appointment as a causal mail handler ended on June 27, 2000. Consequently, sections 8114(d)(1) and (2) of the Act are not applicable to the computation of her pay rate.

Give 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.[10] In

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c)(3) (February 2007).

[10] *See Robert A. Flint*, 57 ECAB ___ (Docket No. 05-1106, issued February 7, 2006).

applying section 8114(d)(3), however, the Office did not adequately consider the earnings of an employee in a similar class working in the same or most similar employment in the same or neighboring location. In accordance with its procedures, it requested information from the employing establishment regarding the earnings of a similar federal employee working the greatest number of hours for the year prior to January 8, 2000. On February 11, 2003 the employing establishment informed the Office that a temporary mail handler employed from January 2, 1999 to December 31, 2000 worked the most hours in similar employment. In determining appellant's pay rate for compensation purposes, the Office found that it could not compare her earnings with a similarly situated employee because she was a seasonal, temporary worker. The requirement in section 8114(d)(3) to consider the earnings of the employee with the greatest number of hours in the same or a similar position and location as the claimant, however, applies to temporary, seasonal workers.[11] In *Aquilline Braselman*,[12] the Board remanded the case for the Office to obtain the annual earnings of another employee with the same kind of appointment working in a job with the same or similar duties in the same or a neighboring location for the year prior to the injury sustained by the claimant, a casual mail handler who worked no more than 180 days a year. The Office thus erred in failing to comply with the requirement set forth in section 8114(d)(3). As it inaccurately applied section 8114(d)(3) in reaching its determination of appellant's pay rate, the Office improperly determined that she received a $15,626.46 overpayment of compensation.[13]

CONCLUSION

The Board finds that the Office failed to establish that appellant received an overpayment of compensation.

[11] *See Robert A. Flint*, *supra* note 10; *Joseph A. Matais*, 56 ECAB ___ (Docket No. 04-1745, issued December 7, 2004); *Aquilline Braselman*, 49 ECAB 547 (1998).

[12] *See Aquilline Braselman*, *supra* note 11.

[13] In view of the Board's disposition of the overpayment determination, the issue of whether the Office properly denied waiver is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 24, 2006 is reversed.

Issued: September 25, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board