United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 11-750**
	)	**Issued: January 12, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Troy, MI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On February 3, 2011 appellant filed a timely appeal of a November 24, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision regarding appellant's rate of pay. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

This case has previously been before the Board on appeal. In a decision dated May 1, 2008,[2] the Board found that appellant worked at the employing establishment as a delivery supervisor from August 15, 1998 through January 25, 2002 and began working as a part-time flexible carrier on January 26, 2002. The Board previously determined that appellant had not worked in the position of part-time flexible carrier for substantially the whole year prior to the beginning of his disability in March 2002 and that the record established that the position was one which would have afforded employment for substantially a whole year.

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

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 07-2083 (issued May 1, 2008).

whether the employee worked in the employment in which he 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.[3] Section 8114(d)(2) of FECA provides

> "Average annual earnings are determined as follows: … 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."[4]

In the May 1, 2008 decision, the Board directed OWCP to undertake further development by contacting the employing establishment to determine whether there was more than one similar employee and whether the employing establishment selected a similar employee with the highest number of hours in addition to requesting whether the employee selected was of the same grade, step and area as appellant.

In undertaking further development, OWCP received confirmation that the selected employee was of the same grade step and area of appellant, however, OWCP did not ask that the employing establishment provide the remainder of the information requested by the Board in the May 1, 2008 decision. It did not ask whether more than one employee had a similar grade, class and area and it did not obtain the actual yearly earnings of the employee working the greatest number of hours in the same position as appellant, *i.e.*, part-time flexible carrier.

OWCP did not follow the Board's remand instructions and request all the additional information as directed in the Board's May 1, 2008 decision. In the July 26 and November 24, 2010 decisions, it essentially used the pay rate determination of May 9, 2007 in calculating appellant's loss of wage-earning capacity.

The Board has final authority to determine questions of law and fact. Its determinations are binding upon OWCP and must, of necessity, be so accepted and acted upon by the Director of OWCP.[5] The Board finds that OWCP failed to undertake development of appellant's pay rate in accordance with the Board's May 1, 2008 decision and the case will be set aside and remanded to OWCP for further development concerning appellant's pay rate as specifically directed in the prior Board decision. Following any such further development as deemed necessary, OWCP shall issue an appropriate decision in this case.

[3] 5 U.S.C. § 8114(d)(1), (2).

[4] *Id*. at § 8114(d)(2).

[5] *See Paul Raymond Kuyoth*, 27 ECAB 498, 503-04 (1976); *Anthony Greco*, 3 ECAB 84 (1949). *See also Frank W. White*, 42 ECAB 693 (1991) (Board's order in a prior appeal imposed an obligation on the Director to take particular actions as directed). *See L.C.*, Docket No. 09-1816 (issued March 17, 2010) (OWCP did not follow the Board's instructions in ascertaining the information necessary to determine payrate).

IT IS HEREBY ORDERED THAT the November 24, 2010 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this order of the Board.

Issued: January 12, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board