United States Department of Labor
Employees' Compensation Appeals Board

B.W., Appellant	)	
and	)	**Docket No. 10-218**
	)	**Issued: January 6, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Owenton, KY, Employer	)	

Appearances:
Geoffrey P. Damon, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 3, 2009 appellant filed a timely appeal from a January 6, 2009 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 merit issues of this case.

ISSUES

The issues are: (1) whether the Office properly found that an overpayment of compensation in the amount of $7,443.64 for the period May 16, 2004 to December 16, 2007 because appellant's compensation was based on an incorrect pay rate; and (2) whether the Office properly denied waiver of the overpayment.[1]

[1] At the time the Office issued the January 6, 2009 decision, it did not seem aware that appellant was receiving wage-loss compensation under Office file number 062172846 for an injury that occurred on September 11, 2006. With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act, and it did not do so in this case. *D.R.*, 59 ECAB ___ (Docket No. 07-823, issued November 1, 2007).

FACTUAL HISTORY

On March 15, 2004 appellant, then a 63-year-old rural carrier associate, sustained employment-related bilateral shoulder impingement and rotator cuff tears in the performance of his federal duties.[2] He stopped work that day and filed Form CA-7 claims for compensation. Appellant received wage-loss compensation for the period May 16, 2004 through June 11, 2005 based on a weekly pay rate of $461.75 with an effective pay rate date of March 15, 2004. He returned to limited duty, working 25 hours a week, on June 12, 2005. On June 23, 2006 the employing establishment provided payroll information for a similar employee for the period beginning on pay period 1 in 2003, ending with pay period 6 in 2004. The records indicated that J.C. worked an average of 35 hours a week at a weekly rate of $535.82.

On November 2, 2006 appellant was granted schedule awards for a 17 percent right upper extremity impairment and a 25 percent left upper extremity impairment. The awards ran for 131 weeks, based on a weekly pay rate of $535.82, for the period June 12, 2005 to December 16, 2007.[3] In a form report received on February 12, 2007, the postmaster, Darla Baker, advised that appellant worked one day and three hours prior to his March 15, 2004 employment injury and estimated that he would have worked an average of 35 hours a week at a weekly pay rate of $656.45. By letter dated September 4, 2008, the employing establishment informed the Office that, as a noncareer, casual worker, appellant was entitled to a 24-hour workweek. When appellant returned to work on March 10, 2004 following a February 11, 2003 employment injury, he was given a modified assignment for up to eight hours a day and he could be scheduled any time during this time frame to meet the needs of the operation. The employing establishment noted that he only worked 18 hours and was then reinjured. It provided payroll records for a similar employee who averaged 26.30 hours per week from pay period 19 in 2005 to pay period 18 in 2006.

On October 31, 2008 the Office issued a preliminary determination that appellant received an overpayment in compensation in the amount of $7,443.64 from May 16, 2004 to December 16, 2007 because he was paid at an incorrect pay rate. It found appellant to be without fault in the creation of the overpayment. Appellant was given 30 days to respond and was provided an overpayment financial questionnaire. A telephone memorandum dated December 2, 2008, noted that appellant was told that the pay rate for compensation purposes was incorrect because the Office should have used his guaranteed hours rather than that of a similar employee. On January 6, 2009 the Office finalized the determination that appellant received an overpayment in compensation in the amount of $7,443.64 that he was not at fault. It denied

[2] The Office initially denied the claim by decision dated August 6, 2004, and denied appellant's request for reconsideration on September 15, 2004. At the time of the March 15, 2004 injury, appellant had recently returned to work from a February 11, 2003 employment injury for which he had left shoulder surgery on July 22 and November 18, 2003, adjudicated by the Office under file number xxxxxx914.

[3] By report dated May 16, 2006, an Office medical adviser reviewed the medical record and determined that maximum medical improvement was reached o March 4, 2005 and that appellant had a 17 percent right upper extremity impairment and a 25 percent left upper extremity impairment. The schedule award decision stated that appellant's impairment was for an additional award. There is no evidence of record that appellant received a prior schedule award.

waiver because he failed to submit the requested financial information. The Office set up a repayment schedule of $220.00 per month.[4]

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act[5] provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[6] When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.[7] The Act provides that monthly pay means the monthly pay at the time of injury, or the time disability begins, or the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment, whichever is greater.[8]

To determine a weekly pay rate, the Office must first determine the employee's "average annual earnings" and then divide that figure by 52.[9] Section 8114(d) of the Act 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 5½-day week, and 260 if employed on the basis of a 5-day week."[10]

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[4] *See supra* note 1.

[5] 5 U.S.C. §§ 8101-8193.

[6] *Id.* at 8102(a).

[7] *Id*. at 8129(a).

[8] *Id*. at § 8101(4); *see Janet A. Condon*, 55 ECAB 591 (2004).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.9 (April 2002).

[10] 5 U.S.C. § 8114(d).

(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 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 1 year immediately preceding his injury."[11]

ANALYSIS

The Board finds this case is not in posture for decision. The Office found an overpayment in compensation on the grounds that appellant received wage-loss compensation based on an incorrect pay rate. The overpayment occurred from May 16, 2004 to June 11, 2005 when appellant received wage-loss compensation at a weekly pay rate of $461.75 and the period June 12, 2005 to December 10, 2007 when he received schedule award compensation at a weekly pay rate of $532.82. In the preliminary overpayment determination, the Office advised appellant that the correct weekly pay rate was $460.75 because he was guaranteed a 25-hour workweek.

A pay rate determination must be made in accordance with the specific provisions of section 8114 of the Act. There is no indication in either the preliminary or final overpayment determinations that these principles were applied in this case. The record indicates that appellant had not worked substantially the whole year preceding the March 15, 2004 employment injury because he had been off work due to a February 11, 2003 employment injury. The postmaster advised that he would have worked an average of 35 hours a week at a weekly pay rate of $656.45.

Section 8114(d)(2) is designed to apply 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.[12] Section 8114(d)(3) provides a method for

[11] *Id*. at § 8114(a)-(d).

[12] *Id.* at § 8114(d)(2); *see Jason A. Clark*, 54 ECAB 592 (2003).

determining average annual earnings if the other provisions of section 8114 cannot be applied reasonably and fairly.[13] The record therefore, supports that either section 8114(d)(2) or 8114(d)(3) would apply in this case.[14]

On June 23, 2006 the employing establishment provided payroll information for a similar employee indicating that she worked an average of 35 hours a week at a weekly rate of $535.82. This pay rate was used as the basis for the November 2, 2006 schedule award. However, in finding an overpayment, the Office did not provide a clear explanation of how it considered the provisions of section 8114 in finding the appropriate pay rate for compensation purposes.[15] The case will therefore be remanded to the Office to obtain sufficient evidence to determine whether section 8114(d)(2) or 8114(d)(3) is the applicable provision to be used in determining appellant's pay rate for compensation purposes. After such development as is necessary the Office may properly determine whether an overpayment was created and issue an appropriate decision.

CONCLUSION

The Board finds this case is not in posture for decision. The Office did not make adequate findings on appellant's pay rate for compensation purposes in accordance with section 8114 of the Act.

[13] *Id.* at § 8114(d)(3); *see Joseph A. Matais*, 56 ECAB 168 (2004).

[14] *Id.* at § 8114(d)(2), (3).

[15] In finding fact of overpayment, the Board has held that the Office must clearly set forth findings that form the basis of its determination. *See Teresa A. Ripley*, 56 ECAB 528 (2005); *Allen Kennedy*, 49 ECAB 276 (1998).

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2009 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for proceedings consistent with this opinion of the Board.

Issued: January 6, 2010
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