

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

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PAUL M. COLOSI, Appellant)	
)	
and)	Docket No. 04-1042
)	Issued: February 3, 2005
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF INVESTIGATION,)	
New York, NY, Employer)	
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Appearances:
Paul M. Colosi, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On March 10, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 9, 2004 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.¹

ISSUE

The issue is whether appellant received proper pay for periods between September 1992 and June 2000.

¹ Additional evidence was added to the record after the Office's March 9, 2004 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

This is the fourth appeal in the present case. In the first appeal,² the Board issued a decision and order on July 23, 1998 in which it reversed the August 11, 1995 decision of the Office on the grounds that the Office improperly terminated appellant's compensation because he refused an offer of suitable work.³ 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,⁴ the Board issued a decision reversing the Office's June 2, 2000 decision on the grounds that the Office 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,⁵ the Board issued a decision and order on November 25, 2003 which set aside the September 24, 2002 decision of the Office and remanded the case to the Office 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. 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, night pay, Sunday pay and holiday pay as measured on various dates, but that the Office did not provide any description of what figures it had determined to be accurate and suitable for inclusion in its calculations. The Board indicated that the Office relied heavily on calculations of Robert Paine, an Office claims examiner, but that such reliance was misplaced as Mr. Paine explicitly indicated that his calculations were merely 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.⁶ 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

² Docket No. 96-778 (issued July 23, 1998).

³ 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.

⁴ Docket No. 00-2334 (issued May 6, 2002).

⁵ Docket No. 03-135 (November 25, 2003).

⁶ The Board indicated that Mr. Paine 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.

the case, but that 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.

By decision dated March 9, 2004, the Office determined the amount of compensation to which appellant was entitled between September 1992 and June 2000. The Office noted that, per its September 24, 2002 decision, it had determined that appellant was entitled to three separate adjustments in his pay for which he received checks: \$27,931.09 for the period September 7, 1992 to July 11, 1997; \$9,982.79 for the period July 12, 1997 to December 31, 1998; and \$6,344.63 for the period January 1, 1999 to June 4, 2000. The Office then proceeded to explain whether it had been correct in calculating the adjustments for the three periods in September 2002. It concluded that it properly calculated the adjustment 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.

The Office explained that in determining the adjusted weekly pay rate for compensation purposes in September 2002 it used a figure for the amount of weekly pay appellant received when he sustained a recurrence of disability effective August 18, 1992. It noted that on August 18, 1992 appellant was a GS-13, Step 2 with a base salary of \$47,750.00 per year. The Office indicated that the following yearly pay increments were included in the weekly pay rate calculation: \$7,640.00 of locality pay, \$13,847.50 of AUO pay, \$7,520.63 of New York City retention pay, \$204.19 of night pay and \$93.36 of Sunday pay. It stated that the total annual pay for compensation purposes was computed at \$77,055.68 or \$1,481.84 per week. The Office indicated that prior to its September 2002 calculations it had used the incorrect figure of \$1,339.52 per week, instead of the correct figure of \$1,481.84 per week, when it determined the pay due for the period September 7, 1992 to July 11, 1997. It noted that, when performing the calculations using the correct figure of \$1,481.84 per week, including consumer price index (CPI), appellant should have received \$292,381.64 for the period September 7, 1992 to July 11, 1997.⁷ The Office stated that appellant actually received only \$264,450.55 for this period, so it issued him an adjustment check for \$27,931.09 on September 6, 2002.⁸ The Office concluded that, in its September 24, 2002 decision, it properly calculated appellant's pay for the period September 7, 1992 to July 11, 1997 and therefore no further adjustment was necessary.

⁷ The Office indicated that the actual computations for this period were attached to its March 9, 2004 decision but no such computations were attached. Although it did not explicitly state so in its March 9, 2004 decision, the Office performed a calculation in September 2002 using the "*Shadrick* formula" which was derived from the case, *Albert Shadrick*, 5 ECAB 376 (1953). 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.

⁸ The Office inadvertently listed the improper date of September 6, 2001.

The Office further noted that for the period July 12, 1997 to December 31, 1998 it applied the *Shadrick* formula to calculate the pay due appellant. It indicated that it used the figure of \$1,481.84 for the adjusted weekly pay rate (*i.e.*, the pay rate when disability recurred on August 18, 1992) and a figure of \$429.37 for current actual earnings during this period. The Office stated that it calculated the \$429.37 figure for current actual earnings based on the fact that appellant earned \$19,000.00 in 1997 and \$14,000.00 in 1998 as shown by W-2 tax forms.⁹ It also determined that the current rate of pay for the job held when injured was \$1,753.08 per week, noting that \$91,160.04 was the total yearly salary as of July 12, 1997 and that this figure divided by 52 weeks per year yielded the \$1,753.08 figure. The Office indicated that the \$91,160.04 figure was comprised of \$59,163.00 of base salary, \$5,413.41 of base pay, \$9,318.17 of New York City retention pay, \$16,144.10 based on a calculation involving AUO and locality pay, \$476.74 of night pay, \$399.69 of Sunday pay and \$244.93 of holiday pay. It concluded that when it performed the *Shadrick* calculation in September 2002 for the period July 12, 1997 to December 31, 1998 it improperly used the figure \$429.37 for the wage-earning amount instead of the correct figure of \$355.64. The Office noted that appellant consequently received an adjustment check for \$68,155.86 as a result of the September 2002 calculation, but actually should have received a check for \$72,973.00. It indicated that therefore another adjustment check for \$4,817.14 would be issued to appellant on March 12, 2004.

The Office then described the calculation it made in September 2002 for the period January 1, 1999 to June 4, 2000. It noted that it had improperly used an adjusted weekly pay rate of \$1,339.52 when it performed the *Shadrick* calculation for this period and should have used the figure \$1,481.84 (*i.e.*, the pay rate when disability recurred on August 18, 1992). The Office indicated that prior to September 2002 appellant had received \$86,221.14 for this period, but that the corrected calculations in September 2002 showed that he should have received \$92,565.77 and therefore the Office issued him an adjustment check for \$6,344.63 on September 6, 2002. It further stated, however, that it made an error in its September 2002 calculations for the period January 1, 1999 to June 4, 2000. The Office indicated that appellant did not have health insurance coverage for this period and therefore \$2,802.68 for health insurance premiums was improperly deducted from his adjustment check. It noted that it would issue appellant an adjustment check for \$2,802.68 on March 12, 2004. The Office then concluded that appellant was entitled to no further adjustments in pay 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.

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 compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."¹⁰ Section 8101(4) of the Act defines "monthly pay" for

⁹ Using the \$19,000.00 and \$14,000.00 figures, the Office calculated a prorated figure for appellant's total income during the period July 12, 1997 to December 31, 1998 and then derived the weekly figure of \$429.37 from this amount.

¹⁰ 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).

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....”¹¹

In determining a claimant’s entitlement to compensation, the Office is required by statute and regulation to make findings of fact.¹² 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.”¹³ These requirements are supported by Board precedent.¹⁴

ANALYSIS

By decision dated November 25, 2003, the Board set aside the September 24, 2002 decision of the Office and remanded the case to the Office for further development regarding appellant’s proper pay for periods between September 1992 and June 2000. 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 these periods. By decision dated March 9, 2004, the Office memorialized its updated assessment of the amount of compensation to which appellant was entitled for periods between September 1992 and June 2000.

The Office’s March 9, 2004 decision contains a significantly more detailed explanation of appellant’s entitlement to compensation than that contained in its September 24, 2002 decision. But the Board finds that the March 9, 2004 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 March 9, 2004 decision do not fully allow appellant to adequately understand the basis for the Office’s determination regarding entitlement to compensation.¹⁵

The determination of pay rates for compensation purposes requires a number of calculations, including the application of certain figures to a computation known as the *Shadrick* formula.¹⁶ Prior to initiating a calculation using the *Shadrick* formula, one must obtain accurate

¹¹ 5 U.S.C. § 8101(4).

¹² 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.”

¹³ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (July 1997).

¹⁴ See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

¹⁵ See *supra* notes 12 through 14 and accompanying text.

¹⁶ See *supra* note 7.

figures for the adjusted weekly pay rate,¹⁷ the current rate of pay for the job held when injured, and the current actual earnings. If any of these initial figures are inaccurate, any calculation under the *Shadrick* formula will be inaccurate even if the formula is applied in a proper manner.

In its November 25, 2003 decision, the Board indicated that the Office relied heavily on calculations of Mr. Paine, an Office claims examiner, when it made the calculations memorialized in its September 24, 2002 decision. The Board noted, however, that such reliance was misplaced as Mr. Paine explicitly indicated that his calculations were merely 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. In its March 9, 2004 decision, the Office again impermissibly relied on the figures and calculations of Mr. Paine. The Office did not explain why it felt that the figures used in the calculations by Mr. Paine were accurate and it did not produce additional documentation, such as records from the employing establishment, to establish that they were in fact accurate. The Office did not supplement the record with additional relevant documents between the issuance of the Board's November 25, 2003 decision and the issuance of its March 9, 1994 decision, nor did it fully discuss, in its March 9, 1994 decision, any documents that were not previously of record.¹⁸

To give a particular example, the Office noted in its March 9, 2004 decision that it determined appellant had an adjusted weekly pay rate of \$1,481.84 per week, a figure that was then applied to its *Shadrick* calculations concerning each of the three payment periods at issue. It indicated that in calculating the \$1,481.84 figure it used figures from August 18, 1992, *i.e.*, the date of appellant's second recurrence of disability, including his base salary of \$47,750.00 per year and the following yearly pay increments: \$7,640.00 of locality pay, \$13,847.50 of AUO pay, \$7,520.63 of New York City retention pay, \$204.19 of night pay and \$93.36 of Sunday pay. However, these figures were taken directly from an August 31, 2001 report of Mr. Paine, a report which the Board indicated had not been established as accurate.¹⁹ Similarly, in calculating the *Shadrick* formula for the period July 12, 1997 to December 31, 1998, the Office used figures from the August 31, 2001 report of Mr. Paine when it determined appellant had a current rate of pay for the job held when injured of \$1,753.08 per week.²⁰

To take another example, the Office stated that, in performing the *Shadrick* formula for the period July 12, 1997 to December 31, 1998, it calculated the \$429.37 figure for current actual earnings based on the fact that appellant earned \$19,000.00 in 1997 and \$14,000.00 in 1998 as

¹⁷ See *supra* note 10 and 11 and accompanying text regarding the determination of an adjusted weekly pay rate from the definition of monthly pay under the Act.

¹⁸ The Office indicated that records of computations were attached to its March 9, 2004 decision but no such records were attached.

¹⁹ Moreover, the Office did not explain why it calculated appellant's adjusted weekly pay rate based on figures from August 18, 1992, the date of his second recurrence of disability, rather than figures from some other date, such as the date of injury or the first recurrence of disability on December 20, 1991. See *supra* note 10 and 11 and accompanying text.

²⁰ For example, Mr. Paine's report was the source for such figures as \$5,413.41 of base pay, \$9,318.17 of New York City retention pay, \$16,144.10 based on a calculation involving AUO and locality pay, \$476.74 of night pay, \$399.69 of Sunday pay and \$244.93 of holiday pay.

shown by W-2 tax forms. In its November 25, 2003 decision, the Board determined 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. It also determined 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. The Office did not submit additional evidence or argument to explain why it felt that these income figures were accurate.

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 be remanded to the Office for further consideration.²¹ 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 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.

²¹ The Office should ensure that any figures it uses in its calculations, in addition to those noted above, are supported as accurate by adequate documentation, such as records from the employing establishment.

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: February 3, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member