United States Department of Labor
Employees' Compensation Appeals Board

O.W., Appellant	)	
and	)	**Docket No. 13-2081**
	)	**Issued: March 7, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Woodbridge, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 11, 2013 appellant, through his attorney, filed a timely appeal from a June 20, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

This case was previously before the Board. In a decision dated November 21, 2008, the Board noted that OWCP accepted that appellant sustained a right ankle and foot sprains in the

[1] 5 U.S.C. § 8101 *et seq.*

performance of duty on January 9, 1999.[2] OWCP issued a July 20, 2005 schedule award decision for a 53 percent right leg permanent impairment. The pay rate for compensation purposes was $340.25 a week, based on an hourly wage of $13.61 at 25 hours per week. Appellant argued that his pay rate was incorrectly determined. The Board remanded the case for further development, noting that OWCP had not explained how it had applied 5 U.S.C. § 8114(d) in determining his pay rate.

By order dated December 22, 2010, the Board remanded the case for further development on the pay rate issue.[3] The evidence required clarification as to appellant's pay. The employing establishment stated that appellant was a probationary employee who worked only 35 days and averaged 25 hours a week. Appellant contended that he worked more than 35 days and generally worked 40 hours per week. The history of the case as provided in the Board's prior decision and order are incorporated herein by reference.

In a letter dated April 18, 2011, OWCP requested additional information from the employing establishment as to appellant's rate of pay on January 9, 1999. An employing establishment human resources employee completed a form dated April 21, 2011, stating that appellant was a part-time flexible employee that worked 35 days and averaged 25 hours a week.

By decision dated August 24, 2011, OWCP denied appellant's claim for an increased pay rate.

Appellant requested a hearing before an OWCP hearing representative, which was held on January 4, 2012. By decision dated March 28, 2012, the hearing representative vacated the August 24, 2011 decision. The hearing representative found that the evidence remained insufficient to properly determine the pay rate and the employing establishment was requested to provide additional information.

In a letter dated October 17, 2012, an employing establishment human resources specialist stated that appellant had been hired on December 19, 1998 as a part-time flexible carrier at $13.61 per hour. From December 19, 1998 to January 8, 1999, appellant had worked 75.16 hours at an average of 25 hours per week. According to the employing establishment, he was hired as a 90-day probationary employee and his employment was terminated during the probationary period. In addition, the employing establishment noted that appellant had worked 462.71 hours from August 15 to November 6, 1998 as a part-time flexible carrier, averaging 37.73 hours per week. It stated that this probationary employment was terminated on November 6, 1998.

By decision dated January 3, 2013, OWCP denied appellant's claim for an increased pay rate. It found that the employing establishment had previously indicated that it did not have information regarding any similarly situated employees from 10 years earlier.

[2] Docket No. 08-1296 (issued November 21, 2008).

[3] Docket No. 10-547 (issued December 22, 2010).

Appellant requested a review of the written record. On April 9, 2013 OWCP received a W2 form (wage and tax statement) for 1998 from the employing establishment showing appellant's earnings of $7,642.32.

By decision dated June 20, 2013, an OWCP hearing representative found that the evidence did not support a higher pay rate. He determined that 5 U.S.C. § 8114(d)(3) was applicable in this case, as appellant was not employed in the date-of-injury job for substantially the year preceding the January 9, 1999 injury, nor would the position have afforded employment for substantially the whole year. Applying 5 U.S.C. § 8114(d)(3), the hearing representative found that the total earnings for the year prior to January 9, 1999 was $7,982.57 ($7,642.35 + $340.25) in 104 days of work, for an average daily wage of $76.76. This represented a pay rate of $221.42 per week using the 150 times the daily wage calculation.

LEGAL PRECEDENT

Section 8114(d) of FECA 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 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 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 federal 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 one year immediately preceding his injury."

ANALYSIS

The case has undergone development with respect to the pay rate issue. OWCP has secured additional evidence on the issue, and the hearing representative of the provisions of 5 U.S.C. § 8114(d) in the June 20, 2013 decision. There remains an additional issue with respect to pay rate that requires additional findings.

The record supports that the date-of-injury job did not provide employment for substantially the whole year prior to January 9, 1999. It is well established that an employee must work at least 11 months before the injury to establish "substantially the whole year" preceding the injury.[4] As to whether the job would have provided employment for substantially the whole year, the Board noted in its November 21, 2008 decision that the employing establishment had indicated the job would not meet this requirement. There was no evidence then of record that the job would have afforded employment for substantially the whole year prior to the injury. Therefore the evidence indicates that 5 U.S.C. § 8114(d)(3) would be appropriate to determine appellant's pay rate, as neither of the prior methods are applicable. As noted, this section provides that average annual earnings is based on a review of any relevant factors regarding employment, including previous employment or employment of other similarly situated employees. Average annual earnings cannot be less than 150 times the average daily wage during the year preceding the injury. Appellant was a part-time flexible employee who was hired on a probationary basis.

The hearing representative attempted to use the available evidence as to appellant's earnings from the employing establishment and his 1998 tax form. He calculated that appellant earned $7,982.57 in the year prior to January 9, 1999. The hearing representative found that appellant worked 104 days, which represented 83 days for the period August 15 to November 6, 1998, and 21 days from December 19 to January 8, 1999. This appears to represent the total number of calendar days for the periods worked, not the actual days worked. The "average daily wage" is the daily wage for employment "during the days employed," not the total calendar days of employment.[5] There is no evidence presented that appellant worked seven days per week. The period August 15 to November 6, 1998 is approximately 12 weeks and from December 19 to January 8, 1999 approximately 3 weeks. If appellant worked 5 days a week, this would result in only 75 days (60 + 15) of work. If he worked 4 days a week, this is only 60 days of work, and consequently a higher daily wage. The evidence of record is not clear on this point. The CA-1 claim form listed the work schedule as flexible and work hours from two to four hours a day.

[4] *See S.H.*, Docket No. 10-106 (issued July 8, 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4 (August 2012).

[5] *See, e.g., Eric B. Petersen*, 57 ECAB 680 (2006) (OWCP must determine average daily wage for the actual days worked).

The case will be remanded to OWCP for proper clarification of its findings as to the average daily wage. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the case requires additional development and proper findings on the pay rate issue.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 20, 2013 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 7, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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