

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH GIRI and DEPARTMENT OF TRANSPORTATION, FEDERAL
AVIATION ADMINISTRATION, SAN JUAN INTERNATIONAL AIRPORT,
San Juan, PR

*Docket No. 00-2589; Submitted on the Record;
Issued March 1, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly calculated appellant's rate of pay for compensation purposes; and (2) whether the Office properly denied appellant's request for a hearing.¹

On January 5, 1976 appellant, then a 39-year-old air traffic controller, filed a claim for stress due to his air traffic control duties. He indicated that he had severe essential hypertension, which caused his disqualification for air traffic control duties. He indicated that he stopped working on October 10, 1975 when he was disqualified from his position. The Office accepted appellant's claim for aggravation of hypertension. The Office began payment of temporary total disability effective August 18, 1978, when his employment with the employing establishment was terminated. The Office noted that appellant's base pay was \$19,078.00 as of October 10, 1975 and, in the year prior to October 10, 1975, appellant had received night differential of \$634.12, Sunday pay of \$632.23 and holiday pay of \$648.64.

In a February 14, 1995 letter, the Office informed appellant that it was reducing his compensation because he had been employed as a driver since October 1, 1993. The Office subsequently determined that appellant had received temporary total disability compensation while working in a variety of positions since January 1980. In a March 13, 1995 letter, the Office indicated that appellant's compensation had been based on an incorrect pay rate and his compensation was being adjusted accordingly.² The Office began payment of temporary total disability effective April 12, 1995, when it was informed that appellant's driving permit had not been renewed due to his hypertension.

¹ Appellant died after the case was appealed to the Board. Appellant's wife, administratrix of his estate, substituted for him.

² The Office subsequently noted that it had not included appellant's holiday pay in calculating his pay rate for compensation purposes.

In a May 9, 1996 letter, the Office informed appellant that it had made a preliminary determination that he had received a \$1,338.14 overpayment in compensation because he was paid temporary total disability during periods in which he worked. The Office stated that appellant was at fault in the creation of the overpayment because he was aware or should have been aware that he was not entitled to temporary total disability compensation while he was working.

In response, appellant claimed that his compensation had been underpaid. He stated that his premium pay included a 10 percent cost of living adjustment, 3.32 percent night differential, 3.34 percent Sunday pay and 3.40 percent holiday pay.

The Office, in a February 14, 1997 telephone conversation, confirmed with an employing establishment official that appellant had been entitled to a 7.5 percent cost of living adjustment because he was living in Puerto Rico. In a June 26, 1997 letter, the Office informed appellant that it had adjusted his pay rate for compensation purposes, with a new pay rate effective May 25, 1997. The Office indicated that it was paying appellant \$3,263.87 as the balance due him for the incorrect calculation of his compensation.

In an undated letter, received by the Office's Branch of Hearings and Review on September 16, 1998 appellant requested an oral hearing, stating that he had been underpaid \$138,075.00 during the period in which he received compensation. In a June 17, 1999 response, the Branch of Hearings and Review noted that appellant had not received a final decision in his case. The case was returned to the Office for a final decision.

In an October 1, 1999 decision, the Office found that the rate of pay for compensation purposes in appellant's case was \$431.32, based on his pay rate as of October 10, 1975 because he sustained a wage loss at that time due to his reassignment. The Office adjusted appellant's compensation payments for all payments issued to appellant from October 10, 1975 to May 24, 1997. The Office noted that appellant had periods of partial disability; January 1, 1980 to April 13, 1982; June 1, 1983 to December 31, 1988; and January 1, 1993 to April 11, 1995. The Office indicated that the calculation of appellant's compensation entitlement was adjusted to reflect his wage-earning capacity during those periods, based on his actual earnings during the periods in question. The Office stated that, since appellant had been paid temporary total disability compensation during those periods, he had been overpaid. The Office indicated that appellant had been paid an adjustment of \$3,263.87, indicating that, in the period May 10, 1975 to May 24, 1997, he was entitled to \$580,339.24 in compensation and was paid \$577,075.47.

In a December 1, 1999 letter, appellant requested a hearing before an Office hearing representative. In a January 13, 2000 decision, the Office denied appellant's request for a hearing as untimely. The Office reviewed the request on its own motion and concluded that the issue in appellant's case could be equally well addressed by requesting reconsideration and submitting evidence not previously considered, which showed that the rate of pay used to calculate his compensation was incorrect.

The Board finds that the Office used the proper rate of pay in calculating appellant's compensation.

Under section 8101(4),³ a claimant's monthly pay is based on the greater of monthly pay at the time of injury, at the time disability begins, or at the time compensable disability recurs if it recurs more than six months after appellant returns to regular full-time employment with the United States. In this case, appellant had an occupational injury of aggravation of hypertension. His date of injury, therefore, would be the date he was last exposed to the employment conditions that caused his disability.⁴ Therefore, the Office properly used appellant's pay rate as of October 10, 1975, the date he was removed from air traffic control duties, in calculating his compensation. The date that appellant's disability began is also October 10, 1975. The Board has held that under the Federal Employees' Compensation Act, disability is defined as the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of the injury.⁵ Appellant entered second career training at the employing establishment at the time he was removed from air traffic control duties. He, therefore, lost premium pay, which reflected an inability to perform the duties of an air traffic controller and earn the wages that he had previously received. The date disability began, therefore, would be the same date as the date of injury. The Office also properly included appellant's night differential, Sunday pay, holiday pay and the cost of living adjustment for living in Puerto Rico in calculating his compensation by adding to its calculation the amount appellant earned in such categories of pay in the year prior to October 10, 1975.⁶ The Office determined that appellant's annual pay was \$19,078.00 and his weekly pay was \$366.98. In the year prior to October 10, 1975, appellant earned \$632.23 in Sunday pay, \$634.12 in night differential, \$648.64 in holiday pay and \$1,430.85 in cost-of-living adjustment, which added \$64.41 to appellant's weekly pay for a total weekly pay of \$431.29. The Office, therefore, properly determined appellant's rate of pay.

The Office also properly determined appellant's total compensation for the period in question. Appellant indicated in forms submitted to the Office that he had intermittent employment in a variety of jobs. The Office used wage information obtained from the Social Security Administration to calculate appellant's loss of wage-earning capacity during these periods, based on his actual earnings. The Office properly included the premium pay, such as night differential, Sunday pay, holiday pay and cost-of-living adjustment in determining the current pay of appellant's former federal position so as to correctly determine his loss of wage-earning capacity.⁷

The Board further finds that the Office properly denied appellant's request for a hearing before an Office hearing representative.

³ 5 U.S.C. § 8101(4).

⁴ *Hugh A. Feeley*, 45 ECAB 255 (1993).

⁵ *Patricia A. Keller*, 45 ECAB 278 (1993).

⁶ Federal (FECA) Procedure Manual Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.9(a) (September 1990).

⁷ *See Sue A. Sedgwick*, 45 ECAB 211 (1993).

Section 8124(b)(1) of the Act⁸ dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." The Board has noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings...."⁹ The Office's decision was issued on October 1, 1999. Appellant requested a hearing in a December 1, 1999 letter, which was beyond the 30-day time limit for requesting a hearing. Appellant, therefore, was not entitled to a hearing before an Office hearing representative.

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing; when the request is made after the 30-day period established for requesting a hearing; or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent. In this case, the Office found that appellant's request for a hearing could be equally well addressed by submitting new evidence and requesting reconsideration. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.¹⁰ There is no evidence that the Office abused its discretion in denying appellant's request for a hearing.

⁸ 5 U.S.C. § 8124(b)(1).

⁹ *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

¹⁰ *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs, dated January 13, 2000 and October 1, 1999, are hereby affirmed.

Dated, Washington, DC
March 1, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member