United States Department of Labor
Employees' Compensation Appeals Board

LOUIS C. DABBONDANZA, Appellant	)	
and	)	**Docket No. 03-1646**
	)	**Issued: April 26, 2004**
DEPARTMENT OF THE TREASURY, BUREAU OF ENGRAVING & PRINTING, Washington, DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On June 18, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 4, 2003 in which the Office determined that an overpayment in the amount of $8,435.85 was created, that appellant was at fault in the creation of the overpayment and that $500.00 would be collected from appellant's continuing compensation to recover the overpayment. Because appellant appealed the Office's April 4, 2003 merit decision within a year of the date it was issued, the Board has jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of $8,435.85 was created; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly determined that $500.00 should be withheld from appellant's continuing compensation to recover the overpayment.

FACTUAL HISTORY

The case is on appeal to the Board for the second time.[1] In the first appeal, the Board vacated the Office's decisions dated July 26, 2001 and April 4, 2002 because the evidence of record regarding appellant's hourly pay at the time of the recurrence (November 16, 1992) and at his date-of-injury job (February 8, 1999), were unclear, and, therefore, the correct amount of the overpayment, if any, was undeterminable. In the April 4, 2002 decision, the Office had determined that an overpayment in the amount of $35,198.03 was created because appellant received total disability compensation from February 8, 1999 through May 20, 2000 while he was working. Appellant contended that he informed several officials at the Office that he had resumed working and the Office hearing representative told him at the December 20, 2000 hearing that there was no overpayment. The Office, found, however, that appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver.[2]

The Office based its calculation of the overpayment on a weekly pay rate of $978.48 or $24.46 an hour. A computer printout showed that appellant had a pay rate of $978.48. An accompanying work sheet dated April 4, 2002 indicated that the effective date of that pay rate was November 16, 1992. On an Office form dated May 23, 2001, the employing establishment indicated that appellant's hourly rate as of November 16, 1992 (the date of recurrence) was $21.20, plus the night differential which was $3.18 (15 percent of $21.20) totaling an hourly rate of $24.38 ($21.20 + $3.18). The employing establishment indicated that the hourly rate of the date-of-injury job on February 8, 1999 would be $32.91. The Board found, however, that the Office had not explained how it obtained the hourly rates of $21.20 and $32.91, and that the absence of the Office's explanation of its findings precluded the Board's review of the decision. The Board instructed the Office on remand to provide reasons, with direct references to documents in the records, for determining appellant's rates of pay on November 16, 1992 and February 8, 1999. The Board also instructed the Office that, if it redetermined that the overpayment must be recovered from appellant in monthly payments, the Office must make specific findings regarding the amount of the monthly payments. The Board instructed the Office to address the information appellant submitted on his January 7, 2002 Form OWCP-20 and compare appellant's total monthly income with his total monthly expenses, consider his

[1] Docket No. 02-1586 (issued November 12, 2002). Appellant, a 54-old plate printer, sustained an injury at work in November 1989 for which he filed an occupational claim. The Office accepted his claim for bronchial irritation, vocal cord nodules, allergic rhinitis, occupational asthma and generalized anxiety disorder. Appellant worked intermittently, stopping work on November 21, 1989 and April 2, 1990, and on November 16, 1992 he sustained a recurrence of disability. He was paid temporary total disability as of October 26, 1990, and received benefits continuously except for certain periods of time in 1991 and 1992. The other facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

[2] On January 7, 2001 appellant submitted Form OWCP-20 in which he indicated that his earnings were $307.00 a month and that he had monthly expenses totaling $2,863.00. On his 2000 income tax return he indicated that he had business income of $3,680.00 for the year. Appellant also had an unpaid bill to his attorney in the amount of $36,879.00. Appellant's funds totaled $507.00 and he had two old cars, a 1989 and 1991 Chevy, each with over 135,000 miles on them which he stated had to be replaced soon. Without any reference to the OWCP-20 or an analysis of appellant's income, expenses, assets and liabilities, the Office required appellant to pay the Office $500.00 a month in order for the Office to recover the overpayment.

liabilities and assets and explain why the amount of the monthly payment was appropriate. The Board stated that after making the necessary findings, the Office should issue a *de novo* decision.

By decision dated April 4, 2003, the Office, following the Board's decision, determined that an overpayment of $8,435.85 was created from February 8, 1999 to May 20, 2000 when appellant erroneously received temporary total disability compensation while he was working.[3] The Office stated that it requested information from the employing establishment regarding appellant's pay rates on the appropriate dates. In the Office's form dated February 5, 2003, the employing establishment indicated that appellant's hourly pay rate effective November 16, 1992 was $24.77 and that the hourly night pay was $28.49 ((15 percent x $24.77) + $24.77). The employing establishment indicated that, if appellant were still in the date-of-injury job, he would be earning $31.98 an hour effective February 8, 1999, and that the hourly night pay would be $36.78 including the night differential ((15 percent x $31.98) + $31.98). The Office therefore determined that from February 8, 1999 to March 22, 2003, appellant was paid $157,356.79 but should have been paid $148,920.94 and that an overpayment of $8,435.85 was created.

In the April 4, 2003 decision, the Office referred to an "enclosed worksheet based on the LWEC determination of April 4, 2003" and to two pages of a copy of appellant's case history of all compensation payments made for the period February 8, 1999 to March 22, 2003. Two worksheets in the record dated April 4, 2003, one undated report and two computer printouts dated April 3 and 8, 2003 show that appellant's weekly pay rate was $1,143.44 and his wage-earning capacity was $331.59. The April 3, 2003 computer printout showed that appellant's gross compensation was $156,668.40. The Office used some unnumbered computer printouts which were in the record for calculating some minor variations in appellant's work schedule. A computation of appellant's compensation rate showed that the Office used a weekly pay rate of $1,143.44 and a wage-earning capacity of $331.59. The two pages of appellant's case history of payments the Office referenced are not in the record.

As he had previously done, appellant submitted a statement of earnings and leave from the employing establishment for the pay period September 20 through October 3, 1992. The statement indicated that appellant's hourly salary was $25.81 and that appellant had a weekly pay of $1,187.20. He wrote on the statement that the night differential of his hourly pay was 15 percent of $25.81 and, therefore, his total hourly pay was $29.68. Appellant indicated that the weekly pay of $1,187.20 was obtained by multiplying $29.68 by 40. On his claim Form, CA-2, on March 3, 1992 his supervisor indicated that appellant's hourly pay was $25.81, and was $29.68 including the night differential. An additional form that appellant submitted showed that the maximum hourly pay of a plate printer effective January 3, 1999 was $31.98 and including the night differential of $4.80 (15 percent of $31.98) was $36.78. The Office did not address these documents in its decision.

The Office determined that, by letter dated April 19, 1995, appellant was informed that in order to avoid an overpayment of compensation, he should notify the district office upon his

[3] In a memorandum dated April 3, 2003, the Office stated that appellant had been paid $158,388.45 from February 8, 1999 to March 22, 2003, was only due $148,920.94 during that time period and that therefore an overpayment of $9,467.51 was created. The Office's April 4, 2003 decision appears to supercede the findings in that memorandum.

return to work and, if he worked for any portion of that time period, he should return the check to the Office or an overpayment might result. The Office therefore found that he knew or should have known to return the checks in question and knew or should have known that he was not due the full temporary total disability payment after returning to work. The Office concluded that appellant was at fault in the creation of the overpayment of $8,435.85.

In the accompanying memorandum dated April 4, 2003, the Office stated that it had been withholding $500.00 a month to recover the amount of the overpayment and the last withholding took place on March 22, 2003.

LEGAL PRECEDENT -- ISSUE 1

Section 5 U.S.C. § 8101(4) of the Federal Employees' Compensation Act provides that the rate of pay to be used in calculating compensation is based on the greatest of either appellant's monthly pay at the date of injury, the date disability began or the date compensable disability recurred if it recurred more than six months after appellant's return to work.[4]

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.[5] Under section 8115 (a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[6] The Board has held that when reducing compensation to reflect earning capacity, if the job held at injury included addition elements of pay such as night differential, such additional pay must be reflected in the current pay for the same job.[7]

The relevant regulations provide that compensation for partial disability is payable as a percentage of the difference between the employee's pay rate for compensation purposes and the employee's wage-earning capacity.[8] Pay rate for the purposes of the calculation is the salary or wages for the job held at the time of injury at the time of the determination.[9] The employee's wage-earning capacity is computed by dividing the employee's earnings by the current pay rate and earnings, which means the employee's actual earnings and multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity. The loss of wage-earning capacity is then obtained by subtracting the resulting dollar amount from the pay rate for

[4] *See Bette L. Kvetensky*, 51 ECAB 346, 348-49 (2000).

[5] *Francesco Bermudez*, 51 ECAB 506, 513 (2000).

[6] *Id*.

[7] *Joseph Haley*, 46 ECAB 639, 642 (1995); *Sue A. Sedgwick*, 45 ECAB 211, 217 n.18 (1993); *see* Federal (FECA) Procedure Manual Part 2 -- Claims, *Computing Claims*, Chapter 2.900.7.b(1) and 8.b (April 1995).

[8] 20 C.F.R. § 10.403(b).

[9] 20 C.F.R. § 10.403; *Albert C. Shardrick*, 5 ECAB 376 (1953).

compensation purposes.[10] The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.[11]

ANALYSIS -- ISSUE 1

In this case, the Office determined that an overpayment of $8,435.85 was created from February 8, 1999 to May 20, 2000 when appellant received temporary total disability compensation while he was working. The Office based its calculation of the pay rate on a letter dated February 5, 2003 in which the employing establishment indicated that appellant's hourly pay rate including night differential on November 16, 1992 was $28.49 and that the hourly pay rate of the date-of-injury job including night differential on February 8, 1999 was $36.78. The Office therefore, determined that appellant was paid $157,356.79 but should have been paid $148,920.94 during the relevant time period and that an overpayment of $8,435.85 was created.

On appeal, appellant contended that his hourly pay rate including night differential effective November 16, 1992 was $28.49 and the hourly pay if he were still in the job when injured would be $36.78. On the February 5, 2003 form, the employing establishment also indicated appellant's hourly pay in the date-of-injury job would be $36.78, a dispute regarding that amount does not exist. However, the evidence is conflicting regarding appellant's hourly rate of pay effective November 16, 1992. Appellant's statement of earnings and leave covering that period shows that appellant had an hourly pay including night differential of $25.81 and his weekly pay was $1,187.20. On March 3, 1992 appellant's supervisor indicated on appellant's claim form that appellant's hourly pay including night differential was $29.68. The employing establishment indicated on the February 5, 2003 form that appellant's hourly pay including night differential on November 16, 1992 was $28.49. Further, an hourly rate of $28.49 yields a weekly pay of $1,139.60, not $1,143.44 as found by the Office. Since the employing establishment's records consisting of appellant's statement of earnings and leave, and the February 5, 2003 form are conflicting regarding appellant's hourly pay on November 16, 1992, the case must be remanded for the Office to resolve the conflict in the evidence. As the Board stated in its last decision, the Office is required to make findings of fact and provide a statement of reasons regarding the material facts of the case.[12] The Office should determine where the employing establishment obtained the figure of $28.49 and why it conflicts with the other documents in the record. It should determine why the relevant computer printouts show a weekly wage of $1,143.44. If the Office determines that appellant had a different pay rate than it originally calculated, it should recalculate appellant's wage-earning capacity. The Office should explain the figures it uses in calculating appellant's wage-earning capacity with references to specific documents. The Office should clearly explain how it calculates the overpayment, with specific references to documents in the record regarding the amount of money appellant was paid and should have been paid. The Office should then readdress the issues of fault and the amount of recovery of the overpayment. After any further development, it deems necessary, the Office should issue a *de novo* decision.

[10] *Dorothy Lams*, 46 ECAB 584, 586 (1996); *Albert C. Shardrick*, *supra* note 9.

[11] 20 C.F.R. § 10.403(b).

[12] *See Beverly Dukes*, 46 ECAB 1014, 1017 (1995).

CONCLUSION

Despite the Board's instructions in its November 12, 2002 decision, the Office did not clearly explain its determination of appellant's hourly pay rate effective November 16, 1992 nor did it clearly explain its calculation of the amount of overpayment. Because the Office did not provide valid reasons for its findings, the Board is precluded from reviewing the amount of the overpayment and the other related issues of fault and the amount of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2003 decision by the Office of Workers' Compensation Programs be set aside, and the case remanded for further action consistent with this decision.

Issued: April 26, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member