

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

D.C., Appellant

and

**U.S. POSTAL SERVICE, NASHUA PRIORITY
MAIL PROCESSING CENTER, Nashua, NH,
Employer**

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**Docket No. 14-1931
Issued: September 15, 2015**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 3, 2014 appellant, through counsel, filed a timely appeal from a July 30, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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.

On appeal counsel contends that OWCP's decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² In a June 18, 2012 decision, the Board reversed an August 24, 2011 OWCP decision finding that appellant's actual earnings as a receptionist fairly and reasonably represented her wage-earning capacity. The Board determined that OWCP had not fully considered all criteria for making a retroactive loss of wage-earning capacity determination and reversed the wage-earning capacity decision.

The relevant facts are set forth below.

OWCP accepted that on May 3, 2001 appellant, then a 35-year-old casual label clerk, sustained a lumbar subluxation as a result of lifting tubs of labels at work. It paid her wage-loss compensation for total disability from June 26 through October 26, 2001.³ Effective October 27, 2001, OWCP placed appellant on the periodic rolls and she began to receive compensation every 28 days in the amount of \$562.00, based on an hourly rate of \$14.05 and a 40-hour workweek.

On August 15, 2001 the employing establishment clarified that appellant was not a full-time employee, but rather a casual employee who worked an average of 29.02 hours a week at a pay rate of \$14.05 per hour. No further action was taken by OWCP regarding the pay rate. Appellant moved to Nevada in 2005.

During the next few years, OWCP developed the medical record as to appellant's work capacity. Appellant was formally referred to vocational rehabilitation in February 2009. In July 2009, OWCP proposed to reduce her wage loss compensation to reflect her ability to earn wages as a reservation clerk or receptionist. Appellant had accepted various nonfederal positions during this time and on March 3, 2011 OWCP found her actual position as a receptionist fairly and reasonably represented her wage-earning capacity and reduced her wage-loss compensation to zero retroactive to April 19, 2010 the day she had begun work as a receptionist. This decision was reversed by the Board on June 18, 2012. On September 18, 2012 appellant's wage-loss benefits were reinstated to April 19, 2010.

It was during the vocational rehabilitation process that OWCP discovered the pay rate error. The employing establishment had reminded OWCP on July 13, 2010 that on the date of injury (May 3, 2001) appellant worked an average of 29.29 hours earning \$411.66 a week as a casual employee.

In a September 30, 2010 decision, OWCP corrected appellant's pay rate. Based on payroll reports, it found that she was a casual employee who earned \$14.05 an hour and averaged 5.8 hours a day and that she had not worked in the position 11 months prior to her injury. This rate was multiplied by 150 and divided by 52 to equal \$235.07 per week. This pay rate was determined effective as of September 30, 2010. OWCP further found that an overpayment of compensation in the amount of \$93,884.63 had been created from June 26, 2001 to April 18,

² Docket No. 12-76 (issued June 18, 2012).

³ In an August 14, 2001 letter, the employing establishment stated that appellant was terminated for being absent without leave as she failed to report to work as scheduled effective June 25, 2001.

2010 because her compensation had been based on the incorrect pay rate of \$562.00 for a 40-hour work week.⁴

Through correspondence between appellant and OWCP over the next few years, appellant disputed the overpayment decision and the pay rate, but the correspondence regarding the pay rate was never adjudicated as a formal request for reconsideration, despite several requests by counsel. By letter dated October 28, 2013 counsel again requested a final, appealable decision on the issue of the pay rate.

On November 15, 2013 OWCP finally issued an appealable decision on the pay rate. It found that the proper pay rate was \$235.07 a week effective September 30, 2010. OWCP determined that 5 U.S.C. § 8114(d)(3) was applicable in this case, as appellant had not been employed in the date-of-injury job for 11 months in the year preceding her May 3, 2001 employment injury. Applying 5 U.S.C. § 8114(d)(3), it found that she had worked 580.32 hours during a 20-week period averaging 5.8 hours a day. OWCP multiplied the hourly pay rate on the date of injury (May 3, 2001) of \$14.05 times 5.8 hours per day times 150 (minimum average annual earnings) divided by 52 weeks (number of weeks in a year), which yielded a weekly pay rate of \$235.07.

OWCP explained that under 5 U.S.C. § 8114 an employee who works substantially the whole year prior to injury, or who would have done so but for the injury, may receive compensation based on the annual pay rate for the job held, if an annual rate was fixed (that is if the employee was a full-time worker). Eleven months is considered to be “substantially the whole year.” However, as appellant did not work in her federal position for 11 months, it calculated the weekly pay rate based on the 150 formula. The 150 formula comes from 5 U.S.C. § 8114(d)(3) which states, “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 his or her injury.” Based on that formula, OWCP found that the correct weekly pay rate was \$235.07.⁵

By letter dated November 26, 2013, appellant, through her attorney, requested a telephone hearing with an OWCP hearing representative. During the June 11, 2014 telephone hearing, appellant stated that she was a full-time employee who worked 40 hours a week. She contended that OWCP had incorrectly interpreted her pay records in determining that she was not a full-time employee. Appellant claimed that the job she held a year prior to her injury was similar to her employing establishment job. She stated that she worked as a contractor for the employing establishment and that she did the same work as postal employees.

In a June 30, 2014 letter, Louise A. Cote, an employing establishment health and resource management manager, submitted payroll records to OWCP and explained that they clearly indicated that appellant had not worked 40 hours a week. Ms. Cote stated that the records were

⁴ In a January 4, 2011 decision, the overpayment was finalized following a telephone conference. The hearing representative waived recovery of the overpayment as appellant’s monthly expenses exceeded her monthly income.

⁵ OWCP noted in its November 15, 2013 decision that OWCP should have revised the pay rate when first advised of the error in 2001 and declared an overpayment. However, that action had not been taken.

used to calculate appellant's average weekly hours of 29.02 for the period she worked prior to her injury.

In a July 30, 2014 decision, an OWCP hearing representative affirmed the November 15, 2013 decision. He found that, although appellant testified that she was a full-time employee, the employing establishment had submitted pay records which established that she was not a full-time employee. The hearing representative further found that appellant had submitted no evidence to corroborate her insistence that she was a full-time employee and her testimony alone was insufficient to overcome the factual evidence in the record.

LEGAL PRECEDENT

Under 5 U.S.C. § 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 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 one year immediately preceding his injury.”

ANALYSIS

OWCP paid appellant disability compensation on the periodic rolls effective November 4, 2001 based on a 40-hour workweek at a weekly pay rate of \$562.00. It later discovered that she was not a full-time employee and had only worked an average of 29.02 hours a week at an hourly rate of \$14.05. The record establishes that on the date of injury appellant was employed as a casual employee who worked an average of 29.02 hours a week or 5.8 hours a day at an hourly rate of \$14.05 which included night differential or other special pay increments.⁶ The record also establishes that she did not work in the position in which she was injured substantially for the entire year immediately preceding the injury. The Board finds that OWCP properly calculated appellant’s compensation pay by following 5 U.S.C. § 8114(d)(3) because she had not been employed during substantially the whole year immediately preceding the injury and it was not a full-time position. OWCP properly followed the formula in § 8114(d)(3) by multiplying the hourly rate of \$14.05 times the average of 5.8 hours a day times 150 which was then divided by 52, yielding a weekly pay rate of \$235.07. There is no evidence of record that she was entitled to a higher rate of pay.

At the hearing appellant argued that she had in fact been a full-time employee and asserted that the employing establishment had misinterpreted her pay records. Appellant offered, however, no documentary evidence to corroborate this assertion. The Board finds OWCP properly relied on the payroll records submitted by the employing establishment and properly calculated the pay rate pursuant to 5 U.S.C. § 8114(d)(3) to find the weekly pay rate for disability compensation purposes.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly calculated appellant’s pay rate for compensation purposes.

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.6(b) (March 2011).

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 15, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board