

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

_____)
P.C., Appellant)

and)

DEPARTMENT OF JUSTICE, FEDERAL)
BUREAU OF INVESTIGATION, New York, NY,)
Employer)
_____)

Docket No. 07-562
Issued: February 4, 2008

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 26, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 14, 2006 merit decision concerning his entitlement to Office compensation 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.

ISSUE

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

FACTUAL HISTORY

This is the sixth appeal in the present case. In the first appeal,¹ the Board issued a decision on July 23, 1998 which reversed an August 11, 1995 Office decision on the grounds that

¹ Docket No. 96-778 (issued July 23, 1998).

it improperly terminated appellant's compensation because he refused an offer of suitable work.² 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,³ the Board issued a decision on May 6, 2002 reversing the Office's June 2, 2000 decision on the grounds that it improperly reduced his compensation effective June 5, 2000 based on his capacity to earn wages as a retail store manager. In the third appeal,⁴ the Board issued a decision on November 25, 2003 which set aside the Office's September 24, 2002 decision and remanded the case 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.

In the fourth appeal,⁵ the Board issued a decision on February 3, 2005 which set aside the March 9, 2004 decision of the Office.⁶ The Board again 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, Sunday pay, holiday pay and night differential pay, but that the Office did not provide any description of those amounts it had determined to be accurate and suitable for inclusion in its calculations.⁷

In the fifth appeal,⁸ the Board issued a decision on August 10, 2006 which set aside the December 16, 2005 decision of the Office. The Board again found that the Office did not provide adequate findings and reasoning for its determination regarding the amount of

² 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.

³ Docket No. 00-2334 (issued May 6, 2002).

⁴ Docket No. 03-135 (issued November 25, 2003).

⁵ Docket No. 04-1042 (issued February 3, 2005).

⁶ By decision dated March 9, 2004, the Office determined the amount of compensation to which appellant was entitled between September 1992 and June 2000. It found that it properly calculated adjustments in pay 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. Therefore, it issued checks to appellant in the amounts of \$4,817.14 and \$2,802.68 to account for these errors.

⁷ The Board 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 the case, but the Office did not provide any description of its reasoning with regard to this aspect of calculating the compensation due to appellant.

⁸ Docket No. 06-556 (issued August 10, 2006).

compensation to which appellant was entitled.⁹ The Board stated that the Office did not explain why it felt that the figures it chose for elements of appellant's pay were accurate and it did not produce additional documentation, such as employing establishment records specifically memorializing the various categories of pay, to establish that they were in fact accurate. It remanded the case to the Office for further consideration and the issuance of an appropriate decision which adequately evaluated the pay to which appellant is entitled. 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.

On December 11, 2006 several biweekly pay stubs, covering the period between mid August and mid December 1991, were added to the record. The pay stubs reveal that appellant received a total of \$93.36 in Sunday pay and a total of \$204.19 in night differential pay during this period.¹⁰ They also show that every two weeks during this period he received either \$459.20 or \$474.40 in AUO pay as well as either \$288.80 or \$298.40 in New York City retention pay. The pay stubs further indicate that AUO pay was calculated by taking 25 percent of the sum of basic pay and locality pay.¹¹

In a December 14, 2006 decision, the Office concluded that the proper figure for appellant's pay on August 19, 1992 was \$1,481.85 and asserted that it had paid appellant correct amounts of compensation for periods between September 1992 and June 2000.¹² The Office indicated that it had been paying appellant based on his August 19, 1992 pay rate because he sustained a second recurrence of disability on that date. It discussed the figures contained in two documents, an August 31, 2001 memorandum of Robert Paine, an Office claims examiner, and a December 10, 2001 memorandum of Dennis Franko, an employing establishment official.¹³ The Office stated that the figures contained in Mr. Paine's August 31, 2001 memorandum were accurate because Mr. Paine indicated that they were verified by appellant's pay stubs. The Office found that Mr. Paine's memorandum showed that on August 19, 1992 appellant had a yearly base salary of \$47,750.00 (\$918.27 per week), yearly locality pay of \$7,640.00 (\$146.92 per week),¹⁴ yearly AUO pay of \$13,847.50 (\$266.30 per week), yearly retention pay of

⁹ The Office indicated that it had calculated appellant's adjusted weekly pay rate for determining pay rates by using figures derived from his pay on August 18, 1992, the date of his second recurrence of disability. The Office stated that appellant's pay was higher on August 18, 1992 than on December 20, 1991, the date of his first recurrence of disability.

¹⁰ Appellant has acknowledged that he only received a total of \$297.55 (\$93.36 plus \$204.19) in Sunday pay and night differential pay for the period August 20, 1991 to August 19, 1992.

¹¹ The pay stubs did not indicate that appellant received holiday pay.

¹² The Office indicated that it actually had based its calculations on the figure of \$1,481.84 but that this one cent difference was statistically insignificant.

¹³ Mr. Franko initially produced a memorandum on November 16, 2001 concerning appellant's pay and then revised that memorandum on December 10, 2001. The record contains copies of Mr. Paine's and Mr. Franko's memoranda. Neither of the documents indicated that appellant received holiday pay between September 1992 and June 2000.

¹⁴ The Office also indicated that a November 29, 1992 document supported the figures for base pay and locality pay. The record contains January 12 and November 29, 1992 Forms 50-B which show that appellant had a yearly base salary of \$47,750.00 and yearly locality pay of \$7,640.00 effective on both of those dates.

\$7,520.63 (\$144.63 per week).¹⁵ It also found that appellant sporadically received Sunday pay which totaled \$93.36 in the year prior to August 19, 1991 and night differential pay which totaled \$204.19 during the same period. The Office concluded that the August 31, 2001 memorandum of Mr. Paine presented “an accurate representation of your weekly pay as of the date of recurrence, August 19, 1992.”¹⁶

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.”¹⁷ Section 8101(4) of the Act defines monthly pay for 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...”¹⁸

Office procedure provides that, when an employee receives Sunday, night differential or premium pay on a fluctuating basis, the amount of such pay should be derived from the total amount of such pay received during the year prior to the date on which the employee’s pay rate is to be fixed.¹⁹

The *Shadrick* formula (derived from *Albert Shadrick*, 5 ECAB 376 (1953)) is used to calculate a claimant’s wage-earning capacity. 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

¹⁵ The record contains documents indicating that the New York City retention pay appellant was entitled to as of August 19, 1992 was his base salary times 15.75 percent.

¹⁶ The Office inadvertently stated that the August 31, 2001 memorandum was produced by Mr. Franko rather than Mr. Paine.

¹⁷ 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).

¹⁸ 5 U.S.C. § 8101(4). The Board has held that if an employee has one recurrence of disability which meets the requirements of section 8101(4), any subsequent recurrence would also meet such requirements and would entitle the employee to a new recurrence pay rate. *Carolyn E. Sellers*, 50 ECAB 393 (1999).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.5b(2), 2.900.9a(2)(h) (September 1990).

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.

In determining a claimant's entitlement to compensation, the Office is required by statute and regulation to make findings of fact.²⁰ 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.²¹ These requirements are supported by Board precedent.²²

ANALYSIS

Appellant alleged that he did not receive proper Office compensation for periods between September 1992 and June 2000.²³ The Board finds that the Office properly determined that appellant's pay rate calculations should be based on the pay he received effective August 18, 1992, the date of his second recurrence of disability. As noted above, pay rate calculations are based on an employee's pay at the time of injury, the time disability begins, or 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.²⁴ Appellant's pay was greater on August 18, 1992 than it was at the time of injury, the time disability began, or the time of his first recurrence of disability on December 20, 1991.²⁵

The Board further finds that the Office properly determined that appellant's pay effective August 19, 1992 for pay rate calculation purposes was \$1,481.85. The Office correctly found that effective August 19, 1992 appellant had a yearly base salary of \$47,750.00 (\$918.27 per week) and yearly locality pay of \$7,640.00 (\$146.92 per week). This conclusion is supported by January 12 and November 29, 1992 Forms 50-B which show that appellant had a yearly base salary of \$47,750.00 and yearly locality pay of \$7,640.00 effective on both of those dates.

The Office properly found that effective August 19, 1992 appellant was entitled to yearly AUO pay of \$13,847.50 (\$266.30 per week). The record contains pay stubs which support that appellant's AUO pay was equal to 25 percent of the sum of his base salary and locality pay.²⁶

²⁰ 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.

²¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (July 1997).

²² See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

²³ Appellant sustained employment injuries on December 29, 1987 and May 21, 1991 and the Office accepted that he sustained recurrences of disability on December 20, 1991 and August 18, 1992.

²⁴ See *supra* note 18 and accompanying text.

²⁵ Appellant's first recurrence of disability met the requirements of 5 U.S.C. § 8101(4) as it occurred more than six months after he resumed regular full-time employment with the employing establishment. Therefore, his subsequent recurrence of disability on August 19, 1992 entitled him to a new recurrence pay rate. See *supra* note 18.

²⁶ The product of 25 percent times the sum of \$47,750.00 and \$7,640.00 is \$13,847.50.

The Office correctly determined that effective August 19, 1992 appellant was entitled to yearly New York City retention pay of \$7,520.63 (\$144.63 per week). The record contains pay stubs and other employing establishment documents which support that appellant's retention pay was equal to 15.75 percent of his base salary.²⁷

The Office also properly found that appellant sporadically received Sunday pay which totaled \$93.36 in the year prior to August 19, 1991 and night differential pay which totaled \$204.19 during the same period. Because these payments were sporadic, it was appropriate for the Office to base its calculation on the total amount of Sunday pay and night differential pay that appellant received in the year prior to August 19, 1992.²⁸ These amounts are supported by the pay stubs covering the period between mid August and mid December 1991. Although the record does not contain pay stubs covering the period mid December 1991 to mid August 1992, appellant has acknowledged that he only received a total of \$297.55 (\$93.36 plus \$204.19) in Sunday pay and night differential pay for the period August 20, 1991 to August 19, 1992. The Office then divided the \$93.36 figure by 52 to determine that appellant had weekly Sunday pay of \$1.80 and divided the \$204.19 figure by 52 to determine that he had weekly night differential pay of \$3.93. Adding the above-described calculations of weekly base salary, locality pay, AUO pay, retention pay, Sunday pay and night differential pay reveals that, for pay rate calculation purposes, appellant received \$1,481.85 of weekly pay effective August 19, 1992.

The Board further finds, however, that the Office's evaluation of the correctness of the compensation appellant received between September 1992 and June 2000 is incomplete. This analysis requires evaluation of the correctness of the application of the *Shadrick* formula, but the Office did not perform this evaluation in its December 14, 2006 decision. Application of the *Shadrick* formula involves obtaining figures for adjusted weekly pay rate (determined to be \$1,481.85 in the present case as discussed above), current rate of pay for the job held when injured and current actual earnings. These figures are then used to calculate the wage-earning capacity percentage, the loss of wage-earning capacity percentage, and the amount of Office compensation due for a given period.²⁹ The Board has noted in its prior decisions that there was uncertainty about the actual amounts appellant earned between September 1992 and June 2000 and the Office has not clarified the uncertainty concerning these amounts.³⁰ The Office should describe in detail how the *Shadrick* formula should be applied. As the elements of the *Shadrick* formula's necessary changed between September 1992 and June 2000 the Office should describe each successive application of the *Shadrick* formula necessitated by these changes.

For these reasons, the case shall be remanded to the Office for further development regarding the amount of compensation appellant was entitled to receive between September 1992 and June 2000.³¹ The Office should provide make findings, supported by adequate

²⁷ The product of 15.75 percent times \$47,750.00 is \$7,520.63.

²⁸ See *supra* note 19 and accompanying text.

²⁹ See *Albert Shadrick*, 5 ECAB 376 (1953). It should be noted that if an employee's current rate of pay for the job held when injured or his current actual earnings changes over time then a new *Shadrick* calculation would have to be made to reflect a change in the amount of compensation due to the employee.

³⁰ It appears that appellant had earnings in private employment for portions of the relevant period.

³¹ See *supra* notes 20 through 22 and accompanying text.

documentation, regarding the various elements of the *Shadrick* formula, and describe the application of the formula.³² After such development it deems necessary, the Office should issue an appropriate decision regarding appellant's entitlement to compensation between September 1992 and June 2000.

CONCLUSION

The Board finds that the case not in posture for decision regarding whether appellant received proper Office compensation for periods between September 1992 and June 2000. After development of the evidence, the Office shall issue an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 14, 2006 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: February 4, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

³² On appeal appellant has asserted that he did not actually receive the amounts of compensation that the Office indicated it paid him between September 1992 and June 2000. As part of its development, the Office should present documents showing how much compensation appellant actually received during this period.