United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 08-224**
	)	**Issued: December 23, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Portland, OR, Employer	)	

Appearances:
John Eiler Goodwin, Esq., for the appellant
No appearance, for the Director

Oral Argument April 9, 2008

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 30, 2007 appellant filed a timely appeal from a May 3, 2007 decision of an Office of Workers' Compensation Programs' hearing representative who found that the Office used the correct rate of pay in awarding compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUE

The issue is whether the Office used the correct rate of pay in computing appellant's entitlement to compensation.

FACTUAL HISTORY

On August 24, 2003 appellant, a 40-year-old registered nurse, injured her right thumb while attempting to restrain a patient. She was hired as a part-time temporary employee and began working on October 20, 2002. The Office accepted that she sustained a right thumb sprain and authorized surgery on the first metacarpal of the right hand, which was performed on

February 19, 2004. Appellant stopped work on August 25, 2003 and returned on September 1, 2003.

On November 14 and December 22, 2003, appellant filed claims for compensation (Form CA-7) for the period September 30 to December 31, 2003. She noted that she had concurrent employment outside of her federal employment from January 1, 2000 to October 28, 2003 at Northwest Home Care. The employing establishment advised that appellant was not a full-time employee (FTE), but a part-time or .60 of a FTE and worked 48 hours every two weeks. As to whether her position would have afforded employment for 11 months but for the injury, the employing establishment noted "not applicable" on the November 14, 2003 claim form and stated, "yes" to the question on the December 22, 2003 claim form.

On January 20, 2004 the employing establishment noted that appellant filed CA-7 forms for time lost from her federal employment and Northwest Home Care. It advised that she was a part-time employee at both facilities and worked at the employing establishment for 48 hours in a two-week period. The human resource manager at Northwest Home Care advised that appellant was a supplemental employee, worked less than 24 hours weekly and had not worked since November 12, 2003.

On February 4, 2004 the Office requested additional information from the employing establishment and Northwest Home Care, including a position description, the total wages earned for the year prior to the work injury and the number of hours worked per week during the prior year.

On February 4, 2004 Northwest Home Care submitted a job description for a pediatric shift care nurse and advised that appellant earned gross wages of $15,909.94 from August 24, 2002 to August 24, 2003. Appellant's average weekly hours were 11.6. In a February 5, 2004 time analysis certification, Northwest Home Care described appellant as a supplemental "on-call" employee who did not have regularly scheduled hours and routinely worked less than 24 hours per week. She averaged about 42 hours per month and would have continued to work 42 hours per month but for her injury.

On February 9, 2004 the employing establishment advised that appellant started work on October 20, 2002 and therefore a one-year pay schedule was not available. The employer noted that from October 20, 2002 to August 23, 2003 appellant earned base pay of $31,741.07, night differential pay of $363.85, Saturday and Sunday pay of $3,068.00 and holiday pay of $828.00 for total compensation of $36,000.92. Appellant worked 1,139.5 regular hours, 130.5 night differential hours, 440 Saturday and Sunday hours and 30 holiday hours.

After undergoing surgery on February 19, 2004, appellant returned to limited-duty work on September 4, 2004.

In a February 23, 2004 daily roll payment worksheet, the Office noted that appellant worked as a part-time nurse at both the employing establishment and Northwest Home Care. Although the employing establishment advised that it could accommodate her work restrictions, Northwest Home Care could not. Appellant's earnings at the employing establishment from October 20, 2002 to August 24, 2003 consisted of base pay of $31,741.07, night differential pay

of $363.85, Saturday and Sunday pay of $3,068.00 and holiday pay of $828.00 for total earnings of $36,000.92. Her salary at Northwest Home Care for the period of August 24, 2002 to August 24, 2003 was $15,909.94. The Office added these amounts to find total wages for the one-year period prior to August 23, 2003 of $51,910.86. It divided this amount by 52 weeks to determine a weekly pay rate of $998.29. The Office determined that appellant's average employing establishment bi-weekly hours were 51.8 hours or 25.9 hours a week and the average weekly hours at Northwest Home Care was 11.6 hours. The average weekly hours at both facilities totaled 37.5 hours per week.[1]

On November 3, 2004 appellant, through her attorney, disputed the Office's pay rate determination. She contended that the Office should have used the pay rate of a full-time employing establishment nurse as appellant had dual employment in similar positions, which demonstrated her capacity to earn wages as a full-time nurse. On November 9, 2005 counsel asserted that the pay rate for a full-time regular employee effective August 24, 2003 would be $1,153.00.

In a December 14, 2005 decision, the Office found that appellant's weekly pay rate was $998.29. It found that appellant worked as a part-time nurse at the employing establishment from October 20, 2002 to August 24, 2003 with total pay of $36,000.92. Her salary at Northwest Home Care for the period August 24, 2002 to August 24, 2003 was $15,909.94. Total wages for the one-year period prior to August 23, 2003 were $51,910.86 or a weekly rate of $998.29.

On January 4, 2006 appellant requested a hearing before an Office hearing representative. The employing establishment submitted an October 20, 2002 SF-50, notice of personnel action, noting that appellant was hired on October 20, 2002 as a part-time temporary employee with an excepted appointment not to exceed October 20, 2003.

In a May 24, 2006 decision, an Office hearing representative set aside the December 14, 2005 decision and remanded the case for further development. She found that appellant's average annual earnings should be determined under section 8114(d)(3) based on the highest of: (a) the earnings of another federal employee in the same or similar class as appellant; (b) appellant's earnings in the year prior to injury, including those from concurrent similar employment; or (c) the pay rate under the 150 formula. As the Office did not develop the evidence as to the earnings of other employees in the same or similar class, the case was returned for development.

In response to an Office request, on June 7, 2006 the employing establishment submitted information concerning the earnings histories of employees performing the same or similar work with the same type of employment (part time .6) of the same grade and step. It identified an individual it believed was an exact type as appellant having earned $41,824.89 during the prior year. The Office noted that the earnings information submitted for Nurse 1 Step 15 was based on a 27 pay period year rather than 26 pay periods. Therefore, the first pay period was omitted from

[1] On November 16, 2004 the Office reduced appellant's compensation for failure to participate in vocational rehabilitation. The Board, in an August 30, 2005 order granting remand, granted the Director's motion to set aside the November 16, 2004 Office decision. Docket No. 05-433 (issued August 30, 2005).

the earnings history of the most similar employee to equal 52 weeks or total earnings of $40,071.81.[2]

The Office considered the earnings of another employee in calculating appellant's pay rate, specifically an employee with the same type of appointment as appellant (part-time or .6 full-time employee) in the same grade and step. The comparable employee earned $40,071.81 per year, which included based pay, night differentials, Saturday and Sunday and holiday pay. It noted that this resulted in a weekly pay rate of $770.61 ($40,071.81 divided by 52 weeks) which was less than the pay rate based on appellant's own earnings for the prior year, including those from her concurrent similar employment.

In a July 7, 2006 decision, the Office again found that appellant's pay rate was $998.29 per week. On August 17, 2006 it modified the July 7, 2006 pay rate determination but again found that her weekly pay rate was $998.29. The Office found that the earnings of a federal employee in the same or similar class as appellant, who worked the greatest number of hours during the year prior to the date of injury, were $40,071.81 or a weekly pay rate of $770.61. It calculated that appellant's earnings, including those from her concurrent similar employment, as $51,910.86 or a weekly pay rate of $998.29. The Office then determined her pay rate based on the 150 formula by dividing her earnings for the year prior to injury of $36,000.92 by 309 (the number of days appellant worked for the employing establishment from October 20, 2002 to August 24, 2003) and multiplied the result by 150 and then divided the total by 52 weeks or a weekly pay rate of $336.08.

On August 21, 2006 appellant requested an oral hearing which was held on February 15, 2007. On March 12, 2007 she contended that Office procedures mandate that it 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 as appellant and in the same or neighboring locality. Appellant argued that the employing establishment did not indicate the size of the class that was considered in determining her pay rate and failed to certify that the pay information utilized was from an employee who worked the most number of hours.

On March 13, 2007 the employing establishment provided additional earnings information. It noted the prior submission that, for the one-year period preceding the date of injury, two nurses were identified as working at the same Nurse grade, step and .6 FTE with a similar number of hours. This was appellant and a nurse identified as Person 6. Appellant had worked 1,011.50 actual hours and 86.50 unscheduled hours, earning $36,000.92. Person 6 was in the same class, grade and step, who worked 1,040.00 actual hours and 15.00 unscheduled hours, earning $41,809.04. Upon additional research, however, the employer found a total class of 15 grade one nurses working at .6 FTE for the year prior to injury doing similar duties as appellant. It listed the salaries of the 15 individuals and the total number of actual hours and unscheduled hours worked. There were several employees listed who earned more than appellant and Person 6 due to having worked more total hours during the year prior to August 23, 2003. However, the employing establishment contended that Person 6 was most

[2] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.901.9 (December 1995). In most instances, the determination of average annual earnings should be divided by 52. *See also William A. Archer*, 55 ECAB 674 (2004).

representative of appellant in the total number of hours worked. The employing establishment contended that the class of employees submitted was of sufficient size for wage-rate comparison purposes.

In a decision dated May 3, 2007, an Office hearing representative affirmed the August 17, 2006 Office pay rate determination.

LEGAL PRECEDENT

Sections 8114(d)(1) and (2) of the Federal Employees' Compensation Act[3] 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 [s]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 [her] injury."

In determining the pay rate for employees under section 8114(d)(3), the Office's procedure manual provides that the Office should determine earnings by taking the highest of: (1) the earnings of the employee in the year prior to the injury; (2) the earnings of a similarly situated employee; or (3) the pay rate determined by the 150 times formula. In considering the earnings of a similarly situated employee, the procedure manual states:

> "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, 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

[3] 5 U.S.C. § 8114(d)(1) and (2).

than a year, the earnings of a 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."[4]

When an employee who has worked the whole year with a part-time or intermittent schedule has worked at another job concurrently with the Federal employment and the duties of the concurrent job are similar to those of the Federal work, the pay rate must be determined according to section 8114(d)(3).[5]

ANALYSIS

Appellant was hired as a nurse on October 20, 2002, in a part-time temporary excepted appointment not to exceed October 20, 2003. As noted, she earned a total of $36,000.92 in that position from October 20, 2002 to August 24, 2003, the date of injury. The record reveals that appellant had concurrent similar employment in the private sector as a part-time nurse from January 1, 2000 to October 28, 2003 at Northwest Home Care and earned $15,909.94 in the year prior to date of injury. She did not work substantially the whole year immediately preceding her injury in her federal employment, rather she worked 10 months from October 20, 2002 to August 24, 2003. Although appellant did not work substantially the whole year, the position would have afforded her employment for substantially the whole year if she had not been injured. She also worked at another job concurrently with her federal employment in a part-time nursing position with similar duties since January 2000. Appellant had approximately 20 years of nursing employment.

Section 8114(d)(1) and 8114(d)(2) of the Act could not be applied reasonably and fairly in this case to adequately set appellant's pay rate. Under these circumstances, section 8114(d)(3) permits the Office to consider concurrent similar earnings and other relevant factors in determining her pay rate.[6] It was appropriate for the Office to apply section 8114(d)(3) to determine appellant's pay rate for compensation purposes.[7] The pay rate for a part-time

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(a)(3)(b) (April 2002).

[5] *Id*.

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4c(3) (April 2002).

[7] *See* section 8114(d)(3) which provides in pertinent part that if section 8114(d)(1) and 8114(d)(2) 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 which includes other previous employment of the employee, or other relevant factors. *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4a(3)(d) (April 2002) which provides: "(d) Any other relevant factors -- this is the 'catch-all' provision set forth in [s]ection 5 U.S.C. § 8114(d)(3) and it is intended to encompass any factor which may pertain to the employee's "average annual earnings" in the employment in which he or she was working at the time of the injury. These factors are too various to enumerate."

employee who has demonstrated the capacity to work full time in the job held when injured is determined from the highest of three alternative formulas:[8]

> "(1) A comparison of the earnings of another federal employee in the same or similar class (Grade/Step) working the greatest number of hours in the same or neighboring locality.
>
> "(2) The claimant's own prior year earnings in federal employment (including earnings from concurrent similar employment but excluding those from dissimilar employment).
>
> "(3) Not less than the 150 formula."

In *Irwin E. Goldman*,[9] the Board addressed the pay rate of a part-time postal clerk who held a concurrent full-time job in the private sector as a salesman-production manger. This demonstrated his ability to have worked full time for the year prior to his injury. *Goldman* provides that earnings from concurrent employment may be combined with the federal salary in determining pay rate if derived from similar employment. This is based on the statutory language that average earnings are the sum which reasonably represents wage-earning capacity of the injured employee "*in the employment in which he was working at the time of injury*."[10] (Emphasis in the original.) Therefore, earnings from dissimilar concurrent employment are not considered for pay rate purposes.[11] As appellant had earnings from similar concurrent employment as a part-time nurse in the private sector, the Office added these earnings ($15,909.94) to those from her prior year in federal employment ($36,000.92) to total $51,910.86, which when divided by 52 resulted in a weekly pay rate of $998.29.

Appellant's own prior year earnings were then compared with the annual earnings of another employee in the same or similar class working the greatest number of hours during the year prior to injury in the same or neighboring location. 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. The employing establishment initially provided pay information on two employees with the same type of appointment (part-time or .6 of a full-time equivalent employee), the same grade and step who worked a full year, appellant and another nurse. The employee with a similar grade and step as appellant worked a full year and earned $40,071.81 during the preceding year. When this amount is divided by 52, it yields a weekly pay rate of $770.61.

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[8] *See supra* note 4.

[9] 23 ECAB 6 (1971).

[10] *Id*.

[11] *See Steven J. Rose*, 44 ECAB 211 (1992) (the employee's concurrent work as an attorney was dissimilar from his federal employment as a substitute rural letter carrier).

However, the employing establishment provided supplemental wage-rate comparison information. It provided a listing of 15 employees with the same grade, step and appointment as appellant and who performed similar nursing duties. The employing establishment identified Person 6, earning $41,809.04, as the federal employee most similar to appellant in hours actually worked. When this salary is divided by 52, a weekly pay rate of $804.02 is the result. Still, it is not apparent that Person 6 was the federal employee with which to make the comparison. The formula notes that the comparison should be with that federal employee of the same or similar class "working the greatest number of hours" during the prior year. The information provided from appellant's employer identified Person 11 as having worked the greatest number of hours during the prior year and having earned $47,003.71. When this salary is divided by 52, it results in a weekly pay rate of $903.91.[12]

On appeal, counsel for appellant contends that the list of 15 part-time nurses from the employer was too small a sampling to afford a reasonable wage-rate comparison. He argues that the Board should remand the case to expand the search for another federal employee to a broader neighboring locality outside the employing establishment and, possibly, at a higher grade. Counsel cites *Joseph A. Matais*[13] in support of his argument. However, the case does not support this proposition. In *Matais*, a disaster assistance employee did not work for substantially the whole year prior to injury. In making a comparison with the annual earnings of another employee with the same kind of appointment and similar duties, the employing establishment submitted information on a federal employee not located in the claimant's region. The Board remanded the case, noting that the record documented three employees within appellant's own region doing the same kind of disaster inspection work and holding the same kind of appointment. In this case, there has been no showing that the information provided by the employer as to the 15 federal employees with similar appointments and working similar duties at the same location as appellant was inadequate for comparison purposes.

However, there was error by the Office in determining appellant's pay rate. In making the comparison of the annual earnings of an employee in the same or similar class working the preceding year in the same or similar employment and the same or neighboring place, the procedure manual provides that the discussion of concurrent employment contained in paragraph 4.a.(3) also applies to these cases.[14] The Office should have incorporated the employee's earnings from concurrent employment in its pay rate comparison of a federal employee with the same or similar employment. The Board has long recognized in interpreting the statute for pay rate purposes that the objective is to arrive at as fair an estimate as possible of the claimant's future earning capacity and that this can best be accomplished by considering appellant's employment activities during the year preceding the injury.[15] As noted, when utilizing 8114(d)(3), the pay an employee receives from concurrent similar employment may be combined

[12] The evidence of record is not clear whether the salary listings of the 15 individuals at the employing establishment were based on 26 or 27 pay periods.

[13] 56 ECAB 168 (2004).

[14] Federal (FECA) Procedure Manual, *supra* note 4, at Chapter 2.900.4.b and 2.900.4.c(3)(c).

[15] *See Billy Douglas McClellan*, 46 ECAB 208 (1994); *John D. Williamson*, 40 ECAB 1179 (1989); *Wendell Alan Jackson*, 37 ECAB 118 (1985); *Irwin E. Goldman*, *supra* note 9.

with the pay from his federal employer. Utilizing the average annual earnings of a federal 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 for the year prior to the injury and including the earnings from concurrent similar nonfederal employment would result in a pay rate greater than $998.29, as found by the Office.

The case will be remanded to the Office for further development concerning appellant's pay rate. Following such development as deemed necessary, it shall issue an appropriate decision in the case.

CONCLUSION

The Board finds that the Office did not use a correct pay rate in computing appellant's entitlement to compensation.

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision.

Issued: December 23, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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