

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

L.S., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Alderson, WV, Employer**

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**Docket No. 06-1726
Issued: November 21, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 19, 2006 appellant filed a timely appeal of a May 3, 2006 decision of the Office of Workers' Compensation Programs denying his request for a hearing and a July 22, 2005 wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation as of January 17, 2000 on the grounds that his actual earnings as a bus driver represented his wage-earning capacity; and (2) whether the Office's Branch of Hearings and Review properly denied appellant's request for an oral hearing before an Office hearing representative.

FACTUAL HISTORY

On November 6, 1996 appellant, then a 44-year-old corrections officer, filed an occupational claim (Form CA-2) alleging that he sustained stress and heart disease as a result of his federal employment. The Office accepted the claim for old myocardial infarction, chronic

ischemic heart disease, acute myocardial infarction and schizoaffective disorder. Appellant received compensation for temporary total disability.

On January 27, 2005 appellant completed a report regarding employment activity (Form EN1032) and he indicated that he had worked as a bus driver from January 17, 2000 to March 26, 2004. He reported that he earned \$13.26 per hour. On April 1, 2005 the Office received a response from the bus company stating that appellant was employed from January 18, 2000 to March 5, 2005. The bus company reported that appellant earned \$7.50 per hour when he was hired and \$10.53 per hour as of February 27, 2000. He continued to receive pay increases and was earning \$15.26 per hour when he stopped working. The Office also received information from the Social Security Administration regarding earnings from 1997 to 2005.

In a memorandum dated July 20, 2005, the Office calculated that, based on the information provided by the Social Security Administration, appellant earned an average of \$365.88 per week from 2000 through 2004. The Office also reported that the current pay rate for the date-of-injury job was \$938.43.

By decision dated July 22, 2005, the Office found that actual earnings in the position of bus driver fairly and reasonably represented appellant's wage-earning capacity. The Office stated that appellant was employed with wages of \$365.88 per week and the employment was effective January 17, 2000. A wage-earning capacity computation worksheet reported the current pay rate for the date-of-injury job as \$938.43 effective July 20, 2005, with appellant earning \$365.88 per week, resulting in a 61 percent loss of wage-earning capacity. The beginning date of appellant's new rate of compensation was January 17, 2000.

In a letter postmarked February 21, 2006, appellant requested an oral hearing before an Office hearing representative. By decision dated May 3, 2006, the Branch of Hearings and Review found that the request was untimely. It further denied the request by stating that the issue could equally well be addressed by requesting reconsideration and submitting new and relevant 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 Office's procedure manual provides that a retroactive determination may be made where the claimant has worked in the position for at least 60 days, the employment fairly and

¹ 5 U.S.C. § 8115(a).

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

reasonably represents wage-earning capacity, and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting his ability to work.³

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁴ has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate for the date-of-injury job.⁵

ANALYSIS -- ISSUE 1

The July 22, 2005 Office decision is a retroactive wage-earning capacity determination that finds the bus driver job fairly and reasonably represented appellant's wage-earning capacity as of January 17, 2000. Actual wages are, as noted above, generally the best measure of wage-earning capacity. The evidence indicated that appellant did have actual earnings as a bus driver from 2000 to 2005. Appellant did work more than 60 days in the position and there is no evidence that the work stoppage was caused by a change in the employment-related condition. There is no evidence in the record contraindicating the use of actual earnings as a bus driver for a retroactive wage-earning capacity determination.

In order to properly determine the wage-earning capacity as of January 17, 2000, however, the Office must apply the *Shadrick* comparison based on actual earnings and current pay rate as of January 17, 2000. It is appellant's actual earnings as of January 17, 2000 which must be compared to the date-of-injury pay rate as of January 17, 2000.⁶ The Office in this case determined that appellant's actual earnings were an average over a period from 2000 to 2004, rather than earnings as of January 17, 2000. Moreover, the Office compared the earnings with date-of-injury pay rate on July 20, 2005, rather than January 17, 2000.

The case will be remanded for a proper calculation. For the date chosen as the effective date of the wage-earning capacity determination, the Office must compare actual earnings with current date-of-injury job pay rate for that chosen date. After such further development as the Office deems necessary, it should issue an appropriate decision. In light of the Board's decision on the wage-earning capacity determination, the Board will not address the denial of a hearing before an Office hearing representative.

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

⁴ 5 ECAB 376 (1953).

⁵ The Office may use "any convenient date for making the comparison as long as both wage rates are in effect on the date used for comparison." 20 C.F.R. § 10.403(d).

⁶ *Id.*; see also, e.g., *Tamra McCauley*, 51 ECAB 375 (2000), where the claimant's return to work in April 1988 and her actual earnings commencing in April 1988 were compared to the date-of-injury pay rate as of April 1988.

CONCLUSION

The Office did not properly apply the formula used to determine appellant's loss of wage-earning capacity as of January 17, 2000.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 22, 2005 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 21, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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