

FACTUAL HISTORY

This case is before the Board for the second time. In the first appeal, the Board reversed the Office's June 29, 2005 decision to modify its July 23, 2003 wage-earning capacity determination.² The Board found that, although appellant had greater earnings by increasing her number of work hours from six to eight since March 14, 2005, the record contained no evidence that appellant had been retrained, vocationally rehabilitated or that her full-time job differed significantly in duties, responsibilities or technical expertise from the part-time job at which she was initially rated. The findings of fact and conclusions of law from the prior decision are incorporated by reference.

In relevant part, the Office accepted that appellant, then a 51-year-old mail handler, had sustained bilateral mononeuritis of the arms and bilateral brachial neuritis/radiculitis of arms and paid all appropriate monetary and medical benefits. Appellant returned to work as a limited-duty mail processing clerk and, on September 21, 2002, reduced her work hours from eight to six hours per day, as recommended by Dr. Windsor S. Dennis, her attending orthopedic surgeon. Thus, the Office paid partial disability compensation. By decision dated July 23, 2003, the Office found that appellant's actual earnings in the limited-duty position she performed as a modified mail processing clerk six hours per day since September 21, 2002, fairly and reasonably represented her wage-earning capacity.

In reports of appellant's work tolerance limitations dated March 14 and 18, 2005, Dr. Dennis indicated that appellant could work eight hours per day. On March 14, 2005 appellant increased the hours per day she worked limited duty from six to eight. She continued to work eight hours per day in her limited-duty position until Hurricane Katrina went through appellant's area in August 2005. Upon appellant's return to work in February 2006, appellant worked in the temporary trailers assisting with mail distribution and then at the customer service station performing similar duties within her physical limitations.

In a June 26, 2006 letter, the employing establishment advised that appellant underwent periodic training from November 1, 1986 through August 17, 2004 to assist her in the performance of the duties required in processing the mail. It further stated that it was unable to confirm whether appellant's training affected appellant's ability to work full time.

On July 10, 2006 appellant filed a claim for compensation (Form CA-7) for the period September 17, 2005 to February 12, 2006. She alleged that no work was available for her at other postal facilities post-Katrina. The employing establishment controverted the claim. It stated that post-Katrina displaced workers were to contact other postal facilities to see if work was available. It noted that appellant did not provide any documentation to verify there was no available work.

By letter dated July 12, 2006, the Office notified appellant that it proposed to modify its July 23, 2003 wage-earning capacity decision as she had been self-rehabilitated and earned wages more than her previous job for which she was rated. The Office determined that, effective March 12, 2005, appellant had increased her working hours from six to eight, she had undergone

² Docket No. 06-30 (issued March 8, 2006).

periodic training from November 1, 1986 through August 17, 2004, which added to her knowledge, skills and ability to work in a safe and productive manner and she earned 37 percent more than her previous job for which she was rated. In calculating the percentage, the Office divided the new wage-earning capacity amount of \$863.57 weekly earnings by the former wage-earning capacity amount of \$628.81 weekly earnings.³ The Office provided appellant 30 days in which to submit additional evidence or argument. No additional evidence was received.

By decision dated July 21, 2006, the Office denied appellant's claim for compensation for the period September 17, 2005 to February 12, 2006. It found the temporary closure of her facility did not qualify as a reason to modify the June 29, 2005 loss of wage-earning capacity decision, which found that she did not have any loss of wage-earning capacity.⁴

By decision dated August 25, 2006, the Office modified its July 23, 2003 loss of wage-earning capacity decision after finding that appellant had been self-rehabilitated such that she earned wages more than the previous job for which she was rated on July 23, 2003. The Office determined that she had no loss of wage-earning capacity and her actual earnings fairly and reasonably represented her wage-earning capacity.

LEGAL PRECEDENT

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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

An increase in pay, by itself, is not sufficient evidence that there has been a change in an employee's capacity to earn wages.⁷ Without a showing of additional qualifications obtained by appellant, it is improper to make a new loss of wage-earning capacity determination based on increased earnings.⁸

³ The Board notes that weekly earnings from the July 23, 2003 wage-earning capacity should be \$628.84.

⁴ As previously noted, the Board's March 8, 2006 decision had reversed the Office's June 29, 2005 wage-earning capacity decision. The Board's decisions are final as to the subject matter appealed. 20 C.F.R. § 501.6(c). Therefore, the Office's July 21, 2006 decision is rendered moot.

⁵ *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000).

⁶ *Stanley B. Plotkin*, *id.*

⁷ *Marie A. Gonzales*, 55 ECAB 395, 399 (2004).

⁸ *See Willard N. Chuey*, 34 ECAB 1018 (1983).

With respect to modification of wage-earning capacity, the Office procedure manual provides:

“c. *Increased Earnings*. It may be appropriate to modify the rating on the grounds that the claimant has been vocationally rehabilitated if one of the following two circumstances applies:

(1) *The claimant is earning substantially more* in the job for which he or she was rated. This situation may occur where a claimant returned to part-time duty with the employing agency and was rated on that basis, but later increased his or her hours to full-time work.

(2) *The claimant is employed in a new job (i.e., 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.*

“d. [*Claims Examiner*] *Actions*. If these earnings have continued for at least 60 days, the CE [claims examiner] should:

(1) *Determine the duration, exact pay, duties and responsibilities of the current job.*

(2) *Determine whether the claimant underwent training or vocational preparation to earn the current salary.*

(3) *Assess whether the actual job differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated.*

“e. *If the results of this investigation establish that the claimant is rehabilitated, or if the evidence shows that the claimant was retrained for a different job, compensation may be redetermined using the Shadrick formula...*”⁹

ANALYSIS

By decision dated July 23, 2003, the Office determined that appellant’s actual earnings as a limited-duty part-time mail processor fairly and reasonably represented her wage-earning capacity effective September 21, 2002. Between that date and the Office’s August 25, 2006 decision modifying the July 23, 2003 determination of her wage-earning capacity, appellant underwent periodic training through August 17, 2004 and had increased the number of hours she worked per day from six to eight on March 14, 2005, thereby earning more wages. There is no evidence that her job differed significantly in duties, responsibilities or technical expertise from the job at which she was rated. By decision dated August 25, 2006, the Office modified its July 23, 2003 decision to reflect that appellant was not entitled to compensation for a loss of

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c)-(e) (July 1997).

wage-earning capacity as she was retrained or otherwise rehabilitated and her current earnings fairly and reasonably represented her wage-earning capacity. The Office found that appellant's actual earnings from March 14, 2005 onward were greater than the current earnings for her previous job for which she was rated.

As previously noted, an increase in pay by itself is not sufficient evidence that there has been a change in an employee's capacity to earn wages.¹⁰ The Board has held that it may be appropriate to modify a claimant's wage-earning capacity determination on the grounds that the claimant is vocationally rehabilitated if the claimant is employed in a job different from the one the claimant was rated in, which pays at least 25 percent more than the current pay of the job the claimant was rated in and these earnings continued for at least three months.¹¹ Prior to such a modification, however, the Office is required to determine the duration, exact pay, duties and responsibilities of the new 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.¹²

In this case, the Office determined that appellant's pay had increased but did not demonstrate that appellant's training or vocational preparation enabled her to earn her current salary. The employing establishment was unable to confirm that appellant's periodic training from November 1, 1986 through August 17, 2004 impacted her ability to work full time. The fact that appellant underwent periodic training does not alone establish that she obtained additional qualifications and thereby changed her wage-earning capacity. Additionally, the record does not establish that she was employed in a job different from the one she was rated in. Appellant continued to work in a temporary limited-duty status performing similar duties within her physical limitations. Consequently, the Board finds that appellant has not been vocationally rehabilitated.

The Office also found that appellant was vocationally rehabilitated because she earned 37 percent more than the job for which she was rated. Rather, than compare appellant's actual earnings to the current pay for the job which she was rated,¹³ the Office compared the new wage-earning capacity amount of \$863.57 by the old wage-earning capacity amount of \$626.81. This comparison is improper for the purpose of establishing vocational rehabilitation.

The Board finds that the Office failed to follow accepted procedures and failed to address adequately the relevant factors for determining whether appellant was vocationally rehabilitated. Thus, the Office did not meet its burden of proof to modify her prior wage-earning capacity determination.

¹⁰ *Marie A. Gonzales*, *supra* note 7.

¹¹ *Billy R. Beasley*, 45 ECAB 244 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c) (June 1996).

¹² *See Beasley*, *id.*; Federal (FECA) Procedure Manual, at Chapter 2.814.11(d).

¹³ *See supra* note 9.

This does not mean, however, that appellant is entitled to continuing wage-loss compensation. Rather, the Office should properly apply the *Shadrick* formula to the wages received for the number of hours worked. To the extent that appellant is earning wages equal to or greater than those received at the time of injury, she has no disability as the term is generally defined under the Federal Employees' Compensation Act with regard to wage-loss compensation.¹⁴

CONCLUSION

The Board finds that the Office did not meet its burden of proof to modify appellant's June 1, 1992 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2006 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 10, 2007
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

¹⁴ See *Gregory A. Compton*, 45 ECAB 154 (1993).