

FACTUAL HISTORY

On the prior appeal of this case,¹ the Board found that the Office improperly modified its August 14, 1992 determination of appellant's wage-earning capacity. The Board explained that increased earnings alone, without a showing of additional qualifications through retraining, was no basis for modifying a determination of wage-earning capacity. Because the Office did not show that appellant was vocationally rehabilitated, because the Office did not assess whether appellant's job of deputy differed significantly in duties or responsibilities or technical expertise from the job in which he was rated, and because the Office did not establish that appellant was employed in a job that paid at least 25 percent more than the current pay of the job in which he was rated, the Board reversed the Office's April 2, 2003 decision modifying the determination of appellant's wage-earning capacity. This dissolved the basis of, and rendered moot, the Office's May 29, 2003 decision finding an overpayment of \$78,967.95, which the Office determined arose because appellant was employed with the Harris County Sheriff's Department beginning October 19, 1992 and continued to earn wages equal to or greater than the current wage of his date-of-injury position. The facts of this case, as set forth in the Board's prior decision, are hereby incorporated by reference.

On October 21, 2003 the Office requested additional information from the Harris County Sheriff's Department, including the following: (1) a copy of the duties, activities, requirements and responsibilities performed by appellant as a deputy from October 19, 1992 to the present; (2) copies of the duties, activities and responsibilities performed by appellant in any additional positions; and (3) copies of appellant's resume, vocational preparation, certifications, professional training, awards, performance appraisals and verification of skills acquisitions since October 19, 1992. The Harris County Sheriff's Department responded by submitting information showing that appellant was appointed as a Jailer on October 19, 1992 and received his Jailer license on November 17, 1992. He was appointed as a Regular Peace Officer on August 30, 1994 and received his Peace Officer license on September 6, 1994. The Sheriff's Department submitted a list of courses appellant completed from October 27 to December 13, 2002, totaling 1,011 hours. The Sheriff's Department also submitted a certification requirements chart for the positions of Basic Peace Officer and Basic Jailer.

In a decision dated November 7, 2003, the Office modified its August 17, 2002 determination of appellant's wage-earning capacity on the grounds that appellant had rehabilitated himself such that his actual earnings with the Harris County Sheriff's Department, currently as a Peace Officer/Deputy, fairly and reasonably represented his wage-earning capacity.² The Office found that appellant was rehabilitated or retrained above and beyond that of his rated position and that this retraining, coupled with a representative increase in salary, justified modification of the prior determination of his wage-earning capacity. The Office compared the wages of a Security Guard on August 17, 1992 with the wages of a Jailer on October 19, 1992 and found that the latter was clearly in excess of a 25 percent increase.

¹ Docket No. 03-1815 (issued October 1, 2003).

² After issuing a decision on August 14, 1992 reducing appellant's compensation based on his capacity to earn wages in the selected position of Security Guard, the Office released its computation of wage-earning capacity on August 17, 1992.

Also on November 7, 2003 the Office made a preliminary determination that appellant was overpaid \$78,967.95 in compensation for the following reason: “you obtained employment with the Harris County Sheriff’s Department on October 19, 1992, and continuing with wages greater than or equal to a Grade 5, Step 1.” The Office made an additional preliminary determination that appellant was at fault in the creation of this overpayment because he accepted and retained payments that he knew or should have known were incorrect. Specifically, the Office found that appellant knew or should have known “that at the date of change in his employment and change in his salary his loss of monetary benefits would be appreciably affected.”

In a decision dated December 11, 2003, the Office finalized its preliminary determinations on the fact and amount of overpayment and on the issue of fault.

LEGAL PRECEDENT -- ISSUE 1

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.³ The burden of proof is on the party attempting to show modification of the award.⁴

It may be appropriate to modify the rating on the grounds that the claimant has been vocationally rehabilitated if the claimant is either earning substantially more in the job for which he or she was rated, or is employed in a new job (*i.e.*, a job different from the job for which he or she was rated) which pays at least 25 percent more than the current pay of the job for which the claimant was rated. These earnings must have continued for at least 60 days. If these conditions are met, the Office should determine the duration, exact pay, duties and responsibilities of the current job; determine whether the claimant underwent training or vocational preparation to earn the current salary; and assess whether the actual job differs significantly in duties, responsibilities or technical expertise from the job at which the claimant was rated.⁵

If the results of this investigation establish that the claimant is rehabilitated or self-rehabilitated, or if the evidence shows that the claimant was retrained for a different job, compensation may be redetermined using the *Shadrick* formula. Any modification of compensation should be preceded by a 30-day prereduction notice and then be made prospectively so that no overpayment results.⁶

³ *Elmer Strong*, 17 ECAB 226 (1965).

⁴ *Daniel J. Boesen*, 38 ECAB 556 (1987).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10.c (December 1993).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10.d (July 1996).

ANALYSIS -- ISSUE 1

On November 7, 2003 the Office modified the determination of appellant's wage-earning capacity on the grounds that appellant was rehabilitated or retrained as a Peace Officer/Deputy with a representative increase in salary. The Office issued its decision, however, without the 30-day prereduction notice required by Office procedures. This was a denial of administrative due process. In addition, when the Office compared appellant's wages as a Jailer with wages in the rated position of Security Guard, for purposes of determining whether the former exceeded the latter by at least 25 percent, the Office incorrectly used figures from 1992. Office procedures require a comparison of current pay. Finally, the Office made no assessment of whether appellant's actual job differed significantly in duties, responsibilities or technical expertise from the job in which he was rated. The Office requested a copy of the duties, activities, requirements and responsibilities performed by appellant as a deputy from October 19, 1992 to the present, but the information it received was nonresponsive in this regard. To discharge its burden of proof, the Office must determine the duties and responsibilities of appellant's current job and explain how they differ significantly from the duties and responsibilities of the position in which he was rated. For these reasons the Board finds that the Office has not met its burden of proof to modify the August 14, 1992 determination of appellant's wage-earning capacity. The Board will reverse the Office's November 7, 2003 decision.

LEGAL PRECEDENT -- ISSUE 2

As a general rule, no further compensation for wage loss is payable once the employee has recovered from the work-related injury to the extent that he or she can perform the duties of the position held at the time of injury or earn equivalent wages.⁷ Once the wage-earning capacity of an injured employee is properly determined, however, it remains undisturbed regardless of actual earnings or lack of earnings until a party attempting to show modification of the award meets its burden of proof.⁸

ANALYSIS -- ISSUE 2

The Office found that an overpayment occurred in this case because appellant began employment with the Harris County Sheriff's Department on October 19, 1992 with earnings equal to or greater than the current pay of his date-of-injury position.⁹ The Office made a determination of appellant's wage-earning capacity on August 14, 1992, however, and has not met its burden of proof to show modification. As a result, the August 14, 1992 determination remains in effect, undisturbed by appellant's earnings from the Harris County Sheriff's Department. Without a proper modification of this determination, one that establishes an increase in appellant's wage-earning capacity, the record does not support the Office's finding that an overpayment occurred in this case. As fact of overpayment is not established, the Board will set aside the Office's December 11, 2003 decision on overpayment and fault.

⁷ See 20 C.F.R. § 10.515(a) (1999).

⁸ See *Daniel J. Boesen*, *supra* note 4.

⁹ See 20 C.F.R. § 10.5(f) (1999) (defining "disability" as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury).

CONCLUSION

The Board finds that the Office did not meet its burden of proof to modify its August 14, 1992 determination of appellant's wage-earning capacity. Fact of overpayment is not established.

ORDER

IT IS HEREBY ORDERED THAT the November 7, 2003 decision of the Office of Workers' Compensation Programs is reversed. The Office's December 11, 2003 decision is set aside.

Issued: August 26, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member