United States Department of Labor
Employees' Compensation Appeals Board

K.L., Appellant	)	
and	)	**Docket No. 20-1005**
	)	**Issued: September 20, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Bellingham, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 9, 2020 appellant filed a timely appeal from an October 24, 2019 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.[2]

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the October 24, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

FACTUAL HISTORY

On July 9, 2014 appellant, then a 50-year-old city carrier assistant 1 (CCA), filed a traumatic injury claim (Form CA-1) alleging that on July 7, 2014 she sustained a strained left knee while in the performance of duty. She explained that a vehicle failed to yield to pedestrian traffic while she was in a crosswalk and struck her left leg and knee. OWCP accepted the claim for left knee strain and left medial meniscus old bucket handle tear. Appellant stopped work on the date of injury and did not return. She received continuation of pay from July 8 through August 21, 2014. OWCP paid appellant disability compensation on the supplemental rolls effective August 22, 2014, and on its periodic compensation rolls effective May 31, 2015.

In October 2014, appellant began requesting clarification regarding the pay rate used for her compensation. Her salary was listed as $31,824.00 per year. In the year immediately preceding the July 7, 2014 employment injury, appellant's total wages were $2,191.97 for 17 days of work.

The record reflected that appellant did not work in the CCA position, with generally variable work hours, for 11 months prior to the injury. However, the position would have afforded employment for 11 months, but for the injury. Thus, OWCP requested that the employing establishment provide the earnings and pay rate information for similarly-situated employees with the same type of appointment and working the same or similar duties during the year immediately prior to appellant's July 7, 2014 date of injury.

On October 10, 2014 the employing establishment indicated that the search for another employee with the same type of appointment and working in a job with the same or similar duties was unsuccessful. It paid appellant based on a $371.94 weekly pay rate.

On September 25, 2017 OWCP again requested that the employing establishment provide earnings and pay rate information for similarly-situated employees during the year immediately prior to appellant's July 7, 2014 date of injury.

On September 26, 2017 the employing establishment clarified that, another employee, J.D., who was similarly situated to appellant, averaged 37.05 hours per week from the date of hire and made $15.30 per hour as of February 15, 2014 with no increase until November 26, 2016. A list of 24 CCAs 1 and 2 from the employing establishment and the Mount Baker stations was provided.

On January 12, 2018 the employing establishment indicated that the similarly-situated employee with the most earnings, J.T., had earned $11,168.99 in the year prior and had worked 20 weeks at $15.30 per hour.

By decision dated January 17, 2018, OWCP denied appellant's request for recalculation of her compensation pay rate. It found that since there were no employees of the same class who worked substantially the whole immediately preceding year in the same class or similar employment as she, then the compensation pay rate would be calculated under 5 U.S.C. § 8114(d)(3), which required that the pay rate be no less than 150 times the average daily wage. Using the "150 Formula" OWCP found that appellant's currently weekly pay rate of $391.94 was

correct and was higher than that of a similarly-situated employee ($11,168.99 gross/52 = $214.79 per week).[3]

On February 15, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held telephonically on June 22, 2018.

By decision dated July 26, 2018, the hearing representative affirmed OWCP's January 17, 2018 decision. The hearing representative indicated that $371.94 was used as appellant's official date-of-injury pay rate.[4] The hearing representative found that, under the "150 Formula" of Section 8114(d)(3), pay rate was determined without reference to the number of hours she worked, but rather on the number of days worked and her gross earnings. The hearing representative further found that appellant had not provided probative evidence to support her assertion that the employing establishment failed to provide the earnings of a similarly-situated employee, that her time cards were forged, or that the employing establishment's timekeeping records were unreliable.

On July 23, 2019 appellant requested reconsideration. She argued that, in establishing her pay rate, OWCP should have used section 8114(d)(2) as opposed to section 8114(d)(3). Appellant indicated that the employing establishment erred in not considering the pay of the other CCA employees. Additionally, since the CCA position was relatively new, other positions such as carrier tech and city carrier transitional should have been used to determine the pay rate of a similarly-situated employee. Appellant asserted that there were at least two other employees at her employing establishment who were either CCA's, carrier tech's, or city carrier transitional, but were not identified on the list of 24 employees. She named these employees as A.O. and A.F. Appellant further explained that, assuming a pay rate of $15.30, A.O. worked at least 2,122 hours in the 11 months prior to her injury and had grossed at least $35,916.75, while A.F. worked at least 2,215 hours in the 11 months prior to her injury, and assuming an hourly pay rate of $15.30 grossed $37,255.60, respectively.

By decision dated October 24, 2019, OWCP denied modification of its July 26, 2018 decision.

LEGAL PRECEDENT

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[5]

[3] Under the "150 Formula," OWCP calculated $21,191.97 gross earnings/17 days worked x 150/52 weeks equaled $391.94 per week. The Board notes, however, that appellant had earned only $2,191.97 gross earnings for 17 days worked in the year prior. Under the 150 Formula ($2,191.97 gross earnings/17 days worked x 150/52), this amounts to $371.94. The record indicates that appellant was paid based on the $371.94 pay rate.

[4] *Id*.

[5] 5 U.S.C. § 8102(a).

An employee is paid compensation for total disability equal to a percentage of his or her monthly pay.[6] To calculate monthly pay, the initial issue is the determination of the specific time when the employee's monthly pay will be calculated. Under 5 U.S.C. § 8101(4), the monthly pay is determined at the time of injury, the time disability begins, or the time compensable disability recurs, if the recurrence begins more than six months after a return to regular full-time employment.[7]

Once the proper time period is determined, the pay rate is determined under 5 U.S.C. § 8114(d). This section provides a specific methodology for determining pay rate:

> "(1) If the employee worked in the employment in which appellant was employed at the time of her 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 or her] daily wage for 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 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 or she] was employed at the time of his or her 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 or] she 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 her injury."

[6] *Id*. at § 8106(c).

[7] *Id*. at § 8101(4).

ANALYSIS

The Board finds that this case is not in posture for decision.

As noted above, the pay rate for compensation purposes is determined under 5 U.S.C. §8114(d). Section 8114(d)(1) is not applicable in this case, as appellant had only worked 17 days in the year prior to her injury. As the position would have afforded employment for substantially a whole year, section 8114(d)(2) is applicable. However, OWCP applied section 8114(d)(3), which required that the pay rate would be no less than 150 times the average daily wage. This section is only to be used if either sections 8114(d)(1) or 8114(d)(2) cannot be applied reasonably and fairly.[8]

OWCP improperly found that 5 U.S.C. § 8114(d)(2) was inappropriate. The employing establishment provided a list of 24 similarly-situated employees, but determined that the one employee who worked the most hours in the year prior to appellant's date of injury of July 7, 2014, only worked 20 weeks. No explanation was provided as to why other employees in the same class as she did not work more than 20 weeks in the year prior to her injury.

Accordingly, the case will be remanded to OWCP for application of section 8114(d)(2). Following any further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

[8] *T.M.*, Docket No. 15-149 (issued March 9, 2015).

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 20, 2021
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board