

FACTUAL HISTORY

This is the second time this case has been before this Board. On the prior appeal, the Board, by a September 20, 2006 decision, set aside a January 23, 2006 decision of the Office and remanded the case to determine whether the accepted air traffic control incident of September 20, 2004 caused or aggravated his emotional condition.¹ The facts and the law as set forth in the prior decision are hereby incorporated into this decision.

On remand, the Office, by decision dated March 23, 2007, accepted appellant's claim for major depression and panic disorder without agoraphobia. On March 25, 2007 appellant filed a claim for compensation commencing December 8, 2007.

The employing establishment indicated that appellant was paid a base salary of \$123,668.00. However, the employing establishment indicated that this salary was based on a 40-hour schedule but that he worked a 24-hour week. The employing establishment further indicated that appellant received additional compensation during the year prior to the accepted work incident as follows: Sunday premium, \$2,908.85; night differential, \$986.06; holiday pay, \$4,153.04; on-the-job training premium, \$78.07; controller-in-charge (CIC), \$5.87; and controller-incentive-pay (CIP), \$4,619.58. The employing establishment also submitted Notification of Personnel Action Forms, including one indicating that as of January 13, 2002 appellant changed his work schedule to work 8 hours per day on Thursday, Friday and Saturday, for 24 hours per week, which continued until he stopped work on September 20, 2004.

By letter dated April 13, 2007, appellant's attorney argued that appellant should be paid compensation based on a 40-hour week, not a 24-hour week, as a 24-hour week does not reasonably represent the annual earning capacity of appellant. He noted that appellant recently had reduced his hours to 24 hours per week because of stress on the job, but that he remained a full-time employee. Counsel noted that other employees working in a similar class, earned \$123,668 basic pay annually.

By decision dated January 28, 2008, the Office determined that appellant was entitled to wage-loss compensation based on a salary of \$1,672.25 per week, based on a pay rate reflecting 24 hours per week.

By letter dated February 8, 2008, appellant requested an oral hearing. This request was later changed to a review of the written record. He, through his attorney, indicated that he should be paid based on a 40-hour week.

By decision dated December 16, 2008, the hearing representative affirmed the Office's January 28, 2008 decision.

¹ On September 28, 2004 appellant, then a 47-year-old traffic control specialist, filed a traumatic injury claim alleging that on September 20, 2004 he sustained extreme emotional distress as a result of an operational situation involving an arrival and departing aircraft on the same runway. Docket No. 06-916 (issued September 20, 2006).

LEGAL PRECEDENT

Section 8114(d) of the Federal Employees' Compensation Act² 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 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 5 1/2-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 [f]ederal employment and of other employees of the United States 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 [one] year immediately preceding his injury.”

² 5 U.S.C. § 8114.

Section 8114(e) of the Act provides that, in addition to annual base pay, certain items will be included in the computation of pay, such as the value of subsistence and quarters, premium pay and any form of remuneration in kind for services.³ Section 8114(e) specifically provides that overtime pay is excluded in computing an employee's monthly pay for compensation purposes.⁴

When the job held at the time of injury includes elements of pay such as night or shift differential, extra compensation for work on Sundays and holidays or pay for administratively uncontrollable overtime, the Office must include the additional pay in the base pay.⁵

ANALYSIS

The Board finds that the Office properly computed appellant's rate of pay. Appellant's salary was based on a pay rate of \$123,668.00 for a 40-hour week. The Office determined that this salary equaled \$59.26 per hour.⁶ It then determined that based on a 24-hour workweek, this would equal weekly wages of \$1,427.03.⁷ The Office then added to this base figure: \$55.94 for Sunday premium (\$2,908.85 divided by 52 weeks per year); night differential of \$18.96 per week (\$986.06 divided by 52); holiday pay of \$79.87 (\$4,153.04 divided by 52); premium pay of \$1.50 (\$78.07 divided by 52); CIC pay of \$0.11 (\$5.87 divided by 52); plus CIP pay of \$88.84 (\$4,619.58 divided by 52). This equaled a weekly pay rate of \$1,672.25. The Office properly applied the Act in determining appellant's pay rate.

The Board does not accept the argument that appellant was entitled to pay based on a 40-hour week. The documentation received by the Office indicated that appellant was paid based on a 24-hour workweek with fixed hours at the time of his injury and had been working in that position and those hours for over one year prior to his injury. Therefore, the Office properly applied section 8114(d)(1)(A) of the Act in determining appellant's rate of pay.⁸ As appellant had fixed annual earnings based on a 24-hour workweek, it would not have been appropriate for the Office to compare his wages to those of other employees, particularly those who worked a 40-hour week. He did not have full-time wages at the time of injury.

CONCLUSION

The Board finds that the Office properly set appellant's pay rate for compensation purposes based on a 24-hour workweek.

³ *Id.* at § 8114(e).

⁴ *Id.*

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7(b) (April 2002); *Madelyn Y. Grant*, 57 ECAB 533 (2006).

⁶ \$123,688.00 divided by 2087 hours per year.

⁷ \$59.26 multiplied by 12 and divided by 52 equals.

⁸ 5 U.S.C. § 8114(d)(1)(A).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 16 and January 28, 2008 are affirmed.

Issued: December 7, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board