

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

_____)	
L.B., Appellant)	
)	
and)	Docket No. 20-1361
)	Issued: February 4, 2022
DEPARTMENT OF AGRICULTURE, FOREST)	
SERVICE, San Bernardino, CA, Employer)	
_____)	

Appearances:

Daniel M. Goodkin, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On July 1, 2020 appellant, through counsel, filed a timely appeal from a January 7, 2020 merit decision and a June 10, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.

ISSUES

The issues are: (1) whether OWCP properly determined appellant's pay rate in calculating her compensation for a schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 19, 2007 appellant, then a 45-year-old volunteer technical analyst, filed a traumatic injury claim (Form CA-1) alleging that on April 21, 2007 she contracted Lyme disease from a tick bite while hiking off trail to obtain information necessary for removal of abandoned vehicles in the forest. She did not immediately stop work. On the reverse side of the claim form, the employing establishment acknowledged the incident and explained that appellant was an unpaid volunteer. OWCP accepted the claim for Lyme disease on May 7, 2008. By decision dated January 2, 2019, it expanded the acceptance of appellant's claim to include other specified rheumatoid arthritis, multiple sites. Subsequently, OWCP further expanded the acceptance of the claim to include rheumatoid polyneuropathy with multiple sites rheumatoid arthritis, arthritis due to Lyme disease, rheumatoid myopathy with multiple sites, rheumatoid arthritis, and other conditions association with Lyme disease.

On July 5, 2019 appellant filed a claim for a schedule award (Form CA-7).

In a letter dated August 8, 2019, OWCP requested information from the employing establishment to calculate appellant's rate of pay.

On an August 14, 2019 completed EN1030 form, the employing establishment explained that appellant was a volunteer employee who had signed a volunteer agreement valid for one year beginning October 11, 2006. It advised that her tour of duty was unknown; that she received no pay for the year immediately preceding April 21, 2007; and that information was unavailable regarding the annual earnings of another employee with the same kind of appointment and work in a job with the same or similar duties

The employing establishment, in a letter dated August 21, 2019, informed OWCP that it was unable to provide all the information requested. However, it provided the pay rate for a Technical Analyst position, noting that the typical volunteer performs the work of a Grade 3, step 1 position. Lastly, the employing establishment advised that it was awaiting a response regarding the days and hours typically worked by a volunteer in this type of position.

In an August 30, 2019 letter, the employing establishment advised that a volunteer similar to a GS-3, step 1 Technical Analyst typically worked 10 hours per day and two days per month. It noted that the position was seasonal.

In a letter dated September 9, 2019, OWCP requested information from appellant so that her rate of pay could be calculated as the evidence of record remained insufficient to establish her pay rate for compensation purposes.

In a letter dated September 16, 2019, OWCP requested that the employing establishment provide additional pay rate information to calculate compensation for appellant's schedule award claim. Specifically, it requested a copy of the volunteer agreement in place on the date of injury,

³ Docket No. 17-0597 (issued September 1, 2017).

how many hours appellant was scheduled to work and/or how many hours she did work on the date of injury, and the day she last worked her volunteer assignment.

On September 16, 2019 appellant responded that while working as a volunteer for the employing establishment she was also employed full time by a private sector employer as a Senior Technical Customer Support Specialist. She advised that she worked eight hours per day, five days a week earning a yearly salary of \$91,690.00 or hourly rate of \$44.08. Appellant attached copies of pay stubs corroborating her wages for the periods April 30, and December 31, 2006, and April 15, 2007.

In a letter dated September 23, 2019, the employing establishment advised that it was unable to provide the additional information requested by OWCP since the employee with the relevant knowledge had retired. Additionally, it reported that many of the documents had either been discarded or sent for archiving. The employing establishment attached a copy of the volunteer service agreement in the Off-Highway Vehicle (OHV) Volunteer Program that appellant signed on October 11, 2006. The duties of the position included monitoring and patrolling forest roads and trail systems while providing education assistance to forest visitors. The employing establishment also noted that appellant may have worked on special projects and events with additional training offered through the Volunteer Program.

On September 24, 2019 the employing establishment informed OWCP that it did not have record of actual earnings for a GS-3 Tech Analyst for one year prior to the date of injury.

With a November 6, 2019 letter, counsel attached a June 2019 e-mail correspondence between appellant and G.H., a recently retired employing establishment ranger regarding her pay rate. He asserted that she should be paid at the GS-5, step 1 level rather than at the pay rate for a GS-3, step 1 as the GS-5, step 1 pay scale was the pay used for volunteers at the time. G.H indicated that volunteers with the employing establishment were equivalent to a Forestry Technician 0462 series, GS-5, step 1, with an hourly rate of \$25.00. He noted that this amount matched the OHV grant.

In a letter dated November 19, 2019, OWCP forwarded the pay rate information to the employing establishment for comment.

On December 23, 2019 the employing establishment provided a position description for a Forestry Aid (Recreation) at a GS-3 level, which it advised was a comparable position for the work performed by appellant. The classification date for this position was October 9, 2012.

In a letter dated December 26, 2019, OWCP requested that the employing establishment provide actual pay rate information for the comparable position of Forestry Aid, GS-3, step 1, one year prior to the date of injury of April 21, 2007. It informed the employing establishment that if it was unable to provide the actual salary for the Forestry Aid, GS-3, step 1, it would calculate appellant's pay rate using the minimum formula based on a GS-2, step 1 salary on the date of injury.

The employing establishment, in a letter dated January 7, 2020, advised that it was unable to identify actual employees in the position of Forestry Aid (Recreation) GS-3, step 1 for one year prior to the injury date of April 21, 2007. It requested that OWCP use the minimum formula to calculate appellant's pay rate.

In a January 7, 2020 pay rate memorandum, OWCP calculated a weekly pay rate of \$486.60 and annual salary of \$25,303.00 based on a California General Schedule (GS) for 2007 for a GS grade, 3 step 1.

By decision dated January 7, 2020, OWCP granted appellant a schedule award for 48 percent permanent impairment of right lower extremity, 45 percent permanent impairment of left lower extremity, 43 percent permanent impairment of the right upper extremity, and 16 percent permanent impairment of the left upper extremity. The period of the award was for 451.92 weeks and ran from February 19, 2019 through October 18, 2027. OWCP noted that the pay rate used to calculate payment of the schedule award was \$486.60.

On March 12, 2020 appellant, through counsel requested reconsideration of the January 7, 2020 schedule award decision with regard to appellant's pay rate. Counsel asserted that at a minimum appellant's pay rate should be calculated at a GS-5, step 1 based on information provided by a former ranger, G.H. He also asserted that appellant's pay rate from her private sector employment of \$44.08 per hour should have been used in calculating the pay rate for her schedule award.

In a letter dated March 27, 2020, the employing establishment advised that G.H. was no longer an employee of the agency as he had retired. It noted that it provided a description of the work appellant performed at the time of her injury to a Public Service Staff Officer, who specialized in volunteer work to determine appellant's pay rate.

In a letter dated June 9, 2020, appellant, through counsel, requested reconsideration and asserted that, contrary to the employing establishment's assertion, the better evidence regarding appellant's pay rate was provided by G.H., a retired ranger. Counsel argued that the employing establishment admitted that no one currently employed knew what work appellant actually performed as a volunteer or how to classify her volunteer work.

By decision dated June 10, 2020, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

To determine a weekly pay rate, OWCP generally determines the employee's average annual earnings and then divides that figure by 52.⁴ Section 8114(d) of FECA provides four different methods for determining average annual earnings based on the character and duration of the employment:

“(1) If the employee worked in the 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 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 the particular employment, or the average

⁴ See 5 U.S.C. § 8114(c).

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-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 [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.

“(4) If the employee served without pay or at nominal pay, paragraphs (1), (2) and (3) of this subsection apply as far as practicable, but the average annual earnings of the employee may not exceed the minimum rate of basic pay for GS-15. If the average annual earnings cannot be determined reasonably and fairly in the manner otherwise provided by this section, the average annual earnings shall be determined at the reasonable value of the service performed but not in excess of \$3,600.[00] a year.”⁵

ANALYSIS -- ISSUE 1

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). The applicable section in this case is Section 8114(d)(4), as appellant was an unpaid volunteer, work at the time of her injury.⁶ OWCP determined appellant’s pay rate based on information supplied by the employing establishment. The employing establishment initially advised that it was unable to provide the information requested by OWCP regarding the pay rate of an employee with the same or similar duties, since the supervisor with the relevant knowledge had retired and it did not have access to the pertinent documentation. It subsequently advised that

⁵ *Id.* at § 8114(d).

⁶ *Id.* at § 8114(d)(4).

appellant's pay should be based on the position of Forestry Aid (Recreation) GS-3, step 1 for one year prior to the injury date of April 21, 2007.

Appellant submitted evidence regarding her pay rate from a ranger, G.H., who had since retired. G.H. advised that volunteers with the employing establishment were equivalent to a Forestry Technician 0462 series, GS-5, step 1, with an hourly rate of \$25.00 and that this amount matched the OHV grant.

Because G.H. worked with appellant and demonstrated a familiarity with the duties she performed as a volunteer and the amount matching the OHV grant, OWCP should have further developed the claim by requesting information from the employing establishment regarding the asserted Forestry Technician 0462 series, GS-5, step 1 position, including a position description which describes the duties of that position and notes the number of days and hours typically worked per month. OWCP shall thereafter compare the job duties of a Forestry Technician, GS-5, step 1, to those of a Forestry Aid, GS-3, step 1, and determine which was the most similar to appellant's a volunteer job in order to ascertain the proper pay rate for schedule award purposes.⁷ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's pay rate for purposes of her schedule award.

On appeal, counsel also asserts that OWCP should have used the pay rate for appellant's concurrent full-time job in the private sector as a Senior Technical Customer Support Specialist. However, the Board has held that in determining a claimant's pay rate under 5 U.S.C. § 8114 earnings from dissimilar concurrent employment are not to be considered if the private earnings are from dissimilar employment.⁸

CONCLUSION

The Board finds that OWCP improperly determined appellant's pay rate in calculating her schedule award.⁹

⁷ See *D.S.*, Docket No. 16-0721 (issued October 13, 2017).

⁸ See *D.H.*, Docket No. 16-0128 (issued April 8, 2016); *Irwin E. Goldman*, 23 ECAB 6 (1971); see also *Steven J. Rose*, 44 ECAB 211 (1992) (the employee's concurrent work as an attorney was dissimilar from his federal employment as a substitute rural letter carrier).

⁹ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2020 decisions of the Office of Workers' Compensation Programs are set aside with regard to the pay rate. The June 10, 2020 decision is set aside as moot. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 4, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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