United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 09-220**
	)	**Issued: August 14, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Blue Bell, PA, Employer	)	

Appearances:
Thomas R. Uliase, 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 October 29, 2008 appellant filed a timely appeal from an October 30, 2007 decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office used the proper pay rate in calculating appellant's schedule award. On appeal, appellant's attorney contends that her pay rate for compensation purposes should have been based on her weekly pay on January 2, 2002, the day she was injured, and not on section 8114(d)(2) of the Federal Employees' Compensation Act.[1]

FACTUAL HISTORY

On January 14, 2002 appellant, then a 37-year-old part-time flexible clerk, filed a Form CA-2, occupational disease claim, alleging that her employment duties caused multiple upper

[1] 5 U.S.C. § 8114(d)(2).

extremity conditions. She stopped work on January 7, 2002. The claim was accepted for bilateral carpal tunnel syndrome and right de Quervain's disease. Appellant received compensation beginning on January 7, 2002.

On March 15, 2004 the employing establishment offered appellant a modified position that she refused. Appellant's application for disability retirement was approved on June 18, 2004. By decision dated July 19, 2004, the Office terminated her compensation benefits on the grounds that she refused an offer of suitable work. Appellant, through her attorney, timely requested a hearing, that was held on April 6, 2005. In a July 22, 2005 decision, an Office hearing representative reversed the July 19, 2004 decision. On August 31, 2005 appellant elected benefits under the Federal Employees' Compensation Act for the period July 19, 2004 to August 31, 2005, and civil service retirement benefits effective that day and thereafter.

On January 11, 2006 appellant filed a schedule award claim. By decision dated May 4, 2006, she was granted a schedule award for a 13 percent left upper extremity impairment and a 10 percent right upper extremity impairment. The effective date of the pay rate was January 7, 2002 or $695.07.

On May 11, 2006 appellant's attorney requested a hearing. By decision dated June 23, 2006, an Office hearing representative remanded the case for further medical development regarding the degree of appellant's upper extremity impairment. Following further medical development, on August 3, 2006, appellant was granted an additional 12 percent left upper extremity impairment and an additional 13 percent right upper extremity impairment, for a 25 percent impairment on the left and 23 percent on the right. Schedule award compensation was based on the $695.07 weekly rate of pay.[2]

Appellant, through her attorney, requested a hearing that was held on November 14, 2006. She testified that, during the year prior to her work stoppage, she took 12 weeks of maternity leave. In a January 19, 2007 decision, an Office hearing representative remanded the case to obtain employment information from the employing establishment and determine the appropriate rate of pay for compensation purposes and a *de novo* decision on the issue.

The Office secured employment information. A time analysis form showed that during 2001 appellant did not work for 12 weeks from pay period 3 through pay period 8, pay period 13 and pay period 24. On March 23, 2007 the employing establishment indicated that she was a part-time flexible employee on the date of injury, January 7, 2002, and that, during the period she was off work, she used annual and sick leave and leave without pay. The employing establishment provided earning information for someone working in the equivalent position for the year prior to January 7, 2002. By letter dated April 27, 2007, the Office advised appellant

[2] Appellant requested that her schedule award be paid in a lump sum. A lump-sum payment in the amount of $58,296.17 was made on August 25, 2006.

that she was entitled to a new pay rate which, including night differential, was $729.50 a week, or a net difference of $7,941.88 in compensation.[3]

In a schedule award decision dated April 27, 2007, the Office noted that appellant had previously received a lump-sum schedule award payment of $58,296.17, and at the new pay rate of $729.50, the amount paid should have been $61,268.23, a difference of $2,972.06 which would be forwarded to her. The impairment ratings were not changed. On May 3, 2007 appellant, through her attorney, requested a review of the written record. By decision dated October 30, 2007, an Office hearing representative affirmed the April 27, 2007 decision. The hearing representative found that section 8114(d)(2) of the Act was the appropriate provision to be used in determining appellant's rate of pay.

LEGAL PRECEDENT

Under section 8101(2) of the Act, "'monthly pay' means the 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.…" The Office's implementing regulations states: "*Pay rate for compensation purposes* means the employee's pay, as determined under 5 U.S.C. § 8114.…"[4] Section 8114(d) 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 his 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 annual rate of pay; or
> >
> > (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for 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 51/2-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

[3] Appellant was also paid for the period July 19, 2004 to August 30, 2005 at the new pay rate. On March 14 and May 16, 2007 her attorney requested that the accepted conditions be expanded to include thoracic outlet syndrome, adhesive capsulitis, brachial plexus lesions, median nerve neuritis and lesions of the ulnar nerve. By letter dated May 25, 2007, the Office advised appellant that, based on an Office medical adviser's opinion, the new conditions were not related to her employment. A final decision in this regard is not of record.

[4] 20 C.F.R. § 10.5(s).

> 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 of 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.
>
> (3) 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 the injury having regard to the previous earnings of the employee in [f]ederal employment and of other employees of the United States 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."[5]

The compensation rate for schedule awards is the same as compensation for wage loss.[6]

ANALYSIS

The Board finds that the Office properly determined appellant's pay rate for compensation purposes by applying section 8114(d)(2) of the Act. The evidence establishes that she did not work in her regular employment for the entire year immediately preceding January 2, 2002, the date her disability began. Time analysis records show that appellant was in a leave status for at least 12 weeks during the preceding year, from pay period 3 through pay period 8 and again in pay period 13.[7] Appellant therefore only worked about nine months in the preceding year. Section 8114(d)(2) is applicable to an employee who did not work substantially the whole year prior to the injury, but the position was one which would have afforded employment for substantially the whole year.[8] The phrase "substantially for the entire year" has been interpreted to mean at least 11 months.[9] As appellant did not work for substantially the entire year prior to January 2, 2002, the Office properly applied section 8114(d)(2) in

[5] 5 U.S.C. § 8114(d); *see H.S.*, 58 ECAB ___ (Docket No. 06-1774, issued May 10, 2007).

[6] *See* 20 C.F.R. § 10.404(b); *K.H.*, 59 ECAB ____ (Docket No. 07-2265, issued April 28, 2008).

[7] Appellant took approximately 3 weeks of sick leave, 10 hours of annual leave, and leave without pay for the remainder of this period. She also took two weeks of annual leave in pay period 24.

[8] 5 U.S.C. § 8114(d)(2); *see Jason A. Clark*, 54 ECAB 592 (2003).

[9] *Vincent Holmes*, 53 ECAB 468 (2002).

determining her correct pay rate by using the pay rate of a similarly situated employee of the same class that did work substantially the whole year precluding the injury.

In applying section 8114(d)(2), as the "average annual earnings" of an employee of the same class in a similar employment, the Office used information provided by the employing establishment for other part-time flexible clerks who were being paid at the same rate. It determined that a similar employee had earned, in the year prior to appellant's injury, $37,356.80, which divided by 52, equaled a base pay of $718.40 per week. The Office then found that the similar employee's average night differential earnings equaled $11.10 per week which, when added together, yielded a weekly pay rate of $729.50. This was used as the pay rate for compensation purposes in the April 27, 2007 schedule award.

The Board finds that the Office obtained pay rate information from the employing establishment and properly determined that appellant's pay rate for compensation purposes was $729.50 a week.[10]

CONCLUSION

The Board finds that the Office used the proper pay rate in calculating appellant's schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 30, 2007 be affirmed.

Issued: August 14, 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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.9 (April 2002).