

employment.¹ He indicated that he first became aware of his disease or illness in April of that year. The Office accepted his claim for bilateral carpal tunnel syndrome and authorized surgeries. Appellant received compensation for wage loss through August 28, 1993.

On or about July 19, 2000 appellant submitted a claim for compensation alleging wage loss from 1993 to “now” because of his accepted employment injury.² On August 30, 2000 the Office advised him that more information was required: “Need the dates that you are claiming and medical evidence establishing disability for work during the entire period claimed.”

In a decision dated November 6, 2000, the Office denied appellant’s claim for compensation on the grounds that he failed to provide the dates and times requested to his employer for verification, “as well as to whether the medical evidence received is sufficient to process your claim.” In an April 18, 2001 decision, the Office denied a reopening of appellant’s case for a review on the merits.

In a decision dated November 16, 2001, the Office reviewed the merits of appellant’s case and denied modification of its prior decisions. The Office noted that he had submitted approximately 170 pages of time analysis forms, but that none of the medical evidence in the record supported the hours for which appellant claimed compensation.

On November 7, 2002 appellant requested reconsideration. He noted that he had sent in over 100 pages showing the dates he worked and the dates he could not work due to doctor’s orders from August 4, 1993 through March 2001. Appellant added that he was basing his claim on a 40-hour work week: “Of course had I not had the injuries I would have worked 40 hours a week or more, as the extra hours for work were available. Had there been no injuries I would have been a regular carrier with benefits and been eligible for retirement by now.”

In a decision dated December 19, 2003, the Office reviewed the merits of appellant’s case and found that he was entitled to 88 hours of compensation for verified medical appointments between September 14, 1993 and June 6, 2001. The Office itemized the dates and hours payable and, after verifying with the employing establishment that appellant averaged 37 hours per week in the year prior to the date of injury, concluded that it should pay compensation based on a 37-hour work week.³

¹ Appellant began his employment with the employing establishment on June 7, 1986 as a rural carrier (relief). He was reassigned to rural carrier (associate) on June 4, 1988 where he averaged about four days’ work per week. The employing establishment explained that the nature of both these positions was to work on an “as needed” basis. On July 19, 1989 a supervisor indicated that appellant’s regular work schedule was Mondays and Fridays from 6:00 a.m. to 2:30 p.m. His work schedule for the week his pay was stopped, however, was described as “variable.” Appellant worked in his date-of-injury position at least 11 months prior to the injury. His pay rate on the date of injury and on the date disability began was the same: \$10.63 per hour.

² Appellant submitted a similar claim on or about June 28, 2001 claiming compensation from September 1993 to “now.”

³ The employing establishment added the total number of hours appellant worked from March 26, 1988 to April 7, 1989, 1,578.88, to the total hours of overtime, 230.78 and divided the sum, 1,809.66, by 50 for an average work week of 36.19 hours, which the employing establishment rounded to 37.

LEGAL PRECEDENT -- ISSUE 1

To determine a weekly pay rate the Office must first determine the employee's "average annual earnings" and then divide that figure by 52.⁴ Section 8114(d) of the Federal Employees' Compensation Act provides four different methods for determining the "average annual earnings" depending on the character and duration of the employment:

"(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --

(A) was fixed, the average annual earnings are the annual rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment or the average thereof, if the daily wage has fluctuated by 300, if he was employed on the basis of a 6-day workweek 280, if employed on the basis of a 5½-day week and 260, if employed on the basis of a 5-day week.

"(2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States, in the same or neighboring place, as determined under paragraph (1) of this subsection."

"(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in federal employment and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within 1 year immediately preceding his injury."

(4) If the employee served without pay or at nominal pay, paragraphs (1), (2) and (3) of this subsection apply as far as practicable, but the average annual earnings of the employee may not exceed the minimum rate of basic pay for GS-15. If the average annual earnings cannot be determined reasonably and fairly in the manner

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.9 (September 1990).

otherwise provided by this section, the average annual earnings shall be determined at the reasonable value of the service performed, but not in excess of \$3,600.00 a year.”⁵

ANALYSIS -- ISSUE 1

Sections 8114(d)(1) and (2) above do not apply in this case. Although appellant worked in the employment in which he was employed at the time of injury during substantially the whole year immediately preceding the injury (employing establishment records show that he worked every week of the year immediately preceding the injury) and although the employment was in a position for which an annual rate of pay was not fixed, appellant was not employed on the basis of a 6-, 5½- or 5-day week. He was a rural carrier associate who worked on an “as needed” basis.⁶ The record indicates that appellant averaged about four days’ work per week after he was reassigned to his rural carrier associate position on June 4, 1988 and a weekly breakdown of his work hours in the year immediately preceding the injury showed that his work week was variable, ranging from as many as 65.83 hours in one week to as few as 4.5 hours in another.

Because appellant’s “average annual earnings” could not be determined reasonably and fairly under sections 8114(d)(1) or (2) of the Act, the Office properly applied section 8114(d)(3) to find a sum that reasonably represented his average annual earnings in the employment in which he was working at the time of injury. The Office gave due regard to the actual hours appellant worked in the year immediately preceding the injury, including overtime. As this one-year period included a partial week at the beginning and at the end of the period, the Office gave appellant the benefit of including in its calculations all of the hours he worked in those weeks. Although the Office’s procedure manual instructs that “average annual earnings” should be divided by 52, the Office divided by 50, which was to appellant’s benefit.⁷ The result was an average of 36.19 hours per week, which the Office rounded to 37, again to appellant’s benefit. After verifying 88 hours for medical appointments, the Office paid compensation based on an average work week of 37 hours.

The last part of section 8114(d)(3) stipulates that the “average annual earnings” shall not be less than 150 times the employee’s average daily wage earned in the particular employment during the year immediately preceding the injury. In most cases this means 150 times the daily wage on the date of injury.⁸ In appellant’s case, this minimum provision does not provide a greater pay rate than that determined by the Office, so it does not apply.

⁵ 5 U.S.C. § 8114(d).

⁶ See *infra* note 1.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.9.d(5) (September 1990). Dividing by 52 would have resulted in a lower average of hours worked and a lower weekly pay rate.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.9.d(5) (September 1990). Dividing by 52 would have resulted in a lower average of hours worked and a lower weekly pay rate. Chapter 2.900.9d(6).

Appellant argues that he is basing his claim on a 40-hour work week because, if the injury had not occurred, he would have worked 40 hours a week or more and he would have been a regular carrier with benefits and would have been eligible for retirement by now. The weekly breakdown of actual hours that appellant worked in the year immediately prior to the injury does not support his contention that he would have worked 40 hours a week or more but for the injury. The factual evidence supports that he averaged no more than 37 hours of work per week during this period. Further, the Board has held that the probability that an employee, if not for his injury-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.⁹ Appellant's argument that his employment injury has cost him a regular carrier position with benefits and eligibility for retirement is irrelevant to the determination of his weekly pay rate under section 8114(d) of the Act.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his claim by the weight of the evidence.¹⁰ For each period of disability claimed, the employee has the burden of proving that he was disabled for work as a result of his accepted employment injury.¹¹ Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of the reliable, probative and substantial evidence.¹²

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.¹³ The Board has held that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to work without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.¹⁴

The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹⁵

⁹ *Donald R. Johnson*, 48 ECAB 455, 458 (1997); *Dempsey Jackson, Jr.*, 40 ECAB 942, 947 (1989); *Francis X. Milesky*, 13 ECAB 128, 131 (1961).

¹⁰ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

¹¹ *David H. Goss*, 32 ECAB 24 (1980).

¹² *Edward H. Horton*, 41 ECAB 301 (1989).

¹³ *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

¹⁴ *John L. Clark*, 32 ECAB 1618 (1981).

¹⁵ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

ANALYSIS -- ISSUE 2

Appellant submitted time analysis forms breaking down the number of hours worked, the type of leave used and the compensation claimed from September 1, 1993 to January 16, 2001, but he submitted no medical opinion with findings on examination stating that he was totally disabled for work because of his employment-related carpal tunnel syndrome on the specific dates for which he claimed compensation. The record indicates that he underwent medical examinations during the period in question. The Office compared the dates of these examinations to the dates on appellant's time analysis forms and paid compensation accordingly.¹⁶ Without a narrative medical opinion directly addressing the other dates listed, the evidence in this case fails to establish that appellant is entitled to additional compensation for disability during the period in question. He has not met his burden of proof.

CONCLUSION

The Board finds that appellant is not entitled to compensation for verified medical appointments based on an average work week of more than 37 hours. The Board also finds that appellant has not met his burden of proof to establish that he is entitled to any additional compensation for the specific dates of disability claimed from September 1993 to March 2001.

¹⁶ If a claimant has returned to work following an accepted injury or the onset of an occupational disease and must leave work and lose pay or use leave to undergo treatment, examination or testing, compensation should be paid for wage loss under 5 U.S.C. § 8105 (compensation for total disability) while undergoing the medical services and for a reasonable time spent traveling to and from the location where services were rendered. Any leave used cannot be compensated until it is converted to leave without pay. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.17.a (January 1991). For a routine medical appointment, a maximum of four hours of compensation is usually allowed. Injury Compensation for Federal Employees, Publication CA-810, *Initiating Claims*, Chapter 2.3.C(2) (revised January 1999).

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 27, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member