United States Department of Labor
Employees' Compensation Appeals Board

T.T., Appellant	)	
and	)	**Docket No. 09-1907**
	)	**Issued: June 28, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Clinton, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 21, 2009 appellant filed a timely appeal from the May 5, 2009 merit decision of the Office of Workers' Compensation Programs concerning schedule award compensation. 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 appellant met her burden of proof to establish that she has more than an eight percent permanent impairment of her left arm, for which she received a schedule award; and (2) whether the Office properly determined the pay rate for appellant's schedule award.

FACTUAL HISTORY

The Office accepted that on July 21, 1999 appellant, then a 30-year-old rural carrier associate, sustained a left ankle sprain, lumbar sprain, cervical sprain, left knee contusion, left shoulder sprain, left shoulder tendinitis and left shoulder impingement syndrome. Appellant

stopped work on July 21, 1999 and returned to work on July 30, 1999. She subsequently stopped work for authorized left shoulder surgery on January 24, 2000.[1] Appellant returned to full duties on May 6, 2000.

On December 23, 2007 appellant completed a claim for schedule award compensation. In a January 5, 2008 letter, she noted that, in the year prior to the injury, from July to December 1998, she was employed on a full-time basis as a nurses' aide. Appellant worked as a cashier and was scheduled to work 25 to 30 hours per week from January to February 1999. She worked on a full-time basis as a plastics machine operator from February to April 1999. Appellant started employment with the employing establishment in April 1999. She stated that her treating physician would not perform an impairment evaluation.

The Office referred appellant for a second opinion evaluation to determine the nature and extent of any injury-related permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). Appellant was evaluated on February 26, 2008 by Dr. Richard J. Watkins, a Board-certified orthopedic surgeon, who provided a history of appellant's employment injury and her subsequent treatment and described her current complaints. Dr. Watkins noted on examination that appellant's left shoulder showed limited motion with flexion to 130 degrees, extension to 30 degrees, full internal rotation, external rotation to 60 degrees, full adduction and abduction to 90 degrees. He rated impairment as 3 percent for flexion, 1 percent for extension, 10 percent for external rotation and 4 percent for abduction, which totaled 18 percent impairment to the shoulder. Dr. Watkins did not cite to the portions of the A.M.A., *Guides.* He noted normal findings and no symptoms related to other diagnosed conditions.

In a July 28, 2008 letter, the Office requested that the employing establishment provide payroll information for another rural carrier associate who worked the year prior to July 21, 1999 in a similar job including gross salary and number of hours worked. If there was more than one rural carrier associate in this situation, figures should be used for the one working the greatest number of hours.

The Office referred the case medical records to Dr. Anthony F. Skalak, a Board-certified orthopedic surgeon, who served as an Office medical consultant, for review and an impairment rating applying the fifth edition of the A.M.A., *Guides*. On August 8, 2008 Dr. Skalak provided an opinion that appellant had an eight percent permanent impairment of her left arm, based on the findings reported by Dr. Watkins. He noted three percent impairment for flexion, one percent impairment for extension, zero percent impairment for full adduction, four percent impairment for abduction, zero percent impairment for full internal rotation and zero percent impairment for 60 degrees of external rotation. Dr. Skalak explained that Dr. Watkins erroneously awarded 10 percent impairment for external rotation as 60 degrees of external rotation did not correspond to a ratable range of motion deficit.

In a September 15, 2008 letter, the employing establishment provided pay information for the rural carrier associate working the greatest number of hours during the year prior to the

[1] The surgery included labrum debridement, subacromial decompression and distal clavicle excision.

July 21, 1999 employment injury. The worker had yearly earnings of $13,433.77, or average weekly earnings of $258.34.

An October 17, 2008 memorandum to the file explained the Office's pay rate calculations. A recurrent pay rate did not apply as appellant returned to work on July 30, 1999, and subsequently stopped work for surgery on January 24, 2000. Appellant was a part-time worker on the date of injury. The evidence did not establish that she worked on a full-time basis (*i.e.*, for 11 months or more) for the year prior to July 21, 1999, considering both federal and private employment. The Office found that appellant's pay rate should be determined under 5 U.S.C. § 8114(d)(3). The worker having the greatest number of hours had an average weekly wage of $258.34, which was therefore established as appellant's pay rate effective July 21, 1999, the date of injury and the date disability began.

In an October 20, 2008 decision, the Office granted appellant a schedule award for eight percent permanent impairment of her left arm. The award ran for 24.96 weeks from February 26 to August 18, 2008. The pay rate used for the award was $258.32 per week, which, when multiplied by the augmented 3/4 rate for those with at least one dependent, rendered a compensation rate of $193.76 per week.

Appellant requested a hearing before an Office hearing representative. At the February 12, 2009 hearing, she testified that she began working for the employing establishment in late February or early March 1999. Appellant described her employment for the year prior to the July 21, 1999 employment injury. She stated that she was guaranteed one day of work a week but she averaged between 24 to 32 hours of work per week. Appellant's attorney disagreed that appellant did not work for substantially the whole year prior to the injury because three months were unemployment and should have been considered a waiting period until appellant could start work with the employing establishment. Counsel also contended that the Office medical adviser should have referred the schedule award computations back to Dr. Watkins for clarification rather than presuming that Dr. Watkins had misapplied the A.M.A., *Guides*.

In a May 5, 2009 decision, the Office hearing representative affirmed the October 20, 2008 decision as to the degree of impairment and the pay rate.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[4]

ANALYSIS -- ISSUE 1

The Board finds that Dr. Skalak, a Board-certified orthopedic surgeon who served as an Office medical consultant, properly determined that the total permanent impairment of appellant's left arm was eight percent. Dr. Skalak's evaluation was appropriately based on the examination findings of Dr. Watkins, a Board-certified orthopedic surgeon who served as an Office referral physician. Appellant indicated that her treating physician would not perform an impairment evaluation and she was referred to Dr. Watkins for evaluation. Dr. Skalak properly found that, under the fifth edition of the A.M.A., *Guides*, appellant had three percent impairment for flexion, one percent impairment for extension, zero percent impairment for full adduction, four percent impairment for abduction, zero percent impairment for full internal rotation and zero percent impairment for 60 degrees of external rotation.[5] He correctly added these figures to equal eight percent. Dr. Skalak explained that Dr. Watkins had erred in the application of Figure 16-46 with respect to the findings regarding external rotation.[6] The Board notes that Dr. Skalak's report constitutes the weight of medical opinion.

LEGAL PRECEDENT -- ISSUE 2

Section 8105(a) of the Act 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."[7] Section 8101(4) of the Act defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he 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...."[8] The compensation rate for schedule awards is the same as compensation for wage loss.[9]

With respect to the calculation of appellant's pay rate for compensation purposes, the Act provides for different methods of computation of average annual earnings depending on whether

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[4] *Id*.

[5] *See* A.M.A., *Guides* 476-77, 479, Figure 16-40, Figure 16-43 and Figure 16-46.

[6] *Id.* at 479, Figure 16-46. Dr. Watkins indicated that 60 degrees of external rotation equals 10 percent impairment but it actually equals 0 percent impairment.

[7] 5 U.S.C. § 8105(a). 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. 5 U.S.C. § 8110(b).

[8] 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

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

the employee worked in the employment in which she was injured substantially for the entire year immediately preceding the injury and would have been afforded employment for substantially a whole year, except for the injury.[10] Sections 8114(d)(1) and 8114(d)(2) 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 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 rate of pay; or
> > >
> > > (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the 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 5 1/2-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 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 for 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."[11]

If the evidence shows that an employee did not work in the employment in which she was injured for substantially the whole year immediately preceding the injury and that she would not have been afforded employment for substantially the whole year, except for the injury, sections 8114(d)(1) and (2) of the Act are not applicable to the computation of the employee's pay rate.

[10] 5 U.S.C. § 8114(d)(1), (2).

[11] 5 U.S.C. §§ 8114(d)(1), (2). The phrase "substantially for the entire year" has been interpreted to mean at least 11 months. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4a (December 1995).

If sections 8114(d)(1) and (2) of the Act are not applicable, section 8114(d)(3) provides as follows:

> "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 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 1 year immediately preceding the injury."[12]

ANALYSIS -- ISSUE 2

The evidence shows that appellant did not work in the employment in which she was injured for substantially the whole year immediately preceding the injury and that she would not have been afforded employment for substantially a whole year, except for the injury, and therefore sections 8114(d)(1) and (2) of the Act are not applicable to the computation of his pay rate.[13]

Given the inapplicability of sections 8114(d)(1) and (2) of the Act, the Office properly applied section 8114(d)(3) to determine appellant's pay rate for compensation purposes.[14] In applying section 8114(d)(3), the Office properly considered the factors delineated therein, including appellant's previous earnings in federal employment; the earnings 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; and appellant's prior nonfederal employment.

[12] 5 U.S.C. § 8114(d)(3). According to Office procedure, the phrase "the same or most similar class working in the same or most similar employment" refers to both the kind of work held and the kind of appointment held. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(3)(b) (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). With regard to nonfederal employment, "[o]nly earnings in employment which is the same as, or similar to, the work the employee was doing when injured may be considered." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4c(3)(c) (March 1996).

[13] Appellant only worked for the employing establishment for about four months in the year preceding the July 21, 1999 work injury.

[14] *See Randy L. Premo*, 45 ECAB 780, 782 (1994) (holding that section 8114(d)(3) of the Act provides an alternative method for determination of the pay rate to be used for compensation purposes when the methods provided in sections 8114(d)(1) and 8114(d)(2) cannot be applied reasonably and fairly).

The Office complied with its procedure by obtaining information from the employing establishment and appellant concerning these factors.[15]

The Office obtained the actual yearly earnings of the employee working the greatest number of hours in the same position as appellant, *i.e.*, rural carrier associate. These earnings were $13,433.77 for the year prior to July 21, 1999 and the average weekly pay rate was properly calculated to be $258.34.[16] After considering the above-noted factors, the Office properly determined that this pay rate was the most appropriate pay rate to use for appellant's October 20, 2008 schedule award.

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 or 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.[17] For the reasons detailed above, the Office used the correct pay rate to calculate appellant's benefits.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that she has more than eight percent permanent impairment of her left arm, for which she received a schedule award. The Board further finds that the Office properly determined the pay rate for appellant's schedule award.

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4c(3) (March 1996). Office procedure provides, *inter alia*, that information should be obtained from the employing establishment regarding the earnings of the federal employee working the greatest number of hours during the year prior to the injury in the same or most similar class and in the same or neighboring locality. *Id.* at 2.900.4c(3)(b). The information concerning appellant's prior nonfederal employment is obtained from appellant. *Id.* at 2.900.4c(3)(c) (March 1996).

[16] The record does not reflect that appellant would qualify for a recurrent pay rate, so it was appropriate for the Office to evaluate her pay rate with reference to July 21, 1991, the date of injury and the date disability first began. *See supra* note 8. The Office also properly determined that the formula found in the last sentence of 5 U.S.C. § 8114(d)(3) would not render a higher pay rate.

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

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 28, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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