

**United States Department of Labor
Employees' Compensation Appeals Board**

P.G., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION, MEDICAL)
CENTER, Memphis, TN, Employer)

**Docket No. 13-1332
Issued: June 16, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Acting Chief Judge¹
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 16, 2013 appellant filed a timely appeal from the December 31, 2012 decision of the Office of Workers' Compensation Programs (OWCP) concerning her pay rate. Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether OWCP properly determined appellant's pay rate for compensation purposes.

¹ Effective May 20, 2014, Patricia Howard Fitzgerald was appointed Acting Chief Judge.

² 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that she did not work a full year prior to her injury and her rate of pay should have included premium pay as shown through a comparable employee.³

FACTUAL HISTORY

On January 31, 2011 appellant, then a 42-year-old nurse, sustained injury to her right jaw during an attempt to calm and secure a patient who kicked her. On March 10, 2011 OWCP accepted her claim for contusion of the right temporomandibular joint (TMJ), other specified right TMJ disorders, contusion and aggravation of right TMJ, anxiety disorder, right cranial nerve palsy, mild pharyngeal dysphagia, ptosis of right eyelid, right eye dryness, temporary exacerbation of diabetes and post-traumatic stress disorder. Appellant stopped work on January 31, 2011 and did not return.

In a Form CA-7 completed by appellant on March 30, 2011, the employing establishment noted that as of the date of injury on January 31, 2011 she earned \$75,115.00 annually as a nurse at grade VN12-1. There was no additional pay listed. The employing establishment noted that appellant worked a fixed 40-hour week schedule. In an April 18, 2011 telephone memorandum, the employing establishment clarified that appellant worked a compressed schedule as a nurse, which equaled an 80-hour pay period. Appellant rotated six 12-hour shifts and one 8-hour shift. OWCP advised that total pay was reported and there were no additional pay elements. On June 6, 2011 it advised appellant that she was in receipt of wage-loss compensation based on a weekly pay rate of \$1,444.52 or \$3,422.37 every 28 days.

By letter dated December 28, 2011, OWCP inquired as to appellant's pay rate at the time of injury, including any premium pay. On January 11, 2012 the employing establishment responded that she began her employment on January 2, 2011 and was injured on January 31, 2011. At the time of injury appellant's base salary was \$75,115.00 per annum with varied work schedules that included premium pay for night differential, Saturday and Sunday pay. On the date of injury appellant was entitled to night differential at 10 percent of the hourly rate or \$3.61 per hour. Her actual wages for January 30 through February 12, 2011, for 80 hours base was \$2,888.80, night differential for 80 hours was \$288.80 and 4 hours for Saturday was \$36.12. Wages, but for the injury, would have been base of \$2,888.80, night differential for 80 hours at \$288.80, Saturday 16 hours \$144.48 and 12 hours Sunday for \$108.36. The employing establishment noted that appellant was not employed for one year prior to her injury and it was unable to provide a full year's earnings. However, appellant's wages earned for the two pay periods prior to the injury totaled \$5,777.60, all of which was base pay with no additional night differential or other premium pay earned. In an attached CA-7 form, the employing establishment portion listed her base pay as of the date of her injury as \$1,444.52 per week, night differential of \$3.61 per hour and Saturday/Sunday differential of \$9.03 per hour. It was noted that appellant's work schedule varied.

³ Appellant also contended on appeal that, in a letter from OWCP to her congressman, he was informed that she would be paid based on the hours of a similar employee. The Board notes that there is a letter to her congressman, dated February 6, 2012, in the record wherein OWCP informed him that as she had not worked the whole year prior to her injury, premium pay will be adjusted once DOL received information with regard to income from a similarly situated employee. However, contrary to appellant's assertion, this was not a formal decision but informational in nature. See 20 C.F.R. § 10.126.

In a pay rate memorandum dated January 31, 2012, OWCP noted that appellant worked a compressed/rotating schedule and had not worked the full year prior to the injury. As appellant worked from January 2 to 31, 2011 or 30 days inclusive, it prorated the premium pay and differentials provided by the employing establishment. The memorandum listed appellant's base weekly rate as \$1,444.52, with an additional night differential total of \$288.80 (which averaged \$67.39 a week or \$9.627 a day) and Saturday premium that totaled 36.12 (which averaged \$8.43 a week or \$1.204 a day). This amounted to an additional pay of \$75.82 a week.

By letter dated February 3, 2012, OWCP requested that the employing establishment submit additional information to determine the correct pay rate. It requested that it confirm the pay rate as of January 31, 2011, include any premium pay and specify the type and amount and provide the total wages earned by a similar employee for one year prior to January 31, 2011. The information sought was for a similar employee with the same work schedule as appellant, with any amounts of premium pay, night differential and Saturday pay to which the employee may be entitled for this period listed separately.

On February 23, 2012 the employing establishment forwarded pay information for a similarly scheduled employee for one year prior to January 31, 2011. The employee worked 2,080 hours at \$75,115.00 annual pay rate, equal to \$36.11 per hour; received night differential for 2,020 hours at 10 percent of the hourly rate, equaled to \$3.61 an hour or \$7,294.82 for the year; received Saturday premium pay at 25 percent of the hourly rate, equal to \$9.03 an hour and \$2,471.48 for 273.75 hours worked; and received Sunday premium pay at 25 percent of the hourly rate, equal to \$9.03 an hour and \$4,245.53 for 470.25 hours worked. The similar employee also had 96 hours of holiday work at an hourly rate of \$36.11 or \$3,466.85 for the year.

By decision dated April 23, 2012, OWCP denied appellant's claim for retroactive pay based on loss of additional pay elements commencing March 31, 2011. It noted that her pay rate was calculated under section 8114(d)(1)(a) based on her fixed base salary as a nurse and additional actual earnings in the form of irregular premium pay prior to her injury and prorated over the time she worked. OWCP stated that it did not calculate or compensate employees for loss of future potential earnings based on promotions or wage grade increases as there was no such provision in FECA.

On May 21, 2012 appellant requested an oral hearing before an OWCP hearing representative. At the hearing held on October 16, 2012 appellant's counsel contended that OWCP should have used the wages of a similarly situated employee, as was provided by the employing establishment and not the average of her earnings, as she only worked 30 days prior to the injury. At the time appellant was injured, she had a base salary plus shift premiums and shift differentials. She was an hourly employee, so the amount she made every week depended upon the hours and times she worked. Appellant stated that she was entitled to premium pay for weeknights and weekends. She noted that everyone doing work as a nurse was required to work a certain amount of nights, holidays and weekends.

In a decision dated December 31, 2012, an OWCP hearing representative affirmed the April 23, 2012 decision.

LEGAL PRECEDENT

Under section 8101(2) of FECA, “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.” Further, with respect to the calculation of pay rate for compensation purposes, FECA provides at section 8114(d) that average annual earnings are determined as follows:

“(1) If the employee worked in the employment in which he [or she] 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 [or her] daily wage for the particular employment or the average thereof if the daily wage has fluctuated, by 300 if he [or she] 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.

“(2) If the employee did not work in employment in which he was employed at the time of the 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 earning 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 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.”

When a job held at the time of injury includes elements of pay such as night or shift differential, extra compensation for work on Sundays and holiday or pay for administratively uncontrollable overtime, OWCP must include the additional pay in the base pay.⁴

ANALYSIS

The Board finds that OWCP did not properly determine appellant's pay rate for compensation purposes by applying section 8114(d)(1)(A) of FECA. The record establishes that appellant started work at the employing establishment on January 2, 2011 and was injured on January 31, 2011. She did not work in her regular employment for substantially the whole year prior to injury; therefore, section 8114(d)(1)(A) is not applicable to the determination of her pay rate. Rather, appellant's pay rate should be determined under section 8114(d)(2), as she had not worked in the employing establishment in which she was employed at the time of injury during substantially the whole year immediately preceding injury, but her position was one which would have afforded employment for substantially a whole year.

This section requires OWCP to base appellant's rate of pay on the average annual earnings of an employee of the same class working substantially the whole year immediately preceding her employment. The employing establishment provided such information to OWCP for a nurse with the same type of appointment who worked in similar employment for one year prior to January 31, 2011. The employing establishment noted that the base pay for 2,080 hours was \$75,115.00 or an hourly rate of \$36.11. The employing establishment provided night differential, Saturday and Sunday premium pay and holiday work information relative to the similar employee. OWCP should have utilized this information to determine appellant's pay rate for compensation purposes as they are elements which should be included in such determination.⁵ For this reason, the case will be remanded to OWCP for further development and an appropriate decision on her pay rate.

CONCLUSION

The Board finds that OWCP did not properly calculate appellant's pay rate for compensation purposes.

⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.8(b) (December 1995).

⁵ See *D.D.*, Docket No. 09-220 (issued August 14, 2009). The record does not reveal whether appellant had any concurrent similar employment in the private sector. See *L.C.*, Docket No. 08-224 (December 23, 2008).

ORDER

IT IS HEREBY ORDERED THAT the December 31, 2012 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further consideration consistent with this opinion.⁶

Issued: June 16, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

⁶ Richard J. Daschbach participated in the preparation of the decision but was no longer a member of the Board after May 16, 2014.