

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

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LUIS LOZANO-ALVARADO, Appellant)	
)	
and)	Docket No. 05-883
)	Issued: November 18, 2005
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Fort Lauderdale, FL,)	
Employer)	
)	

Appearances:
Luis Lozano-Alvarado, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On March 4, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 9, 2005 with respect to an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant had no loss of wage-earning capacity as of September 8, 2000; (2) whether the Office properly found that an overpayment of \$5,330.41 was created during the period July 27, 2000 to December 6, 2003; and (3) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On August 18, 1999 appellant, then a part-time flexible mail handler, filed a traumatic injury claim for compensation (Form CA-1) alleging that he sustained neck, shoulder and back

injuries as a result of lifting heavy bags and trays. The claim form indicated that appellant did not stop working. The pay rate reported was \$36,877.00 per year. The Office accepted the claim for cervical and thoracic strains, and right rotator cuff tear. Appellant stopped working on June 20, 2000 and underwent right shoulder surgery.

The attending orthopedic surgeon, Dr. Alan Lazar, submitted a report dated July 26, 2000 indicating that appellant was unable to work. He also completed a duty status report dated July 26, 2000, indicating that appellant could work six hours per day with restrictions. Appellant returned to work on September 8, 2000.

On October 4, 2000 appellant submitted a claim for compensation (Form CA-7) commencing June 20, 2000. On the reverse of the claim form, the employing establishment indicated that as of June 20, 2000 appellant earned \$19.04 per hour as a part-time flexible employee, scheduled for five days per week, plus \$53.91 per week in night differential. The employing establishment also indicated that in the prior year appellant had averaged "5.99 [hours] daily." The employing establishment also reported that appellant was working four hours per day. A form report (CA-20) dated September 15, 2000 from Dr. Lazar limited appellant to four hours per day. In a November 1, 2000 report, Dr. Lazar stated that he had inadvertently indicated in a form report that appellant could return to work as of July 26, 2000, but appellant was totally disabled at that time.

The record indicates that on December 1, 2000 the Office issued a compensation payment for 68 hours of time lost during the period July 27 to September 30, 2000. On May 4, 2001 appellant received a schedule award for a 10 percent right arm permanent impairment; the period of the award was December 7, 2000 to July 13, 2001. Appellant received a compensation payment for 504 hours of time lost from July 14, 2001 to January 10, 2003, and for 114 hours from January 11 to December 6, 2003. The pay rate for compensation purposes was \$329.54 per week.

In a conference memorandum dated October 14, 2004, the Office stated that, according to the employing establishment, in the year prior to June 20, 2000 appellant earned \$25,391.16 in base pay, and \$1,975.07 in night differential, for a pay rate of \$526.27. The Office also stated that appellant "returned to work six hours per day in a light-duty capacity on September 8, 2000 following surgery." The Office indicated that the full-time pay rate was \$38,684.00 per year.

The Office issued two decisions dated November 10, 2004. In one decision, the Office found that compensation had been paid based on an incorrect pay rate. The Office found that appellant's pay rate as of June 20, 2000 was \$526.27. As of September 8, 2000, the Office determined that appellant's pay rate was \$38,684.00 per year, or \$18.60 per hour, multiplied by 30 hours per week for a base pay of \$557.94 per week. A night differential of 10 percent, or \$55.80 per week, resulted in a pay rate of \$613.80 per week as of September 8, 2000.

In a separate November 10, 2004 decision, the Office determined that appellant had no loss of wage-earning capacity as of September 8, 2000. The Office found that actual earnings of \$613.80 per week as of September 8, 2000 fairly and reasonably represented his wage-earning capacity, and his actual earnings met or exceeded the current wages of the job held when injured.

On November 19, 2004 the Office advised appellant of a preliminary determination that an overpayment of \$5,330.41 had occurred during the period July 27, 2000 to December 6, 2003. A memorandum stated that from July 27, 2000 to December 6, 2003 appellant had received \$9,933.88 in compensation. The Office offset that amount by \$4,603.47, stating that this represented an underpayment of compensation during the period of the schedule award, for an overpayment of \$5,330.41. Appellant was found not at fault in creating the overpayment and was requested to submit financial evidence with respect to a waiver of the overpayment.

In a decision dated February 9, 2005, the Office finalized its determination that an overpayment of \$5,330.41 was created. The Office denied waiver on the grounds that appellant did not submit financial evidence.

LEGAL PRECEDENT -- ISSUE 1

Under section 8115(a) of the Federal Employees' Compensation 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.¹ Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.²

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,³ has been codified at 20 C.F.R. § 10.403. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate.⁴

Section 8114 (d) of the Act provides:

"Average annual earnings are determined as follows:

"(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 particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the

¹ 5 U.S.C. § 8115(a).

² *Dennis E. Maddy*, 47 ECAB 259 (1995).

³ 5 ECAB 376 (1953).

⁴ 20 C.F.R. § 10.403.

basis of a 6-day work week, 280 if employed on the basis of a 5 1/2-day week, and 260 if employed on the basis of a 5-day week.”⁵

ANALYSIS -- ISSUE 1

The Office issued decisions dated November 10, 2004 on pay rate and wage-earning capacity. A wage-earning capacity decision must be based on a proper determination of pay rate, and therefore the Board will review both issues. In this case, appellant stopped work on June 20, 2000 and returned to work on September 8, 2000. The Office made a finding that appellant’s actual earnings fairly and reasonably represented his wage-earning capacity and that appellant had no loss of wage-earning capacity as of September 8, 2000. In support of its finding, the Office stated that appellant returned to work at six hours per day; it also found that appellant’s current pay rate (as of September 8, 2000) for the date-of-injury job was \$526.27 per week, while his September 8, 2000 actual earnings were \$613.80 per week, resulting in no loss of wage-earning capacity.

The evidence of record, however, is not sufficient to support the Office’s findings. With respect to his return to work on September 8, 2000, the employing establishment clearly indicated on the October 4, 2000 CA-7 that appellant had returned to work at four hours per day, not six hours. Appellant apparently did at some point return to work at six hours, but the Office’s determination that appellant had actual earnings of \$613.80 as of September 8, 2000 is not substantiated by the record.

Moreover, it is not clear whether the determination that appellant’s pay rate for the date-of-injury job was correct. The proper procedure for determination of pay rate is the application of 5 U.S.C. § 8114. As noted above, if appellant was working in a position substantially the whole year prior to June 20, 2000 at an annual rate of pay that was not fixed, his pay rate (if employed five days a week) is 260 times his average daily wage. According to the evidence provided by the employing establishment in the October 4, 2000 CA-7, appellant’s pay on June 20, 2000 was \$19.04 per hour with an average of 5.99 hours per day. This results in a daily wage of \$114.05, multiplied by 260 for annual earnings of \$29,653.00 in base pay, or \$570.25 per week. With the additional \$53.91 in night differential, this would result in a pay rate of \$624.16, which is significantly higher than the pay rate found by the Office. It is not clear why there is such a discrepancy between the information provided by the employing establishment in the October 14, 2004 conference and the evidence provided on the October 4, 2000 claim for compensation.

On remand, the Office should further develop the evidence and make accurate findings with respect to appellant’s pay rate and loss of wage-earning capacity. After such further development as necessary, it should issue an appropriate decision.

With respect to the overpayment issues, the Board notes that the basis for the overpayment was that appellant had no loss of wage-earning capacity and therefore was not entitled to the compensation he received from July 27, 2000 to December 6, 2003. Since the case is not in posture as to wage-earning capacity, it is not in posture on the overpayment issues.

⁵ 5 U.S.C. § 8114(d).

It is noted, however, that the period of the overpayment was claimed to commence on July 27, 2000. The record does not indicate that appellant returned to any work until September 8, 2000, and he may have continued to have some loss of wage-earning capacity as he initially returned at four hours per day. The Office did not explain why compensation paid from July 27, 2000 was an overpayment. Although Dr. Lazar had reported appellant could return to work on July 26, 2000 in a duty status report, his other report of the same date shows that appellant was totally disabled and he later explained that he was incorrect in stating that appellant could return to work as of July 26, 2000.

Once the Office has properly made a wage-earning capacity determination, it should issue an appropriate decision on overpayment and waiver, with a clear explanation as to the period of the overpayment based on the evidence of record.

CONCLUSION

The Board finds that the case is not in posture with respect to wage-earning capacity, pay rate and the declared overpayment of \$5,330.41 during the period July 27, 2000 to December 6, 2003. The case will be remanded to the Office for further development of the evidence.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 9, 2005 and November 10, 2004 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 18, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board