

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

<hr/>	)	
<b>D.J., claiming as widow of T.J., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-1344</b>
	)	<b>Issued: June 11, 2024</b>
<b>DEPARTMENT OF THE INTERIOR,</b>	)	
<b>NATIONAL PARK SERVICE, DEATH</b>	)	
<b>VALLEY NATIONAL PARK,</b>	)	
<b>Death Valley, CA, Employer</b>	)	
<hr/>	)	

*Appearances:*  
Dan Bolton, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On September 10, 2021 appellant, through counsel, filed a timely appeal from an August 5, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

---

<sup>1</sup> 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 a 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.

Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

### ISSUE

The issue is whether OWCP determined the proper pay rate when calculating appellant's survivor benefits.

### FACTUAL HISTORY

On December 1, 2019 appellant, the employee's widow,<sup>4</sup> filed a claim for compensation by widow (Form CA-5), alleging that the employee was injured after drowning during an annual recertification swim test at the Palm Desert Aquatic Center in Palm Desert, California while in the performance of duty on March 18, 2018 and passed away as a consequence of that injury on March 24, 2018.

Municipal law enforcement incident reports dated March 18, 2018 indicate that, on that date, during an 800-yard swimming qualification the employee became unresponsive. Another participant began cardiopulmonary resuscitation. The employee was transported to a hospital emergency department.

Appellant submitted the employee's hospital records, dated March 18 through 24, 2018, noting that the employee sustained a cardiac arrest with anoxic brain injury on March 18, 2018. The employee was hospitalized and passed away on March 24, 2018.

Appellant provided the employee's death certificate, issued April 18, 2018, noting that he passed away on March 24, 2018 from atherosclerotic cardiovascular disease.

In a December 2, 2019 letter, the employing establishment noted that, at the time of injury, the employee was in volunteer status.

In a January 22, 2020 letter, J.G., an employing establishment official, asserted that the employee was a volunteer under the Volunteer of the Parks Act of 1969 according to Public Law 91-357. J.G. submitted the employee's volunteer service agreement for natural and cultural resources, dated April 1, 2017, noting his participation as Lead Safety Diver for the Devil's Hole Pupfish Count Dive Team. Volunteers were required to maintain self-contained underwater breathing apparatus (SCUBA) certification with a qualification in cave diving.

---

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that OWCP received additional evidence following the August 5, 2021 decision. 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.*

<sup>4</sup> The employee was a volunteer member of the employing establishment's Devil's Hole Diving Team.

In an official superior's report of employee's death (Form CA-6) dated January 28, 2020, the employing establishment indicated that appellant had "[s]igned up as volunteer since early 1990s -- [n]ot a federal employee."

In a February 6, 2020 statement, appellant asserted that on March 18, 2018 the employee had been participating in a mandatory annual SCUBA recertification required by the employing establishment.

On July 7, 2020 OWCP received a copy of the employee's May 18, 2018 final autopsy report. Dr. Leticia F. Schuman, a forensic pathologist, opined that the employee's cause of death was hypertensive and atherosclerotic cardiovascular disease.

On July 7, 2020 OWCP requested that Dr. Amanda C. Trimpey, a physician Board-certified in occupational and environmental medicine serving as an OWCP District Medical Adviser (DMA), review the medical record and a statement of accepted facts to determine the employee's cause of death and its relationship to his activities as an employing establishment volunteer. In an August 6, 2020 report, Dr. Trimpey opined that the acute physical exertion of the required recertification swim caused the employee's sudden cardiac death.

In a development letter dated September 9, 2020, OWCP requested that the employing establishment provide full details of the employee's work schedule in the year prior to March 18, 2018, including the hours worked per day, days worked per week, the date the employee began his assignment, and the date the assignment was to be completed. It also requested "the title, grade, and pay rate of a full-time position at [the employing establishment] in which the service performed is the same or most similar to that performed by [the employee]." OWCP afforded the employing establishment 15 days to provide the requested evidence, noting that the information was needed "to determine the correct entitlement to compensation."

In a file memorandum dated September 9, 2020, OWCP noted that, as the evidence of record supported that the employee's death occurred while in the performance of his volunteer duties, OWCP would accept appellant's claim for survivor benefits.

By decision dated September 17, 2020, OWCP found that the employee's death was covered under section 8133 of FECA<sup>5</sup> and approved the payment of compensation benefits to appellant as the employee's widow. It noted that the rate of compensation was under development and that an amended award letter would be issued once the additional information had been submitted.

In a September 21, 2020 email, R.W., an employing establishment official, indicated that, in 2017, appellant volunteered from March 21 through April 2, 2017 for 10 hours per day, and from September 15 through 17, 2017 for 10 hours per day, performing pupfish count dives. The employee also performed eight hours of required SCUBA development training, and a five-hour dive qualification on March 10, 2017. R.W. noted that a supervisor thought that the employee's activities as a team lead diver were equivalent to a General Schedule (GS)-12 position.

---

<sup>5</sup> 5 U.S.C. § 8133 (entitled, "Compensation in case of death").

On November 2, 2020 the employee's son-in-law informed OWCP that the employee had founded the Devil's Hole dive team and served as lead diver for 20 years. OWCP indicated that appellant would likely have been entitled to locality pay and step increases equivalent to a GS-12, Step 10 after 20 years of service.

In a development letter dated November 19, 2020, OWCP requested that the employing establishment verify the employee's volunteer service schedule as set forth in the September 21, 2020 email, and specify whether the employee's activities were equivalent to those performed by a GS-12, Step 10 employee. It afforded the employing establishment 15 days to provide the requested evidence.

In a separate development letter dated November 19, 2020, OWCP requested that appellant provide information about any federal or nonfederal employment the employee performed from March 18, 2017 through March 17, 2018.

On December 4, 2020 appellant submitted the employee's 2017 federal wage and tax statements (Internal Revenue Service Form W-2) indicating that he earned \$11,482.45 and \$74,611.09, respectively from two private sector companies. She also submitted Social Security Administration (SSA) benefit statements (Form SSA-1099) and portions of a federal income tax form.

In a January 27, 2021 file memorandum, OWCP noted that under 5 U.S.C. § 8114(d)(4) of FECA,<sup>6</sup> to determine average annual earnings, if the employee served without pay, and average earnings could not be determined reasonably and fairly as provided otherwise in that section, "the average annual earnings shall be determined at the reasonable value of the services performed, but not in excess of \$3,600.00 a year." It noted that as the employee had an irregular, part-time volunteer schedule in the year prior to his injury and death, death benefits could not be paid based on the rate of a full-time employee. OWCP further noted that as the employee had substantial private sector earnings in the year prior to his death, additional information was needed as to his duties for the two private sector companies.

In a development letter dated April 1, 2021, OWCP requested that appellant provide information regarding the employee's job title and duties with the two private sector companies during the year prior to the date of injury. It noted that survivor benefits would be issued shortly based on a temporary pay rate based on a statutory minimum compensation rate.

In an initial payment memorandum dated April 2, 2021, OWCP noted that it would issue survivor benefits on a temporary basis at the rate of \$1,760.08 per month, equivalent to \$304.63 per week, based on the statutory minimum GS-2, Step 1 pay rate in 2018. It explained that it needed additional information regarding the employee's private sector employment in the year prior to the date of injury. If the employee's private sector duties were related to diving, his earnings could be considered in calculating his pay rate.

---

<sup>6</sup> *Id.* at § 8114(d)(4).

On April 9, 2021 OWCP paid appellant survivor benefits in the amount of \$32,870.33 for the period March 25, 2018 through March 27, 2021.

OWCP continued to pay appellant survivor benefits in the amount of \$885.23 every 28 days.

In letters dated May 19, June 28, and August 2, 2021, appellant requested that OWCP issue a formal decision regarding the employee's pay rate with an explanation of how her survivor benefits were calculated.

By decision dated August 5, 2021, OWCP awarded appellant survivor benefits under 5 U.S.C. § 8133 of FECA<sup>7</sup> based on a pay rate of \$1,760.08 every 28 days, the statutory minimum monthly pay rate under FECA Bulletin 18-01. It noted that it had requested additional information regarding the employee's job duties for his two private sector employers to determine if they were similar to his volunteer duties; however, no additional information was received.

### **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 or her federal employment.<sup>8</sup> Section § 8114 of FECA<sup>9</sup> addresses the determination of average annual earnings for employees who served without pay. Under this section, if an employee served without pay, did not work in the employment for substantially the whole year,<sup>10</sup> the position would not have afforded employment for substantially a whole year,<sup>11</sup> and a sum that reasonably and fairly represents the earning capacity of the injured employee cannot be determined,<sup>12</sup> "the average annual earnings shall be determined at the reasonable value of the services performed, but not in excess of \$3,600.00 a year."<sup>13</sup>

### **ANALYSIS**

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

Section 8114 of FECA provides for different methods of computation of average annual earnings depending on whether the employee worked in the job in which he was injured for substantially the entire year immediately preceding the injury or would have been afforded the

---

<sup>7</sup> *Id.* at § 8133.

<sup>8</sup> *Id.* at § 8102(a).

<sup>9</sup> *Id.* at § 8114; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c) (September 2020).

<sup>10</sup> *Id.* at § 8114(d)(1).

<sup>11</sup> *Id.* at § 8114(d)(2).

<sup>12</sup> *Id.* at § 8114(d)(3).

<sup>13</sup> *Id.* at § 8114(d)(4).

opportunity for employment for substantially a whole year, but for the injury.<sup>14</sup> According to the Federal (FECA) Procedure Manual, in order to determine the employee's average annual earnings under section 8114(d)(3), OWCP is required to take the highest of the employee's earnings during the prior year, the earnings of a similarly-situated employee or the pay rate determined by the 150 times formula.<sup>15</sup> It is mandated to prepare a memorandum, which is to become part of the record, setting forth its determination and explaining the basis for it.<sup>16</sup>

In this case, the Board is unable to ascertain from the evidence of record what the employee's constructed annual earnings would have been at the time of the injury, based on the earnings of a similarly situated employee, and is therefore unable to determine the rate of compensation appellant should have received. The case record contains a September 21, 2020 email by R.W., noting that a supervisor equated the employee's volunteer activities as a team lead diver to a GS-12 position. As well, OWCP indicated that given his 20 years of service that the employee was likely have been a GS-12 Step 10. OWCP, however, implemented the statutory minimum pay rate under FECA Bulletin No. 18-01, without explaining how it arrived at its decision.<sup>17</sup> It did not provide the job title and pay rate for a similarly situated employee.

The Board has long recognized in interpreting the statute for pay rate purposes that the objective is to arrive at as fair an estimate as possible of the claimant's future earning capacity, and that this can best be accomplished by considering the claimant's employment activities during the year preceding the injury.<sup>18</sup> Given the circumstances of this case, OWCP should obtain further information, which does not appear in the record, for the calculation of the employee's average annual earnings.<sup>19</sup>

It is well established that, proceedings under FECA are not adversarial in nature, and while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source. OWCP has an obligation to see that justice is done.<sup>20</sup>

On remand, OWCP shall request that the employing establishment provide complete information regarding the title, pay rate<sup>21</sup>, and duty description of a similarly situated employee,

---

<sup>14</sup> *Id.* at § 8114(d)(1)-(2).

<sup>15</sup> In most cases, this means 150 times the daily wage on the date of injury. *See supra* note 9 at Chapter 2.900.4.d (September 2020).

<sup>16</sup> *See supra* note 9 at Chapter 2.900.4.c(4) (September 2020).

<sup>17</sup> *See Leonard N. Canfield*, Docket No. 04-2017 (issued February 1, 2005).

<sup>18</sup> *See Billy Douglas McClellan*, 46 ECAB 208 (1994); *John D. Williamson*, 40 ECAB 1179 (1989); *Wendell Alan Jackson*, 37 ECAB 118 (1985); *Irwin E. Goldman*, 23 ECAB 6 (1971).

<sup>19</sup> *See G.D.*, Docket No. 13-1754 (issued April 4, 2014); *Leonard N. Canfield*, *supra* note 17.

<sup>20</sup> *S.J.*, Docket No. 23-0903 (issued April 23, 2024).

<sup>21</sup> Including any applicable premium pay, such as diver pay under 5 C.F.R. §532.281.

and apply the procedures pursuant to 5 U.S.C. § 8114(d) to determine the proper pay rate. Following this and other such 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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 5, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 11, 2024  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board