United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 08-983**
	)	**Issued: August 4, 2009**
DEPARTMENT OF HOMELAND SECURITY, FEDERAL EMERGENCY MANAGEMENT AGENCY, Albany, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 19, 2008 appellant, through counsel, filed a timely appeal from the January 18, 2008 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed an April 30, 2007 wage-earning capacity decision. 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 for compensation purposes in determining her loss of wage-earning capacity effective March 24, 2003; and (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 her wage-earning capacity. On appeal, counsel contends that her pay rate should be determined by comparing wage information for an employee working the greatest number of hours in similar employment in all 10 nationwide regions of the employing establishment.

FACTUAL HISTORY

This case has previously been before the Board. In an August 25, 2006 decision, the Board found that the Office improperly calculated appellant's pay rate and remanded the case for further development.[1] The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.[2]

On remand, the Office conducted additional development to verify the rate of pay for a similarly situated employee in a neighboring region. On March 1, 2007 Shirley Kuhn, a human resources assistant at the employing establishment, advised that, at the time of injury, appellant was a temporary, intermittent employee in Region 2, located in New York. Appellant's gross pay, without overtime, for the year prior to her February 2, 1998 injury was $23,161.00 for 935 hours worked. As her work schedule was other than full time, the employing establishment provided the actual annual earnings for another employee with the same kind of appointment and working in a job with similar duties. Ms. Kuhn noted that the earnings of the employee working the greatest number of hours in similar work were those of a disaster employee in Region 2 who earned $40,021.12 for 1,936.50 hours. She advised that her office also provided support for Regions 6 through 10.

In an April 30, 2007 decision, the Office reduced appellant's compensation to zero based on her actual wages as a modified core-disaster operations and recovery specialist. It found that, at the time of injury, she was employed as an on-call disaster assistance employee with a weekly pay rate of $769.66. The current pay rate for the position held when injured was $1,141.45 effective March 24, 2003 and that appellant presently earned $1,271.60. As she had earned only $22,141.07 or $425.79 a week, during the one year preceding her February 2, 1998 injury, it used the average annual salary for a similarly situated employee of $40,022.10 or $769.66 per week.

On May 14, 2007 appellant's counsel requested an oral hearing before an Office hearing representative, which was held on October 30, 2007. At the hearing, appellant's counsel noted that the region appellant worked in at the time of her injury also provided support for Regions 6 to 10. Therefore, the Office should have considered the pay rate for a similarly situated employee located in one of the 10 regions rather than the region she worked in or a neighboring region.

Subsequent to her request for an oral hearing, appellant submitted factual evidence including her July 13, 2007 information regarding the disaster assistance employee program and copies of some of her pay stubs from 1997, 1998, 2005 and 2006. She contended that the Office

[1] Docket No. 06-357 (issued August 25, 2006).

[2] On February 2, 1998 appellant injured her neck, shoulder and chest in a motor vehicle accident. Her duty station was listed in Albany, New York. A June 17, 1998 letter from the employing establishment advised that appellant was located in Region 2. On April 27, 1999 the Office was informed that appellant was currently an employee in Region 3. Appellant's claim was accepted for cervical sprain and postconcussive syndrome. In a November 9, 2001 decision, the Office determined that her actual earnings as a core-disaster operations and recovery specialist represented her wage-earning capacity effective March 15, 1999. Appellant's wage-loss benefits were reduced to zero as her actual wages met or exceeded the wages of her date-of-injury position.

should have computed her pay rate based upon an employee working the greatest number of hours in all 10 regions of the employing establishment.

By decision dated January 18, 2008, the Office affirmed the Office's March 30, 2007 loss of wage-earning capacity decision. The hearing representative rejected appellant's argument that the Office should have calculated her pay rate information based upon the wages of a similarly situated employee working the greatest number of hours among all 10 regions. She found that the Office correctly calculated appellant's pay rate using a similarly situated employee in Region 2.

LEGAL PRECEDENT -- ISSUE 1

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 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: (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 notes:

> "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.

[3] 5 U.S.C. § 8114(d)(1) and (2).

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

"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]

ANALYSIS -- ISSUE 1

In the prior appeal, the Board noted that the Office properly applied section 8114(d)(3) to determine appellant's pay rate for her loss of wage-earning capacity given the inapplicability of sections 8114(d)(1) and (2) of the Act. However, the Office did not adequately consider the factors delineated under subsection (d)(3) with regard to the earnings of other federal employees in the same or similar class working in the same or neighboring location working the greatest number of hours.[5]

On remand, the Office obtained supplemental information from the employer regarding an employee "in the same or neighboring location." The evidence submitted showed that $40,022.10 was the salary for the federal employee working the greatest number of hours in the same or similar class as appellant. The employing establishment advised the Office that this employee was a disaster employee who was based in Region 2. On appeal, counsel for appellant contends that this was too small a sampling and that the case should be remanded to expand the comparison of wage rate information to an employee with the greatest number of hours in all 10 regions of the employing establishment.

The procedure manual provides that in determining pay rate under section 8114(d)(3) comparison is made to that of a similarly situated employee in the same or neighboring locale. Appellant at the time of her injury was based in Region 2. The information provided by the employing establishment was for a disaster worker located in Region 2. Office procedures provide that the earnings of a similar federal employee from the same or neighboring locale may be used.[6] The Board finds that it was appropriate for the Office to use the earnings for the disaster worker with the greatest number of hours whose appointment was similar to that of appellant working in Region 2, the region were she was employed at the time of injury. There is no showing that the information provided by the employer as to the federal employee with a similar appointment and working similar duties was inadequate for comparison purposes.[7]

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

[5] *Dale Mackelprang*, 57 ECAB 168 (2005); *Aquilline Braselman*, 49 ECAB 547 (1998).

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

[7] *See L.C.*, 60 ECAB ___ (Docket No. 08-224, issued December 23, 2008).

Considering the factors delineated in section 8114(d)(3), the Office properly found that the amount of $40,022.10 being the highest, represented the average yearly earnings to be derived from this portion of section 8114(d)(3).[8]

The Office complied with its procedure by comparing the amount for average annual earnings to that which would be obtained from the formula delineated in the last sentence of section 8114(d)(3). 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 $793.49, a figure which was derived by dividing the average salary of a similarly situated employee in 1999 of $40,022.10 "by the 1998 hourly rate of $24.22 times by the 1999 hourly rate of $24.97" and then divided by 52 weeks. The Board finds that the Office properly determined that appellant's pay rate for compensation purposes was $793.49 per week.

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.[9] For the reasons detailed above, the Office used the correct pay rate to calculate appellant's benefits.

LEGAL PRECEDENT -- ISSUE 2

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction-in-benefits.[10] Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if such earnings fairly and reasonably represent her wage-earning capacity.[11] Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, will be accepted as such measure.[12]

When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, the Office must determine whether the earnings in the alternative employment fairly and

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[8] *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. *See also* FECA Bulletin No. 04-05 (May 2004).

[9] *Gerald A. Karth*, 48 ECAB 194, 197 (1996).

[10] *A.W.*, 59 ECAB ___(Docket No. 08-306, issued July 1, 2008).

[11] *M.A.*, 59 ECAB ___ (Docket No. 07-349, issued July 10, 2008); *Sherman Preston*, 56 ECAB 607 (2005). *See* 5 U.S.C. § 8115(a).

[12] *S.B.*, 59 ECAB ___ (Docket No. 07-346, issued April 23, 2008); *Lottie M. Williams*, 56 ECAB 302 (2005).

reasonably represent the employee's wage-earning capacity.[13] The procedure manual notes that reemployment may not be suitable if the job is part time, seasonal or of a temporary nature.[14] After the employee has worked for 60 days, the Office will determine whether her actual earnings represent her wage-earning capacity. In so doing, it will apply the *Shadrick* formula in determining the claimant's monetary entitlement.[15]

ANALYSIS -- ISSUE 2

Appellant was employed as a disaster assistance employee at the time of her injury. The Office reduced her compensation effective March 24, 2004 based on her actual earnings as a modified core-disaster operations and recovery specialist. Appellant performed the position for two months. There is no evidence of record that she required special assistance to perform the tasks of the job as listed in the detailed position description provided.[16] There is no evidence of record, and appellant does not contend, that the duties listed on the position description were not within her medical restrictions at the time the offer was made. The Board finds that her actual earnings in the modified core-disaster operations and recovery specialist job properly represented her wage-earning capacity. The Office's reduction of appellant's wage-loss compensation based on her actual earnings was proper and supported by the evidence of record.

CONCLUSION

The Board finds that the Office correctly calculated appellant's rate of pay in determining her loss of wage-earning capacity. The Board further finds that her actual earnings as a modified core-disaster operations and recovery specialist represent her wage-earning capacity.

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (May 1997).

[14] *Id. See Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

[15] *Id. See Albert C. Shadrick*, 5 ECAB 376 (1953). This has been codified by regulation at 20 C.F.R. § 10.403.

[16] *Selden H. Swartz*, 55 ECAB 272 (2004). *See also James D. Champlain*, 44 ECAB 438 (1993), where the Board noted that the record contained a position description which included the physical requirements of the position, indicating that it was not a makeshift position.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 18, 2008 is affirmed.

Issued: August 4, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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