

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

P.C., Appellant)	
)	
and)	Docket No. 06-556
)	Issued: August 10, 2006
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF INVESTIGATION, New York, NY,)	
Employer)	

Appearances:
P.C., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 4, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 16, 2005 merit decision determining his pay for periods between September 1992 and June 2000. 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 appellant received proper pay for periods between September 1992 and June 2000.

FACTUAL HISTORY

This is the fifth appeal in the present case. In the first appeal,¹ the Board issued a decision on July 23, 1998 which reversed an August 11, 1995 decision of the Office on the grounds that it improperly terminated appellant's compensation because he refused an offer of

¹ Docket No. 96-778 (issued July 23, 1998).

suitable work.² The Board determined that the Office failed to establish that the modified special agent position offered to appellant by the employing establishment was suitable. In the second appeal,³ the Board issued a decision on May 6, 2002 reversing the Office's June 2, 2000 decision on the grounds that it improperly reduced appellant's compensation effective June 5, 2000 based on his capacity to earn wages as a retail store manager.

In the third appeal,⁴ the Board issued a November 25, 2003 decision which set aside a September 24, 2002 decision of the Office and remanded the case for further development of the evidence. The Board found that the Office did not provide adequate findings and reasoning for its determination regarding the amount of compensation to which appellant was entitled for periods between September 1992 and June 2000.

In the fourth appeal,⁵ the Board issued a decision on February 3, 2005 which set aside the March 9, 2004 decision of the Office.⁶ The Board again found that the Office did not provide adequate findings and reasoning for its determination regarding the amount of compensation to which appellant was entitled for periods between September 1992 and June 2000. It noted that a proper calculation of appellant's compensation initially required the compilation of accurate figures for his base salary, locality pay, New York City retention pay, administrative uncontrollable overtime (AUO) pay, Sunday pay, holiday pay, and night differential pay, as measured on various dates, but that the Office did not provide any description of those amounts it had determined to be accurate and suitable for inclusion in its calculations. The Board noted that the Office relied heavily on calculations of an Office claims examiner, but that such extensive reliance was misplaced as he had explicitly indicated that some of his calculations were provisional and that a fully accurate assessment of the compensation due appellant required additional information and the reconfirmation of figures which had already been

² On December 29, 1987 appellant, then a 30-year-old special agent, sustained employment-related subluxations at C3-4, T10-11 and L4-5, and cervical, thoracic and lumbar strains. On May 21, 1991 he sustained employment-related sciatica, myalgia, myositis, and thoracic and lumbar sprains. Appellant stopped work for various periods and received disability compensation from the Office. He sustained recurrences of disability on December 20, 1991 and August 18, 1992, which were accepted as related to the May 21, 1991 employment injury. Beginning July 12, 1997, appellant began working as a manager in an Athlete's Foot Shoe Store which he operated. He indicated that he did not earn any income in this position after December 31, 1998.

³ Docket No. 00-2334 (issued May 6, 2002).

⁴ Docket No. 03-135 (issued November 25, 2003).

⁵ Docket No. 04-1042 (issued February 3, 2005).

⁶ By decision dated March 9, 2004, the Office determined the amount of compensation to which appellant was entitled between September 1992 and June 2000. It found that it properly calculated adjustments in pay for the period September 7, 1992 to July 11, 1997, but errors were made in the calculations for the periods July 12, 1997 to December 31, 1998 and January 1, 1999 to June 4, 2000 and that further adjustments in pay were due to appellant. Therefore, it issued checks to appellant in the amounts of \$4,817.14 and \$2,802.68 to account for these errors.

obtained.⁷ It also noted that calculation of a claimant's pay rate required assessing his pay at the time of injury, the time disability begins, or the time compensable disability recurs, depending on the circumstances of the case, but the Office did not provide any description of its reasoning with regard to this aspect of calculating the compensation due to appellant. The facts and the circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.

On remand the Office supplemented the record to include a undated Social Security Administration document which indicated that appellant had earnings of \$69,317.21 in 1991, \$18,264.96 in 1992, \$9,232.80 in 1995, \$19,000.00 in 1997 and \$14,000.00 in 1998.

By decision dated December 16, 2005, the Office noted additional development of the factual evidence of record and figures for calculating appellant's pay rate for compensation purposes. It noted that it had calculated appellant's adjusted weekly pay rate for determining pay rates (for the periods September 7, 1992 to July 11, 1997, July 12, 1997 to December 31, 1998, and January 1, 1999 to June 4, 2000) by using a figure derived from his pay on August 18, 1992, the date of his second recurrence of disability. The Office indicated that it used the August 18, 1992 date as a reference point because appellant's pay was higher on that date than on the date of injury, May 21, 1991, or the date of the first recurrence of disability, December 20, 1991. It indicated that it had obtained figures for appellant's pay on August 18, 1992 from a document initially produced on November 16, 2001 and revised on December 10, 2001 by Dennis E. Franko, an employing establishment official.⁸ The Office asserted that the revised December 10, 2001 document of Mr. Franko contained accurate figures for pay categories which, when added together, comprised appellant's total pay at any given time, including figures for base salary, locality pay, AUO pay, New York City retention pay, Sunday pay, holiday pay and night differential pay. It claimed that the figures contained in the revised December 10, 2001 document of Mr. Franko "generally correspond" with the figures contained in the August 31, 2001 document produced by claims examiner, a document which it had previously heavily relied upon in calculating appellant's pay rate. The Office found that there was no reason to recalculate appellant's pay rate or "*Shadrick* formula," that the calculations contained in its March 9, 2004 decision were accurate, and that no adjustments would be made to appellant's compensation.

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

⁷ The claims examiner based his calculations on the assumption that appellant earned \$19,000.00 in 1997 working as a manager for his Athlete's Foot Shoe Store and \$14,000.00 in 1998 working as a manager in the same store. The Board noted, however, that there was limited evidence that appellant earned \$19,000.00 in 1997 because that figure was based on an unsigned 1997 "S corporation" tax form which provided that the "compensation for officers" at Athlete's Foot Shoe Store was \$19,000.00 but did not specifically identify appellant's salary. The Board also indicated that there was limited evidence that appellant earned \$14,000.00 in 1998 because this figure was based on appellant's assertion that he earned that amount and there was no documentation to support this assertion.

⁸ Mr. Franko's precise position with the employing establishment is unclear. This document was already in the case record at the time of the Board's February 3, 2005 decision.

compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.”⁹ 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....”¹⁰

The “*Shadrick* formula” formula (derived from *Albert Shadrick*, 5 ECAB 376 (1953)) is used to calculate a claimant’s wage-earning capacity. The calculation involves obtaining figures for adjusted weekly pay rate (per 5 U.S.C. § 8101(4)); current rate of pay for the job held when injured, and current actual earnings. The wage-earning capacity percentage is obtained by dividing current actual earnings by the current rate of pay for the job held when injured. The wage-earning capacity amount is calculated by multiplying the current rate of pay for the job held when injured times the wage-earning capacity percentage. The loss of wage-earning capacity figure is then obtained by subtracting the wage-earning capacity amount from the current rate of pay for the job held when injured. Finally, the compensation rate is obtained by multiplying the loss of wage-earning capacity figure times either 2/3 (no dependents) or 3/4 (one or more dependents) per 5 U.S.C. §§ 8105, 8110.

In determining a claimant’s entitlement to compensation, the Office is required by statute and regulation to make findings of fact.¹¹ Office procedure further specifies that a final decision of the Office must include findings of fact and provide clear reasoning which allows the claimant to “understand the precise defect of the claim and the kind of evidence which would tend to overcome it.”¹² These requirements are supported by Board precedent.¹³

ANALYSIS

The Board finds that the Office’s December 16, 2005 decision does not provide adequate findings and reasoning for its determination regarding the amount of compensation to which appellant was entitled for periods between September 1992 and June 2000. The deficiencies in the Office’s December 16, 2005 decision do not fully explain the basis for its determination regarding appellant’s entitlement to compensation.¹⁴

⁹ 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).

¹⁰ 5 U.S.C. § 8101(4). 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).

¹¹ 5 U.S.C. § 8124(a) provides: “The [Office] shall determine and make a finding of facts and make an award for or against payment of compensation.” 20 C.F.R. § 10.126 provides in pertinent part that the final decision of the Office “shall contain findings of fact and a statement of reasons.”

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (July 1997).

¹³ See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

¹⁴ See *supra* notes 11 through 13 and accompanying text.

In its December 16, 2005 decision, the Office indicated that it had calculated appellant's adjusted weekly pay rate for determining pay rates (for periods between September 1992 and June 2000) by using a figure derived from his pay on August 18, 1992, the date of his second recurrence of disability. The Office indicated that it used the August 18, 1992 date as a reference point because appellant's pay was higher on that date than on the date of injury, May 21, 1991, or the date of the first recurrence of disability, December 20, 1991.¹⁵ The Office also obtained, per the request of the Board in its February 3, 2005 decision, a document from the Social Security Administration which shows that appellant earned \$19,000.00 in 1997 and \$14,000.00 in 1998.

The Office indicated that it had obtained figures for appellant's pay on August 18, 1992 from a document initially produced on November 16, 2001 and revised on December 10, 2001 by Mr. Franko, an employing establishment official. The Office asserted that the revised December 10, 2001 document of Mr. Franko contained accurate figures for pay categories which, when added together, comprised appellant's total pay at any given time. It noted that the figures contained in the revised December 10, 2001 document of Mr. Franko "generally correspond" with the figures contained in the August 31, 2001 document produced by an Office claims examiner.¹⁶ The Office found that there was no reason to recalculate appellant's pay rate or "*Shadrick* formula," that the calculations contained in its March 9, 2004 decision were accurate, and that no adjustments would be made to appellant's compensation.

The Board finds, however, that the Office's reasoning for not recalculating appellant's pay rate is not sound as there are in fact significant differences between the figures found in the revised December 10, 2001 document of Mr. Franko and the August 31, 2001 document of the claims examiner. For example, with reference to appellant's pay in the year prior to August 18, 1992, the revised December 10, 2001 document of Mr. Franko contains the following figures: base salary of \$47,750.00, locality pay of \$292.80, AUO pay of \$13,811.20, New York City retention pay of \$164.80, and no payments for Sunday pay, holiday pay, and night differential pay. In contrast, the August 31, 2001 document of the claims examiner contains the following figures for August 18, 1992: base salary of \$47,750.00, locality pay of \$7,640.00, AUO pay of \$13,847.50, New York City retention pay of \$7,520.63, Sunday pay of \$93.36, night differential pay of \$204.19 and no payments for holiday pay. There are other significant discrepancies between the revised December 10, 2001 document and the August 31, 2001 document for other dates, including the date of injury, May 21, 1991, and the date of the first recurrence of

¹⁵ The Office correctly noted that when determining the monthly or weekly pay for a claimant at a given point in time the greatest figure should be chosen among the figures for pay at the time of injury, at the time disability begins, or at the time compensable disability recurs if the recurrence begins more than six months after the injured employee resumes regular full-time employment for the federal government. *See supra* notes 9 and 10 and accompanying text.

¹⁶ The Office had heavily relied upon this document in calculating appellant's pay rate in its March 9, 2004 decision.

disability, December 20, 1991. In general, the August 31, 2001 document shows significantly higher pay on various dates.¹⁷

Moreover, the Office did not explain why it felt that the figures from the revised December 10, 2001 memorandum of Mr. Franko were accurate and it did not produce additional documentation, such as employing establishment records specifically memorializing the various categories of pay,¹⁸ to establish that they were in fact accurate. Apart from the Social Security Administration document regarding appellant's total earnings in 1997 and 1998, the Office did not supplement the record with any additional relevant evidence between the issuance of the Board's February 3, 2005 decision and the issuance of its December 16, 2005 decision.

Given the above-described deficiencies in the Office's determination regarding the compensation due appellant for periods between September 1992 and June 2000, the case shall again be remanded to the Office for further consideration. The Office shall further evaluate appellant's case and provide a detailed discussion, supported by documentation, of the compensation due appellant, such that the above-noted concerns are adequately addressed. After such development as it deems necessary, the Office shall issue an appropriate decision on this matter.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant received proper pay for periods between September 1992 and June 2000. The case shall be remanded to the Office for further consideration and the issuance of an appropriate decision which adequately evaluates the pay to which appellant is entitled.

¹⁷ The Board has noted that the Office's previous extensive reliance on the August 31, 2001 document of Mr. Paine was misplaced as Mr. Paine indicated that his calculations were provisional and that a fully accurate assessment of the compensation due appellant required the acquisition of additional information and the reconfirmation of figures which had already been obtained. However, this is not to say that the August 31, 2001 memorandum of Mr. Paine would not provide any guidance in determining proper figures, but rather that these figures need to be supported by additional documentation.

¹⁸ Although the record contains some personnel documents identifying appellant's base salary at various relevant dates, it does not contain personnel documents specifically identifying such pay categories as locality pay, AUO pay, New York City retention pay, Sunday pay, holiday pay and night differential pay at various relevant dates.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 16, 2005 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: August 10, 2006
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board