

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

JOSEPH R. GIALLANZA, Appellant)	
)	
and)	Docket No. 03-2024
)	Issued: December 23, 2003
DEPARTMENT OF THE NAVY, NAVAL)	
STATION, Guantanamo Bay, Cuba, Employer)	
)	

Appearances:
Joseph R. Giallanza, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 4, 2003 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated February 10 and June 16, 2003. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the February 10, 2003 decision, addressing the rate of pay used to pay appellant's compensation and over the June 16, 2003 decision denying appellant's request for a hearing.

ISSUES

The issues are: (1) whether the Office used the correct rate of pay for the compensation paid to appellant since March 19, 1990; and (2) whether the Office properly denied appellant's request for a hearing.

FACTUAL HISTORY

Appellant sustained a traumatic injury to his back on July 29, 1988 when he tripped over a coil of wire while working as an electrician. The Office accepted that he sustained sciatica and a lumbar strain with radiculopathy as a result of this injury. Appellant received continuation of

pay on July 29, 1988 and for a recurrence of disability from September 12 to October 23, 1988. He returned to work on October 24, 1988 having received a promotion to the position of inventory management specialist.

On November 26, 1989 appellant transferred to the Naval Training Station in Orlando, Florida. On March 15, 1990 this facility determined that, effective March 19, 1990, it was no longer able to provide appellant with light duty.¹ Appellant filed a claim for compensation beginning March 18, 1990, on which the employing establishment indicated that his rate of pay at the time he stopped work was \$14.70 per hour.

The Office began payment of compensation on March 19, 1990, using a rate of pay of \$588.00 per week, equivalent to \$14.70 per hour.

The Office terminated appellant's compensation effective October 16, 1994, but this decision was reversed by the Board in a December 15, 1995 decision, on the basis that there was an unresolved conflict of medical opinion.² The Office reinstated appellant's compensation retroactive to October 16, 1994 and later accepted the additional condition of depression.

In a letter to his congressional representative dated July 1, 2002, forwarded to the Office on July 11, 2002, appellant noted that a Form SF-50 indicated that his salary at the time of his termination on March 18, 1991 was \$15.23. Appellant contended that he was entitled to compensation at this rate since March 1990. In a response dated July 23, 2002, the Office advised appellant's congressional representative that the pay rate in effect at the time disability started for work must be used and that "The increased pay on the official date of separation will have no effect on the payment of compensation since the actual period of disability started one year prior to that date."

In a letter to his congressional representative dated August 8, 2002, forwarded to the Office on August 15, 2002 appellant reiterated that he earned \$15.23 per hour at the time he stopped working on March 16, 1990.

By decision dated August 23, 2002, the Office found that \$14.70 per hour or \$588.00 per week was the correct pay rate for appellant's compensation beginning March 19, 1990. The Office noted that it "could find no information in file that indicated that you were paid more than \$14.70 per hour at the time light duty was withdrawn on March 18, 1990 or that you returned to any form of gainful employment with the [employing establishment] after compensation was started." Appellant requested a review of the written record and an Office hearing representative, by decision dated January 13, 2003, noted the conflicting evidence on appellant's pay rate. The case was remanded to the Office to contact the employing establishment to determine what appellant was earning on March 19, 1990, the date of his compensable recurrence of disability.

¹ The employing establishment noted that appellant had been unable to perform the duties of his position description due to medical limitations since his reassignment from Cuba.

² Docket No. 95-1854 (issued December 15, 1995).

By letter dated January 21, 2003, the Office asked the employing establishment whether the \$14.70 hourly wage represented appellant's pay rate at the time light duty was withdrawn on March 18, 1990 and whether the \$15.23 hourly rate on the March 18, 1991 Form SF-50 reflected a standard cost-of-living increase that would have been effective had not the light-duty job been withdrawn. By letter dated January 27, 2003, the employing establishment stated that appellant's salary on March 19, 1990 was \$14.70 per hour. Enclosed were copies of all Form SF-50 notifications of personnel action from January 7, 1988 through his termination on March 18, 1991. One of these indicated that appellant was placed on leave without pay (LWOP) on March 19, 1990 for a period not to exceed March 19, 1991 and that he would be paid under the Federal Employees' Compensation Act.

By decision dated February 10, 2003, the Office found that it properly based appellant's wage-loss compensation on the \$14.70 per hour earnings in effect at the time his light-duty assignment was withdrawn. Appellant's request that he be compensated at a "pay rate other than the \$588.00 per week (\$14.70 x 40) in effect on the date of recurrence of disability, March 18, 1990, was denied."

By letter dated May 30, 2003, appellant requested an oral hearing, contending that the Office's August 23, 2002 decision was not accompanied by an explanation of his appeal rights.

By decision dated June 16, 2003, the Office found that appellant was not entitled to a hearing for the reason that his request was not made within 30 days of the issuance of its decision. The Office exercised its discretion and determined that it would not grant a hearing for the reason that the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence regarding his pay rate.

LEGAL PRECEDENT – ISSUE 1

Section 8105(a) of the 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."³ Section 8101(4) of the Act provides: "'monthly pay' means the 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 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."⁴

ANALYSIS – ISSUE 1

Appellant sustained a compensable injury on July 29, 1988 a recurrence of disability from September 12 to October 23, 1988 and a second recurrence of disability beginning March 19, 1990. On appellant's claim form for disability beginning March 19, 1990, the employing establishment indicated that appellant's rate of pay was \$14.70 per hour, or \$588.00 per week. This is also the pay rate noted on the Form SF-50 that placed appellant in an LWOP

³ 5 U.S.C. § 8105(a).

⁴ 5 U.S.C. § 8101(4).

status from March 19, 1990 not to exceed March 19, 1991. It is also the pay rate that the employing establishment stated in a January 27, 2003 letter, appellant had on March 18, 1990.

Appellant's rate of pay on March 18, 1990 is the greatest of the alternatives provided for determining monthly pay under section 8101(4) of the Act. Appellant's pay was less than \$14.70 on the date of injury, July 29, 1988.⁵ Although the rate of pay for his position was \$15.23 on the date his employment was terminated by the employing establishment, this increase occurred on February 10, 1991. The record establishes that appellant was not working at that time but was already in an LWOP status and receiving compensation. For this reason, this increase does not factor into the determination of appellant's pay rate for compensation purposes.

CONCLUSION – ISSUE 1

The Office paid appellant compensation based on the correct rate of pay, which was the rate of pay at the time of his recurrence of compensable disability on March 18, 1990.

LEGAL PRECEDENT – ISSUE 2

Section 8124(b)(1) of the Act,⁶ concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made 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 held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.⁷

The Office's regulations provide that a request received more than 30 days after the Office's decision is subject to the Office's discretion⁸ and the Board has held that the Office must exercise this discretion when a hearing request is untimely.⁹

LEGAL ANALYSIS – ISSUE 2

Appellant's request for a hearing was dated May 30, 2003, more than 30 days after the Office issued its February 10, 2003 decision. Appellant was not entitled to a hearing as a matter of right. Appellant's contention that he did not receive notification of appeal rights with his August 23, 2002 decision is without merit. There is no indication that he was not notified of his

⁵ Appellant's rate of pay was also less than \$14.70 on the date of his first recurrence of disability on September 12, 1988 though this recurrence does not fall under section 8101(4) of the Act because it occurred less than six months after the initial injury.

⁶ 5 U.S.C. § 8124(b)(1).

⁷ *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

⁸ 20 C.F.R. § 10.616(b).

⁹ *Samuel R. Johnson*, 51 ECAB 612 (2000).

appeal rights with either the Office's August 23, 2002 or February 10, 2003 decisions. The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual.¹⁰ Under the mailbox rule, evidence of a properly addressed letter together with evidence of proper mailing may be used to establish receipt.¹¹

The Office properly exercised its discretion in denying a hearing upon appellant's untimely request by determining that the issue could be equally well addressed by requesting reconsideration and submitting new evidence on his pay rate. As a properly addressed copy of the August 23, 2002 and February 10, 2003 decisions with attached notification of appeal rights appeals in the case record, there is no evidence to rebut the presumption of receipt by appellant under the mailbox rule.

CONCLUSION – ISSUE 2

The Office properly denied appellant's request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the June 16 and February 10, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 23, 2003
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁰ See *Larry L. Hill*, 42 ECAB 596 (1991); *George F. Gidicsin*, 36 ECAB 175 (1984).

¹¹ *Id.*