

myelopathy at C3-4 and C4-5, a face contusion and left shoulder strain. The employing establishment noted that appellant's hourly pay rate was \$11.00, and that she received continuation of pay and wage-loss compensation, based on working four and a half hours a day, four days a week. The record reveals that she had worked for one month prior to the employment injury. On September 13, 2010 appellant underwent cervical spine surgery. In a January 27, 2011 decision, OWCP terminated her monetary compensation. Appellant remained entitled to medical benefits.

On November 30, 2012 appellant submitted a schedule award claim. In an October 16, 2012 report, Dr. Jack L. Rook, an attending Board-certified physiatrist, advised that she had 10 percent impairment of the left arm. In a report dated March 3, 2013, an OWCP medical adviser agreed with Dr. Rook's rating and advised that the date of maximum medical improvement was October 16, 2012.

Appellant advised that she had no employment similar to the census enumerator position during the year prior to her injury, stating that she drove a semi and worked as a farm hand driving combines and tractors during that time.

An OWCP pay rate memorandum dated April 2, 2013 noted that appellant's hourly pay rate on the date of injury was \$11.00, and that she worked an average of 4.5 hours a day. OWCP multiplied the hourly rate of \$11.00 times the hours per day (4.5) times 150 (minimum average annual earnings) divided by 52 (number of weeks in a year), which yielded a weekly pay rate of \$142.79.²

Appellant was granted a schedule award on April 2, 2013 for 10 percent impairment of the left arm. The period of the award was October 16, 2012 to May 22, 2013, or 31.2 weeks. The weekly pay of \$142.79 was multiplied by her compensation rate of 66 2/3 percent, yielding a compensation rate of \$95.20. After cost-of-living adjustments, the weekly compensation was increased to \$100.00 a week.

On April 15, 2013 appellant, through her attorney requested reconsideration, noting that the pay rate of \$142.79 did not agree with a May 19, 2010 pay rate memorandum that noted a pay rate of \$198.67. In a merit decision dated October 24, 2013, OWCP determined that the pay rate used for schedule award purposes was correct, and denied modification of the April 2, 2013 decision.

LEGAL PRECEDENT

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly rate.³ Section 8101(4) provides that "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,

² *Id.* at § 8114(d)(3).

³ *See id.* at §§ 8105-07.

whichever is greater.⁴ The compensation rate for schedule awards is the same as compensation for wage loss.⁵

Section 2.900.5.a(3) of OWCP procedures provide that, if the employee did not stop work on the date of injury or immediately afterwards, defined as the next day, the record should indicate the pay rate for the date of injury and the date disability began. The greater of the two should be used in computing compensation, and if they are the same, the pay rate should be effective on the date disability began.⁶

Section 2.900.3.e provides that temporary positions, such as census enumerators, historically average 4.5 hours a day, four days a week.⁷ However, an individual may have worked more or less depending on the local census office's operational requirements, and the factual evidence should be evaluated carefully. Because of their irregular federal employment, these employees are usually paid under the provisions section 8114(d)(3) of FECA.⁸

Section 8114(d)(3) of FECA provides:

“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 due 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 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.”⁹

Sections 2.900.4 and 2.900.12 of OWCP procedures provide that, when computing compensation for census workers, when disability did not exceed 90 days, compensation should be paid on a daily basis according to section 8114(c). For enumerators who ordinarily worked 4.5 hours a day, 4 days a week, where disability extended beyond 90 days and the claimant had similar employment during the years prior to the injury, compensation should be paid in accordance with section 8114(d)(1) and (2). Otherwise, it should be based on a weekly basis

⁴ *Id.* at § 8101(4).

⁵ *See* 20 C.F.R. § 10.404(b); *K.H.*, 59 ECAB 495 (2008).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5.a(3) (September 2011).

⁷ Federal (FECA) Procedure Manual, *id.* at Chapter 2.900.3.e (March 2011).

⁸ *Supra* note 2.

⁹ *Supra* note 2.

using the following formula: 150 times the actual daily wage divided by 52. The actual daily wage should be determined by multiplying the hourly pay rate by 4.5 hours.¹⁰

ANALYSIS

Appellant, a part-time, intermittent census enumerator, was injured in a motor vehicle accident on March 8, 2010. She stopped work on that date. Appellant did not return to work and received compensation, based on her pay rate on the date of injury, until monetary compensation was terminated on January 27, 2011. She was granted a schedule award on April 2, 2013 for 10 percent impairment of the left arm.

The Board finds that OWCP properly determined appellant's pay rate for schedule award computation purposes. Appellant is not challenging the impairment rating of his schedule award but is challenging the rate of pay used to calculate the award.

The evidence establishes that appellant did not work in the position in which she was injured substantially for the entire year immediately preceding the injury. Rather, she worked approximately one month as a temporary-part-time, intermittent census enumerator at an hourly wage of \$11.00. Appellant noted that during the preceding year, she worked driving a semi and as a farm hand driving tractors and combines. This was not similar to her federal employment.

OWCP procedures provide that, as an intermittent part-time census employee, appellant was considered to have worked 4.5 hours a day, 4 days a week.¹¹ As noted, sections 2.900.4.c and 2.900.12.e(3) describe the procedures to be followed in calculating pay rate for census enumerators. The Board finds that OWCP properly determined appellant's schedule award pay rate by multiplying the hourly rate of \$11.00 times the hours per day of 4.5 times 150 which was then divided by 52, yielding a weekly pay rate of \$142.79. OWCP based her pay rate for schedule award purposes on \$142.79, multiplied by her compensation rate of 66 2/3, and found that her weekly pay rate was \$95.20, which was raised by a cost-of-living increase to \$100.00. These calculations are in accordance with OWCP procedures.¹² Although appellant's counsel noted that a May 19, 2010 OWCP pay rate memorandum listed a \$198.67 pay rate, OWCP procedures clearly specify the manner in which the pay rate of an intermittent part-time census employee is to be determined.¹³ The Board finds that OWCP properly determined appellant's pay rate.

¹⁰ Federal (FECA) Procedure Manual, *supra* note 5 at 2.901.10 (February 2013); *see* 2.900.4.c and 2.900.12 (March 2011); *see* 5 U.S.C. §§ 8114(c), 8114(d)(1).

¹¹ *Id.*

¹² *See M.H.*, Docket No. 12-140 (issued July 10, 2012).

¹³ Appellant was provided a weekly compensation rate of \$198.67 from the date of injury until termination of compensation benefits on January 27, 2011. This clearly was in error, resulting in an overpayment.

CONCLUSION

The Board finds that OWCP used the proper rate of pay in calculating appellant's April 2, 2013 schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 3, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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