United States Department of Labor
Employees' Compensation Appeals Board

JERRY W. LEWIS, Appellant	)	
and	)	**Docket No. 05-989**
	)	**Issued: October 11, 2005**
DEPARTMENT OF THE ARMY, ARMY AVIATION & MISSILE COMMAND, Redstone Arsenal, AL, Employer	)	

Appearances:
Jerry W. Lewis, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On March 22, 2005 appellant filed a timely appeal of the February 25, 2005 merit decision of the Office of Workers' Compensation Programs, which found that appellant had zero loss of wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly modified the March 20, 1995 loss of wage-earning capacity determination.

FACTUAL HISTORY

On March 31, 1991 appellant, then a 44-year-old fire fighter, sustained a traumatic injury in the performance of duty when his left knee was struck by a fire hose attachment. The Office accepted the claim for left knee contusion and strain. On April 11, 1991 appellant underwent surgery to repair torn anterior cruciate and lateral collateral ligaments, which the Office

authorized. He returned to work on August 12, 1991. Appellant later received a schedule award for 15 percent permanent impairment of the left lower extremity. He filed a claim for recurrence of disability on July 12, 1994 which the Office accepted. Appellant underwent a second left knee surgery on September 27, 1994. Unable to resume his prior duties as a fire fighter, appellant returned to work as a construction inspector on December 6, 1994.

In a decision dated March 20, 1995, the Office found that appellant's actual wages as a construction inspector, fairly and reasonably represented his wage-earning capacity. In comparison to his date-of-injury job as a fire fighter, appellant earned approximately $190.30 less per week as a construction inspector.[1] The Office, therefore, compensated appellant based on his loss of wage-earning capacity.

On February 5, 2003 the employing establishment provided the Office with a position description of appellant's current permanent assignment as an engineering technician, which became effective September 8, 2002. The Office also received a history of appellant's salary adjustments from August 3, 1997 to January 21, 2003. Appellant's current salary as a GS-9, step 3 engineering technician was $41,327.00. The employing establishment later requested modification of the March 20, 1995 loss of wage-earning capacity determination. According to the employing establishment, appellant had been vocationally rehabilitated and was earning more than 25 percent of the current pay of the position for which he was previously rated. The employing establishment reiterated its request for modification on February 13, 2004, noting that appellant's current annual salary was $43,854.00, which represented weekly wages of $840.40. In a May 7, 2004 letter, the employing establishment provided the Office with information concerning on-the-job training that appellant received from 1995 to 2001.

On January 10, 2005 the Office issued a notice of proposed termination. The Office indicated that appellant was presently earning wages that were more than 25 percent greater than the current wages of the position, for which he was previously rated. The Office also noted that appellant was self-rehabilitated though training. Additionally, the Office found that appellant had a zero loss of wage-earning capacity and, therefore, was not entitled to further wage-loss compensation.

Appellant responded on January 19, 2005. He noted that he was previously employed as a fire fighter with annual earnings of approximately $34,000.00. Appellant explained that the current pay of a fire fighter exceeded $52,000.00 annually. He also noted that he had received additional training and attempted to reach a pay grade that would allow him to get off of workers' compensation, but he had not yet attained that level. According to appellant, he continued to experience a loss of wages because his present job did not pay as much as what he would have earned had he been able to continue working as a fire fighter. Additionally, he provided the Office with information regarding how to calculate fire fighters pay.

[1] The Office noted a weekly pay rate of $656.21 as a fire fighter and an adjusted earning capacity of $465.91 as a construction inspector. Appellant, therefore, had a loss in earning capacity of $190.30 per week.

The Office issued a final decision on February 25, 2005 terminating wage-loss compensation.[2]

LEGAL PRECEDENT

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.[3] 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.[4] The actual earnings in the position are compared with the current wages of the date-of-injury position to determine loss of wage-earning capacity.[5]

Once the wage-earning capacity of an injured employee 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.[6] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[7]

It may be appropriate to modify a loss of wage-earning capacity determination on the grounds that the claimant has been vocationally rehabilitated if the claimant is earning substantially more in the job for which he or she was rated.[8] This situation may occur where a claimant returned to part-time duty with the employing establishment and was rated on that basis, but later increased his or her hours to full-time work.[9] Modification may also be justified in a situation where the claimant is employed in a new job; one different from the job for which he or she was rated and is receiving pay at least 25 percent more than the current pay of the job for which the claimant was rated.[10]

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[2] The February 25, 2005 decision noted, without elaboration, that the Office considered the information appellant submitted in response to the notice of proposed termination.

[3] 5 U.S.C. § 8115(a); *see Loni J. Cleveland*, 52 ECAB 171, 176-77 (2000).

[4] *Loni J. Cleveland, supra* note 3.

[5] 20 C.F.R. § 10.403(1999); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[6] *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[7] *Id.*

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c) (June 1996).

[9] *Id.*

[10] *Id.*

ANALYSIS

The Office's January 10, 2005 notice of proposed termination of benefits included several errors, which the Office incorporated in its final decision dated February 25, 2005. First, the Office incorrectly stated that appellant was employed as a GS-6, step 5 "Housing Inspector" at the time of his March 31, 1991 employment injury. Appellant was previously employed as a fire fighter, which he pointed out in his January 19, 2005 response. He further noted that he earned in excess of $33,000.00 annually when employed as a fire fighter.

Second, the Office incorrectly stated that it had previously determined appellant's loss of wage-earning capacity based on his position as a "GS-6 step 5 Housing Inspector at an annual salary of $24,117.00." This is only partially correct. While the noted salary is accurate, the identified position is not. The March 20, 1995 loss of wage-earning capacity determination was based on appellant's weekly wages as a "construction inspector," effective December 6, 1994. Based on information provided by the employing establishment, appellant was working as a construction inspector as of February 5, 1995 and he did not become a housing inspector until February 4, 1996. As the Office was mistaken about the duties appellant performed when he was initially rated on March 20, 1995 the Office obviously did not compare appellant's current duties as an engineering technician with the duties he performed as a construction inspector.[11] In fact, neither the January 10, 2005 notice of proposed termination nor the February 25, 2005 final decision included any reference to the specific duties appellant performed as a construction inspector, housing inspector or engineering technician.

The third error the Office committed in modifying the March 20, 1995 loss of wage-earning capacity determination is that it failed to consider the current wages of appellant's date-of-injury job as a fire fighter. Since accepting appellant's recurrence of disability in September 1994, the Office continuously paid wage-loss compensation based on a September 4, 1994 recurrence pay rate of $656.21 per week as a fire fighter. In concluding that appellant currently had a zero loss of wage-earning capacity, the Office incorrectly relied on a weekly pay rate of $465.91. The $465.91 figure is not what appellant earned as a fire fighter through September 4, 1994, but what he earned as a construction inspector effective December 6, 1994. This information is clearly reflected in the March 20, 1995 loss of wage-earning capacity determination and accompanying documentation.

The worksheets associated with the January 10, 2005 notice of proposed termination and the February 25, 2005 final decision reveal that the Office determined that the current weekly pay of a GS-6, step 5 housing inspector was $648.67 and because appellant was now earning $746.75 a week as an engineering technician, he had zero loss of wage-earning capacity. As previously indicated, appellant earned more than $648.67 per week when he last worked as a fire fighter more than 10 years ago.

Assuming *arguendo* that appellant's present wages as an engineering technician represent his wage-earning capacity, to properly determine whether appellant continues to experience a

[11] The procedure manual requires the Office to "assess whether the actual job differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(d) (July 1997).

loss of wage-earning capacity a comparison must be made between his actual earnings and the current wages paid a fire fighter.[12] Consequently, the Office should have obtained additional information regarding the current fire fighter wages, including any applicable premium pay, shift differentials and administratively uncontrolled overtime.[13] Again, appellant provided some information regarding the current earnings of a fire fighter when he responded to the Office's January 10, 2005 notice of proposed termination of benefits. However, the Office does not appear to have considered this and other relevant information when it issued its final decision on February 25, 2005.[14]

While there is evidence of increased earnings, additional training and several job changes since appellant was initially rated on March 20, 1995 the factual errors noted in the Office's recent decision reflect that the Office did not fully adhere to its own procedures in evaluating whether a proper basis existed for modifying the March 20, 1995 loss of wage-earning capacity determination. The Office also erred in reducing appellant's compensation to zero based on an incorrect pay rate. In view of the numerous errors committed by the Office in attempting to modify the March 20, 1995 loss of wage-earning capacity determination, the Board finds that the Office did not meet its burden. Accordingly, the February 25, 2005 decision is reversed.

CONCLUSION

The Board finds that the Office improperly modified the March 20, 1995 loss of wage-earning capacity determination.

[12] 20 C.F.R. § 10.403(c) and (d) (1999).

[13] In computing one's pay rate, section 8114(e) of the Act provides for the exclusion of overtime pay from consideration in determining the appropriate pay rate. 5 U.S.C. § 8114(e). The Office, however, has determined that premium pay for "administratively uncontrollable overtime" will be included in computing an employee's pay rate. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7(b)(5) (December 1995).

[14] The record also includes a January 20, 2005 memorandum from the employing establishment advising the Office that the current pay rate of a GS-5, step 5, fire fighter was $17.11 per hour. This figure reportedly included Sunday premium and a night differential. However, this hourly rate does not appear to account for the regular overtime appellant's was previously required to perform, which the Office took into account in calculating his September 4, 1994 recurrence pay rate of $656.21 per week.

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2005 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 11, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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