

FACTUAL HISTORY

On December 28, 1985 appellant, then a 53-year-old letter carrier, sustained bilateral knee strains causally related to his federal duties and received compensation for temporary disability effective June 28, 1986. Appellant was paid at a weekly rate of \$503.98 based on an annual salary of \$26,207.00. On May 12, 1989 the Office determined that appellant's appropriate compensation was \$843.26 per week based on the fact that, at the time of the injury, he was working concurrently as a janitor at a local high school. On July 10, 1996 the Office terminated appellant's compensation after finding that his disability ceased. On July 27, 1997 an office hearing representative reversed the July 10, 1996 decision. The Office reinstated appellant's pay rate at the rate of \$503.98 per week.

In a decision dated August 21, 1997, the Office explained that it relied on the Federal (FECA) Procedure Manual Part 2.900.4(2)(a) that states that "A pay rate based on full-time [f]ederal employment for at least 11 months prior to the injury may not be expanded to include the pay earned in concurrent employment, even if that employment is similar to the [f]ederal duties." The Office determined that it previously erred in compensating appellant for his nonfederal employment because he had worked full time in his federal position for more than a year prior to his injury.²

Appellant requested a hearing and argued that the hearing representative had directed the Office to pay him at his former rate, that the decision to pay compensation at the \$503.68 level was based on the incorrect assumption that he was a seasonal employee, and that the Office had previously determined that his pay rate for wage-loss compensation should include both the federal and nonfederal jobs. In an October 2, 1998 decision, the Branch of Hearings and Review affirmed the Office's August 21, 1997 decision.

On February 16, 1999 appellant requested reconsideration and argued that the appropriate pay rate was \$843.26 and submitted FECA Program Memorandum No. 164 that provides:

"[P]ay rate is defined at 5 U.S.C. [§] 8101(4) as[:] (1) pay at the time of the injury; (2) pay at the time disability begins.... The definition does not require that the pay rate be earned in [f]ederal employment. If the individual is working in private industry at the time the disability begins ... non[f]ederal pay may be used in determining the pay rate...."

Appellant also submitted a copy of section 8101(4) of the Act regarding the definition of "monthly pay."³ In a November 8, 1999 decision, the Office denied reconsideration.⁴ On January 7, 2000 appellant filed an appeal with the Board. In a July 2, 2002 order, the Board

² Appellant worked for the employing establishment for 29 years. He worked in his nonfederal employment with the Los Angeles public schools for 18 years.

³ Appellant later submitted other letters requesting reconsideration and additional copies of the FECA Program Memorandum No. 164 and 5 U.S.C. § 8114.

⁴ Subsequently an overpayment of \$141,094.66 was found to have occurred due to the error in calculating appellant's pay rate. That decision is not before the Board at this time.

remanded the case finding the Office had submitted an incomplete record⁵ and directed it to issue a new decision. In a September 10, 2002 decision, the Office again denied appellant's request for reconsideration.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁶ the Office's regulation provides that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁷ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁸ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁹

ANALYSIS

Appellant argued in his request for reconsideration that the Office erroneously applied a point of law because his compensation pay rate should have been based upon both his federal wages and his concurrent employment wages. The Board finds that the Office did not abuse its discretion in denying appellant a merit review as appellant's legal argument is without color of validity.¹⁰ In the present case, appellant worked for 29 years as a letter carrier and, concurrent to his federal employment, he worked 18 years in nonfederal employment as a janitor. As these positions are not the same or similar combining the pay for calculating wage rates is not permitted by the Act or prior case law.

Section 8114(d)(1) of the Act¹¹ clearly establishes that, if the employee was in the date-of-injury position for substantially the whole year prior to the injury and his annual rate of pay was fixed, the average annual earnings are those of the date-of-injury job. This section does not contemplate or suggest that concurrent nonfederal employment should be included in the pay rate calculation. The Board has long held that wages from concurrent dissimilar employment will not be included in pay rate calculations if the federal employment in which appellant

⁵ Docket No. 00-1010 (issued July 2, 2002).

⁶ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

¹⁰ *Marion Johnson*, 40 ECAB 735 (1989).

¹¹ 5 U.S.C. § 8114(d).

sustained injury provided fixed earnings and the employment lasted for substantially the whole year prior to injury.¹² Appellant's legal argument therefore lacks color of validity.

The Board also finds that appellant has not submitted new evidence or raised arguments relevant to his factual situation which would require merit review.

CONCLUSION

The Office did not abuse its discretion when it refused to reopen appellant's claim for merit review in its September 10, 2002 decision.

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2002 decision by the Office of Workers' Compensation Programs is affirmed.

Issued: September 22, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹² *Irwin E. Goldman*, 23 ECAB 6 (1971).