United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 07-312**
	)	**Issued: August 1, 2008**
DEPARTMENT OF AGRICULTURE, FARM OPERATIONS BRANCH, Beltsville, MD, Employer	)	

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument May 22, 2008

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 16, 2006 appellant filed a timely appeal from a March 8, 2006 merit decision of the Office of Workers' Compensation Programs reducing his compensation benefits based on its recalculation of his pay rate and a September 27, 2006 hearing representative's decision affirming the pay rate determination and finding that he received an overpayment of compensation and was not entitled to waiver of the recovery of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the pay rate and overpayment decisions.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation based on its recalculation of his pay rate; (2) whether he received a $117,479.61 overpayment of compensation from September 19, 1991 to August 6, 2005 because he was paid compensation at an inaccurate rate; and (3) whether the Office properly denied waiver of the recovery of the overpayment.

FACTUAL HISTORY

On April 15, 1991 appellant, then a 50-year-old tractor operator, filed a traumatic injury claim alleging that he sustained an injury on April 12, 1991 when he twisted his left leg jumping off a tractor. The Office accepted his claim for acute lumbar strain. He worked intermittently until September 19, 1991, when he stopped work and did not return.

On October 11, 1991 appellant filed a claim for compensation (Form CA-7) beginning September 24, 1991. The employing establishment indicated on the form that he earned $11.01 per hour and had worked six months in federal employment. Appellant had not worked in the position for 11 months prior to the injury and the position would not have provided 11 months of employment. The Office paid him disability compensation beginning September 19, 1991 and placed him on the periodic rolls effective October 5, 1991. It used a weekly pay rate of $440.40 in computing the amount of appellant's compensation or his hourly wage multiplied by 40.[1]

On February 1, 2005 the employing establishment advised that appellant had worked only five days prior to his April 12, 1991 employment injury. He worked intermittently subsequent to his employment injury. Appellant's temporary, seasonal appointment ended on October 6, 1991. He earned $11.01 per week.

Social Security Administration records show that appellant earned $10,555.47 in 1990 and $2,594.70 in 1991 working for the Department of the Army. He also earned $469.52 in 1990 working for Modern Moving & Storage, Incorporated.

By letter dated May 17, 2005, the Office noted that as appellant was in a temporary position at the time of his employment injury his pay rate should have been based on either his earnings for the year prior to the injury, the earnings of a similar employee or the daily wage formula. It found that the earnings of a similar employee or his wages in other positions were not available. The Office advised appellant that it had used the daily wage formula, or his daily wage multiplied by 150, to find that he was entitled to a weekly pay rate of $254.08.

On June 15, 2005 the Office notified appellant of its proposed reduction of compensation based on its finding that he should be paid based on a weekly pay rate of $254.08. It informed him that he had 30 days to submit evidence showing that he worked full time substantially the whole year prior to April 12, 1991, his date of injury.

Appellant submitted a personnel Form (SF-50) showing that he began working effective September 30, 1990 as a tractor operator for the Department of the Army. The personnel form indicated that he had been working for the Department of the Army as a warehouse worker.

[1] The Office terminated appellant's compensation by decision dated December 1, 1992. By decisions dated December 21, 1992 and May 11, 1993, it denied modification of the termination. On August 31, 1993 the Office vacated its December 1, 1992 decision and returned appellant to the periodic rolls retroactive to December 13, 1992. By decision dated February 22, 2000, it determined that he had not established that his degenerative cervical condition, left carpal tunnel syndrome, left tarsal tunnel syndrome and left rotator cuff tear were causally related to the April 12, 1991 employment injury.

By decision dated July 27, 2005, the Office reduced appellant's compensation effective August 6, 2005. It applied the 150 formula set forth in 5 U.S.C. § 8114(d)(3) in determining that $254.08 represented his weekly pay rate. The Office indicated that it was unable to determine whether appellant worked substantially the whole year prior to his employment injury. On July 28, 2005 it advised appellant of its preliminary determination that he received an overpayment of $117,479.61 for the period September 19, 1991 through August 6, 2005, because he was paid compensation at an inaccurate rate. The Office found that he was without fault in the creation of the overpayment.

On July 30, 2005 appellant requested an oral hearing. On August 10, 2005 he requested a prerecoupment hearing. At the hearing, held on August 22, 2005, appellant contended that he had worked full time for a year prior to his employment injury with no break in service. On September 6, 2005 he submitted an overpayment recovery questionnaire.

A personnel form dated February 1990 indicates that the Department of the Army hired appellant as a warehouse worker. A personnel form dated April 13, 1991 reveals that appellant resigned from the Department of the Army to accept a position in Fort Myers, Virginia.

By decision dated December 12, 2005, the hearing representative set aside the July 27, 2005 decision reducing appellant's pay rate and the preliminary overpayment determination. She stated:

> "The evidence of record establishes that [appellant] did work for the Department of the Army for substantially the entire year immediately preceding the April 12, 1991 injury. [He] worked for Fort Bragg from February until September 29, 1990 as a warehouse worker and as a tractor operator for Fort Bragg from September 30, 1990. The Department of the Army terminated his appoint[ment] on April 12, 1991. I find that [appellant] has submitted evidence sufficient to establish that he worked in a federal government job more than one year prior to his injury and he earned wages from the federal government as a full-time employee during this period."

The hearing representative found that section 8114(d)(3) was applicable to determining appellant's pay rate as he did not work in the employment in which he was employed at the time of injury substantially the whole year preceding the injury and would not have been employed substantially the whole year if he had not been injured. She noted that the Office considered appellant's earnings one year prior to the injury when it verified earnings in 1990 and 1991 through the Social Security Administration but found that these earnings did not show entitlement to a pay rate higher than the 150 formula. The hearing representative concluded, however, that the Office had not obtained information from the employing establishment or other federal agency regarding the pay rate of an employee in the same or similar class prior to reaching its pay rate determination under section 8114(d)(3).

On December 15, 2005 the Office requested that the employing establishment "reconstruct the earnings of an employee working in a similar tractor operator position in the same or neighboring location for one year prior to April 12, 1991." On February 16, 2006 the employing establishment indicated that it reconstructed appellant's salary and work history

because it had retrieved his personnel file from archived records. The employing establishment asserted that it "was unable to find another name of someone that worked in the same or similar position as [appellant] in 1990/1991."

By decision dated March 7, 2006, the Office reduced appellant's compensation based on its finding that he was entitled to a weekly pay rate of $254.08 pursuant to the 150 formula in section 8114(d)(3). It noted that the employing establishment was unable to identify an employee who worked in the same or similar position in the same or a neighboring locality during the year prior to his injury. On March 9, 2006 the Office informed appellant of its preliminary determination that he received a $117,479.61 overpayment of compensation from September 19, 1991 through August 6, 2005, because he received compensation at an inaccurate rate. It also advised of its preliminary determination that he was without fault in the creation of the overpayment.

On March 13, 2006 appellant requested an oral hearing. At the telephonic hearing, held on May 3, 2006, he described his work history and challenged the overpayment finding. The hearing representative held the record open for appellant to submit information regarding waiver, which he submitted on August 24, 2006.

By decision dated September 27, 2006, the hearing representative affirmed the March 7, 2006 decision. She further finalized the finding that appellant received an overpayment of $117,479.61. The hearing representative found that he was not entitled to waiver of the recovery of the overpayment and that the entire amount was due and payable in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8105(a) of the Federal Employees' Compensation Act[2] 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."[3] 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.[4] 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.[5]

Section 8114(d)(1) and (2) of the Act,[6] provides 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

[2] 5 U.S.C. §§ 8101-8193.

[3] *Id*. at § 8105(a).

[4] *Id*. at § 8110(b).

[5] *Id*. at §§ 8101(4), 8114; *see also* 20 C.F.R. § 10.5(s).

[6] 5 U.S.C. § 8114(d)(1) and (2).

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.[7]

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).

> 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 [f]ederal 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 [f]ederal 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."[8]

[7] *Id*. at § 8114(d)(3).

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

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained acute lumbar strain due to an April 12, 1991 employment injury. At the time of his injury, he had worked only five days for the employing establishment as a temporary, seasonal tractor operator. Prior to beginning work for the employing establishment, appellant worked for the Department of the Army as a temporary tractor operator from September 30 to April 7, 1991 and as a warehouse worker from February 26 to September 29, 1990.

Appellant did not work in his date-of-injury employment for substantially the whole year immediately preceding his April 12, 1991 employment injury. He worked only five days in his date-of-injury position with the employing establishment and worked approximately six months as a tractor operator for the Department of the Army prior to his injury. Appellant also would not have been afforded employment for substantially the whole year except for the injury as he had a temporary appointment with the employing establishment, not to exceed October 6, 1991. Consequently, sections 8114(d)(1) and (2) of the Act are not applicable to the computation of his pay rate.

Given the inapplicability of sections 8114(d)(1) and (2) of the Act, the Office properly utilized section 8114(d)(3) to determine appellant's pay rate for compensation purposes.[9] In applying section 8114(d)(3), however, it 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 The procedure manual provides that the Office should consider the earnings of another federal 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. It can obtain this information either from the employing agency or another federal agency in the same or neighboring location.[10] The Office requested information from the employing establishment regarding the earnings of a tractor operator in the same or similar location rather then the earnings of an employee working either as a tractor operator or in a similar position. Further, when it failed to get a response from the employing establishment regarding a similarly situated employee, it did not inquire from other federal agencies about the earnings of an employee in a similar position in a similar location. The Office thus erred in failing to fully comply with the requirement set forth in section 8114(d)(3) and its procedure manual. As it inaccurately applied section 8114(d)(3) in reaching its determination of his pay rate, it improperly reduced appellant's compensation benefits.[11]

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation based on its recalculation of his pay rate.

[9] *See Robert A. Flint*, 57 ECAB 369 (2006).

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

[11] In view of the Board's disposition of the pay rate issue, the issue of whether appellant received an overpayment of compensation and the issue of waiver are moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 27 and March 7, 2006 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 1, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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