United States Department of Labor
Employees' Compensation Appeals Board

CARL R. BENAVIDEZ, Appellant	)	
and	)	**Docket No. 04-2264**
	)	**Issued: June 20, 2005**
DEPARTMENT OF THE NAVY, NAVAL STATION, San Diego, CA, Employer	)	

Appearances:
Carl R. Benavidez, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 16, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 15, 2004 merit decision concerning his pay rate. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On October 1, 1981 appellant, then a 35-year-old contract price analyst, filed an occupational disease claim alleging that he sustained an emotional condition due to incidents and conditions at work. He alleged that he first became aware of his condition on or about August 28, 1981. The Office accepted that appellant sustained an employment-related aggravation of paranoid personality disorder. Appellant stopped work on August 28, 1981 and the Office determined that he was entitled to receive total disability compensation beginning

August 29, 1981.[1] He initially elected to receive compensation from the Office of Personnel Management (OPM) and retired from the employing establishment effective April 6, 1982. In December 1985 appellant elected to receive compensation from the Office retroactive to August 29, 1981. In January 1986, he was placed on the periodic rolls.[2]

The record contains documents indicating that on August 29, 1981 appellant earned $12.25 per hour or $490.00 per week; it also contains calculations showing how his compensation was initially determined based on his earnings on August 29, 1981.[3] The documents reveal that beginning March 1, 1983, appellant received an increase in his compensation each year due to cost of living adjustments (COLA).

In late 1998 appellant contended that he had been paid at an improper pay rate because his compensation did not include increases for locality pay.

By decision dated November 3, 1998, the Office determined that appellant's pay rate for compensation purposes had been properly calculated. The Office explained that appellant's pay rate was set by the pay he received on August 29, 1981 ($490.00 per week), *i.e.*, the date that his employment-related disability began. It noted that appellant had not sustained a recurrence of disability and therefore was not entitled to receive the "recurrent pay rate." The Office noted that locality pay did not come into effect until January 1993 and that it did not go into effect in the San Diego area until January 1994. It indicated that appellant had not received locality pay on August 29, 1981, the date his pay rate was set and that there was no provision to retroactively include locality pay in his pay rate.

In May 2000 appellant again contended that he had been paid at an improper pay rate. He asserted that there were two types of compensation administered by the Office, one for "employees" and one for "annuitants or former employees." Appellant claimed that the Office improperly failed to acknowledge his status as an "employee" and therefore improperly paid him compensation as an annuitant rather than an employee. He argued that he should have received compensation as an employee on leave without pay (LWOP) status since August 29, 1981 such that his pay rate would have included the grade and step increases that he would have received over the years. Appellant suggested that his 1985 election of Office benefits retroactive to August 29, 1981 served to nullify his retirement status.[4]

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[1] Under 5 U.S.C. §§ 8105 and 8110, the Office's pay rate calculations included multiplication of the figure for loss of wage-earning capacity times ¾ due to the fact that appellant had one or more dependents. *See Albert Shadrick*, 5 ECAB 376 (1953) regarding the calculation of wage-earning capacity under the "*Shadrick* formula." In the present case, appellant's loss of wage-earning capacity was 100 percent of his earnings.

[2] As a result of appellant's retroactive election, an adjustment of compensation payments was made between the Office and OPM.

[3] On August 29, 1981 appellant's pay grade was GS-11 and his step level was 5.

[4] Appellant also asserted that he should receive a COLA increase every January 1st rather than an increase every March 1st. He drafted several other letters to the Office and congressional representatives, which contained similar arguments.

In an informational letter dated May 15, 2000, the Office advised appellant that, due to his retirement in 1982, he no longer was an employee of the employing establishment but rather was an "[Office] compensation recipient." It stated that appellant's pay rate was set by the pay he received on August 29, 1981 plus the annual COLA increases he received each March 1st. The Office noted that appellant was not entitled to receive the grade and step increases that he might have received if he had continued as an employee.[5]

By decision dated June 15, 2004, the Office affirmed its November 3, 1998 decision. The Office found that appellant was not entitled to locality pay and that his pay rate was set by the pay he received on August 29, 1981 plus the annual COLA increases he received each March 1st since March 1, 1983. The Office noted that appellant's employment status had no effect on his pay rate and indicated that he was not entitled to receive the grade and step increases that he might have received if he had continued as an employee.

LEGAL PRECEDENT

Section 8105(a) of the Federal Employees' Compensation Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[6] Section 8101(4) of the Act defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he 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...."[7]

The word "disability" is used in several sections of the Act. With the exception of certain sections where the statutory context or the legislative history clearly shows that a different meaning was intended, the word as used in the Act means "Incapacity because of injury in employment to earn wages which the employee was receiving at the time of such injury." This meaning, for brevity, is expressed as "disability for work."[8]

ANALYSIS

Appellant claimed that he sustained an emotional condition due to employment-related incidents and conditions prior to stopping work on August 28, 1981. The Office accepted that he sustained an employment-related aggravation of paranoid personality disorder and paid him total

[5] The Office drafted similar informational letters in response to inquiries by appellant and his congressional representatives.

[6] 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

[7] 5 U.S.C. § 8101(4).

[8] *See Charles P. Mulholland, Jr.*, 48 ECAB 604, 606 (1997).

disability compensation effective August 29, 1981.[9] Appellant retired on disability retirement from the employing establishment effective April 6, 1982.

Appellant claimed that since August 29, 1981 the Office improperly calculated his pay rate for compensation purposes. By decisions dated November 3, 1998 and June 15, 2004, the Office determined that it had properly calculated appellant's pay rate.

The Board finds that the Office properly based its calculation of appellant's pay rate on his earnings on August 29, 1981, the date he first sustained disability due to his employment injury. As noted above, section 8101(4) of the Act defines "monthly pay" for purposes of computing compensation benefits as the monthly pay at the time of injury, 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 federal employment, whichever is greater.[10]

The record documents that on August 29, 1981 appellant earned $12.25 per hour or $490.00 per week. The Office properly based its calculations on this pay rate and correctly applied the *Shadrick* formula to determine the amount of compensation he was entitled to receive.[11] The Board notes that appellant was continuously disabled on and after August 29, 1981 and therefore he did not sustain an employment-related recurrence of disability. The Office properly found that it was not necessary to determine whether appellant had greater earnings at the time of a recurrence of disability.[12]

Beginning March 1, 1983, the Office correctly recalculated appellant's compensation each year by adding a COLA increase. The appropriate effective date for COLA increases is set by 5 U.S.C. § 8146 and the Office has no authority to change the effective date of March 1, 1983.[13] Appellant asserted that he should receive a COLA increase every January 1st rather than an increase every March 1st. However, he did not support his contention with citation to pertinent legal authority and there is no evidence to show that the Office improperly calculated his COLA increases under 5 U.S.C. § 8146.

[9] Appellant initially elected to receive OPM benefits. In December 1985 he chose to receive compensation from the Office retroactive to August 29, 1981 and an adjustment of compensation payments was made between the Office and OPM.

[10] *See supra* note 7 and accompanying text.

[11] *See Albert Shadrick*, *supra* note 1. Per 5 U.S.C. §§ 8105 and 8110, the Office properly multiplied the figure for loss of wage-earning capacity by the augmented three fourths rate due to the fact that appellant had one or more dependents.

[12] In an occupational disease claim, the date of injury is the date of last exposure to the employment factors, which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002). Appellant was last exposed to employment factors on August 28, 1981, the date he stopped working for the employing establishment and therefore his date of injury was August 28, 1981. Appellant was entitled to the same earnings on August 28, 1981 as on August 29, 1981 and therefore the fact that the Office based his pay rate on his earnings on the date disability began (August 29, 1981) rather than on the date of injury (August 28, 1981) is of no significance.

[13] 5 U.S.C. § 8146; *see also* 20 C.F.R. § 10.420 for the standards for applying COLA increases.

Appellant asserted that there were two types of compensation administered by the Office, one for "employees" and one for "annuitants or former employees." He claimed that the Office improperly failed to acknowledge his status as an employee and therefore improperly paid him compensation as an annuitant rather than an employee. Appellant asserted that since August 29, 1981 he held the status of an employee on LWOP. However, the record clearly establishes that appellant stopped working for the employing establishment on August 28, 1981 and was not placed on LWOP on or after that date. Appellant retired on disability retirement effective August 29, 1981, but suggested that his 1985 election of Office benefits retroactive to August 29, 1981 served to nullify his retirement status. Appellant again did not provide any legal authority for this claim and there is no provision of the Act that would alter the fact, under the circumstances of the present case, that appellant retired effective August 29, 1981.

Appellant argued that, because he felt he was an employee on LWOP status since 1981, his pay rate for compensation purposes since August 29, 1981 should have included grade and step increases that he would have received over the years. In addition to the fact that appellant has mischaracterized his employment status on and after August 29, 1981, the Board notes that appellant's employment status would have no effect on the amount of the compensation he was entitled to receive from the Office. The Office does not have the authority to enlarge the terms of the Act nor to make an award of benefits under any terms other than those specified in the statute.[14] The Board has consistently held that there is no provision which entitles a claimant to receive additional compensation for grade and step increases which the employee might have received if he had remained in his position with the employing establishment.[15]

Appellant also alleged that he had been paid at an improper pay rate because his compensation did not include increases for locality pay. However, there is no indication in the record that the Office failed to include locality pay to which appellant was entitled when it based its pay rate calculations on appellant's earnings on August 29, 1981, the date that disability began.[16] The Office noted that locality pay consideration did not come into effect until January 1993 and that it did not come into effect in the San Diego area until January 1994. Appellant did not identify any provision of the Act or other legal authority which would show that he was entitled to locality pay increases until January 1994.

CONCLUSION

The Board finds that the Office properly determined appellant's pay rate for compensation purposes.

[14] *Timothy A. Liesenfelder*, 51 ECAB 599, 602 (2000).

[15] The Board has held that the probability that an employee, if not for his work-related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act. *See Dan C. Boechler*, 53 ECAB 559, 561 (2002); *Dempsey Jackson, Jr.*, 40 ECAB 942, 947 (1989).

[16] Appellant would only have such locality pay included in his pay rate if he received locality pay on August 29, 1981. *See generally Hayden C. Ross*, 55 ECAB (Docket No. 04-136, issued April 7, 2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7(b)(16) (December 1995).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 15, 2004 decision is affirmed.

Issued: June 20, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member