

)	
O.T., Appellant)	
)	
and)	Docket No. 13-1104
)	Issued: February 25, 2014
DEPARTMENT OF THE TREASURY,)	
INTERNAL REVENUE SERVICE,)	
Birmingham, AL, Employer)	
)	

Case Submitted on the Record

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On April 4, 2013 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) merit decisions dated October 19 and December 11, 2012 and February 22, 2013. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issues are: (1) whether appellant met his burden of proof to modify OWCP's July 16, 2003 wage-earning capacity determination; (2) whether OWCP properly determined appellant's rate of pay for purposes of calculating his monetary compensation; and (3) whether OWCP properly refused to reopen appellant's case for reconsideration of his claim under 5 U.S.C. § 8128.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This is the third appeal before the Board. On August 7, 1985 appellant, a 48-year-old special agent, injured his lower back. OWCP accepted the claim for low back strain and herniated nucleus pulposus at L4-5. It paid temporary total disability and placed appellant on the periodic rolls. In a report dated November 26, 2001, Dr. Anthony C. Pitts, a specialist in physical and rehabilitative medicine, found that appellant was not totally disabled. Appellant was restricted from activities requiring frequent bending, lifting, squatting, stooping but opined that he could perform sedentary work, as long as he was allowed to stand as needed and avoid protracted immobilization. Dr. Pitts advised that appellant had degenerative disc disease which was evolutionary with age. In a work capacity evaluation dated June 17, 2002, he stated that he could work an eight-hour day with restrictions of no twisting; sitting for no more than four to six hours per day; walking, standing, pushing, pulling and lifting for no more than one to two hours per day; and squatting and kneeling for no more than five minutes per day. Dr. Pitts advised appellant to take 15- to 20-minute breaks every two to three hours. On October 22, 2002 a vocational rehabilitation counselor selected the position as credit authorizer, listed in the Department of Labor's *Dictionary of Occupational Titles*, as conforming to appellant's work restrictions and prior work experience.

By decision dated July 16, 2003, OWCP reduced appellant's compensation to reflect his wage-earning capacity in the position of credit authorizer. It found that he was no longer totally disabled and had the capacity to earn wages in the position, DOT #249.367.022, at the rate of \$343.20 per week, in accordance with the factors outlined in 5 U.S.C. § 8115.² OWCP calculated that appellant's compensation rate, every four weeks, should be adjusted to \$2,145.00 using the *Shadrick*³ formula. It noted that appellant's salary as of August 7, 1985, the date he stopped working, was \$608.20 per week; this included \$539.20 in base salary, as well as \$69.00, or 15 percent, in premium pay for law enforcement personnel. His current adjusted pay rate for his job on the date of injury was \$1,207.98, based on an annual salary, \$50,252.00, the rate for a GS-11, step 3 criminal investigator. This yielded a weekly salary of \$966.38 and 25 percent premium pay, for a total of \$1,207.98 per week. OWCP found that appellant was currently capable of earning \$343.20 per week, the rate of a credit authorizer. It found that he had an adjusted weekly compensation rate of \$536.25 and that his current adjusted compensation rate, per four-week period, was \$2,145.00. OWCP noted that the case had been referred to a vocational rehabilitation counselor, who had identified the position of credit authorizer as suitable for appellant given his work restrictions and was available in his commuting area.

In a July 7, 2003 report, received by OWCP on June 20, 2006, Dr. John P.K. Featheringill, a specialist in orthopedic surgery, stated that appellant had experienced back pain since his 1985 work injury. Dr. Featheringill advised that appellant had undergone lumbar disc surgery and had been on disability ever since. He asserted that appellant's continuing problems with back pain had resulted in him recently undergoing a magnetic resonance imaging (MRI) scan. Dr. Featheringill stated that appellant's current problem began when he was involved in a

² 5 U.S.C. § 8115.

³ *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

motor vehicle accident on May 17, 2003; he opined that he has experienced severe pain and left leg numbness since that date. He diagnosed severe degenerative arthritis of the lumbar spine at L4-5 and L5-S1 and recommended that appellant undergo another MRI scan and additional physical therapy.

In a report dated November 20, 2006, Dr. Ronald Borlaza, an attending Board-certified orthopedic surgeon, stated that he had treated appellant since December 16, 2005 for lumbar radiculopathy stemming from the August 7, 1985 employment injury. Appellant underwent an L5-S1 laminectomy on November 1985 but continued to experience chronic low back pain with bilateral leg numbness and weakness. He underwent a lumbar MRI scan on May 17, 2006 that revealed degenerative changes with mild to moderate facet hypertrophic changes and mild disc bulges at L5-S1. Dr. Borlaza stated that appellant's condition was due to residual symptoms from his lumbar radiculopathy which did not resolve despite surgery. Appellant had additional back pain from the degenerative changes seen on the MRI scan. He asserted that appellant was not able to do any meaningful full-time or part-time work.

By decision dated November 20, 2006, OWCP denied appellant's request for reconsideration without a merit review, finding the request was untimely and did not establish clear evidence of error. In a May 9, 2008 decision,⁴ the Board set aside the November 20, 2006 decision. The Board found that OWCP erred by treating appellant's October 17, 2006 correspondence as a request for reconsideration of the July 16, 2003 wage-earning capacity determination under 5 U.S.C. § 8128(a). The Board found that appellant's October 17, 2006 letter constituted a request for modification of OWCP's July 16, 2003 wage-earning capacity determination. The Board set aside the November 20, 2006 decision and remanded for OWCP to adjudicate appellant's request for modification of the wage-earning capacity determination. By decision dated May 30, 2008, OWCP denied modification of the July 16, 2003 wage-earning capacity determination. By decision dated June 5, 2009, it denied modification of the May 30, 2008 decision.

In a December 23, 2010 report, Dr. Borlaza noted that appellant had chronic low back pain and residual symptoms from his lumbar radiculopathy and degenerative disc disease. On examination, appellant demonstrated moderate lumbar back tenderness with 80 percent muscle strength and decreased sensation on his legs bilaterally. His most recent lumbar MRI scan of May 17, 2006, showed degenerative changes with mild to moderate facet hypertrophic changes and mild disc bulges at L2-S1 and L2 vertebral body contusion or edema. Dr. Borlaza stated that appellant's condition was due to residual symptoms from his lumbar radiculopathy that did not resolve despite surgery. Appellant had additional back pain from the degenerative changes seen on the MRI scan. Dr. Borlaza reiterated that appellant was totally disabled.

By letter dated April 18, 2011, appellant requested reconsideration. He also requested that OWCP address the pay rate for compensation paid to him since his 1985 work injury. Appellant asserted that Dr. Borlaza's December 23, 2010 report established that his back condition had worsened since the July 16, 2003 wage-earning capacity determination.

⁴ Docket No. 07-929 (issued May 9, 2008).

By decision dated September 7, 2011, OWCP denied appellant's request for reconsideration without a merit review, finding that it was untimely filed and failed to establish clear evidence of error. In an August 14, 2012 decision,⁵ the Board again found that OWCP erred by treating appellant's April 18, 2011 letter as a request for reconsideration under 5 U.S.C. § 8128(a). Appellant submitted Dr. Borlaza's report in support of his contention that OWCP erred in the July 16, 2003 wage-earning capacity determination and that his condition had materially worsened since the determination was issued. The Board remanded the case for OWCP to adjudicate appellant's request for modification of the wage-earning capacity determination.

On remand appellant submitted reports from diagnostic testing of the lumbar spine and lower extremities. The reports were not accompanied by a physician's opinion addressing his accepted lumbar strain or lumbar herniated disc.

By letter dated September 24, 2012, OWCP asked the employing establishment to verify appellant's date-of-injury pay rate information in order to determine whether his compensation had been properly computed. It asked the employing establishment to confirm appellant's assertion that, as of August 7, 2005, his salary included a 25 percent premium pay rate. If so, to also indicate the type of premium pay, how many hours per week to which he was entitled at premium pay and the percentage used to calculate the premium rate.

By decision dated October 19, 2012, OWCP denied modification of its July 16, 2003 loss of wage-earning capacity (LWEC) decision. It reviewed Dr. Borlaza's reports and found that he failed to provide sufficient opinion to establish any of the three criteria required to modify the LWEC decision. Appellant failed to submit sufficient evidence to support that his accepted condition worsened due to a spontaneous material change in his injury-related accepted condition.

OWCP also found that appellant did not present evidence that there was an error in the calculation of his wage-earning capacity. It found that the July 16, 2003 LWEC decision included 25 percent premium pay in the original calculation of his compensation. OWCP calculated his weekly date-of-injury pay rate by adding his base salary as an investigator of \$539.20 to the \$69.00 in premium pay for a total salary of \$608.20. It advised that his premium pay was derived from his October 11, 1985 Form CA-7, which indicated that his date-of-injury premium pay was "\$11.50 per hour times 15 percent" which produced a premium pay rate of \$1.725 per hour; it then obtained the premium pay rate of \$69.00 by multiplying \$1.725 times 40 hours per week. OWCP determined that appellant failed to demonstrate that there had been a material change in the nature and extent of the injury-related condition or that the original LWEC determination was erroneous. Therefore, it denied modification of the July 16, 2003 LWEC decision.

By letter dated November 10, 2012, appellant requested reconsideration. He reiterated his contentions of error. In a November 6, 2012 report, Dr. Borlaza stated that appellant was still experiencing chronic low back pain which began with the 1985 car accident and was permanent and disabling. He related that his back pain had worsened since 1985. Dr. Borlaza opined that appellant was unable to perform any meaningful full-time or part-time work.

⁵ Docket No. 12-753 (issued August 14, 2012).

By decision dated December 11, 2012, OWCP denied modification of the July 16, 2003 LWEC decision, finding that he failed to submit evidence sufficient to establish one of the three criteria required to modify the LWEC decision.

On February 6, 2013 appellant requested reconsideration. He did not submit any additional medical or factual evidence.

By decision dated February 22, 2013, OWCP denied appellant's application for review on the grounds that it did not raise any substantive legal questions or included new and relevant evidence sufficient to require further review.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.⁶ If actual earnings do not fairly and reasonably represent wage-earning capacity, or if the claimant has no actual earnings, his wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his usual employment, age, qualification's for other employment, the availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his disabled condition.⁷ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁸

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.⁹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁰

The Board has held that a new injury does not constitute a material change in the nature and extent of the original injury-related condition such that a wage-earning capacity determination should be modified.¹¹

⁶ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁷ See *J.S.*, 58 ECAB 280 (2007).

⁸ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁹ *Sharon C. Clement*, 55 ECAB 552 (2004).

¹⁰ *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

¹¹ *M.E.*, Docket No. 07-2306 (issued March 24, 2008).

ANALYSIS -- ISSUE 1

Appellant injured his low back in August 1985. OWCP accepted a lumbar strain and herniated disc. In his June 17, 2002 report, Dr. Pitts indicated that appellant could perform work for eight hours per day with restrictions on twisting; sitting for no more than four to six hours per day; walking, standing, pushing, pulling and lifting for no more than one to two hours per day; and squatting and kneeling for no more than five minutes per day. A vocational rehabilitation counselor selected a credit authorizer position, listed in the Department of Labor's *Dictionary of Occupational Titles*, which, she determined, reasonably reflected appellant's ability to earn wages based on Dr. Pitts' restrictions. OWCP used the information provided by the rehabilitation counselor of the applicable wage rate in the area for a credit authorizer. Finally, it properly applied the principles set forth in the *Shadrick*¹² decision to determine appellant's employment-related LWEC. OWCP calculated that appellant's compensation rate should be adjusted to \$2,145.00 using the *Shadrick* formula.

In its October 19 and December 11, 2012 decisions, OWCP denied modification of the July 16, 2003 LWEC determination. It found that the duties of the credit authorizer position that was the subject of the original LWEC represented appellant's wage-earning capacity. OWCP properly found that he was no longer totally disabled as a result of his accepted conditions, and it followed established procedures for determining his employment-related LWEC capacity based on the selected position of credit authorizer. The Board therefore finds that OWCP met its burden of proof to reduce appellant's monetary compensation in its July 16, 2003 decision.

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. Appellant has not shown that the original wage-earning capacity determination was in fact erroneous.

Subsequent to OWCP's July 16, 2003 wage-earning capacity determination, appellant argued that it should be modified because his back condition had worsened. The Board finds that the record does not establish this contention. Following the July 16, 2003 decision, OWCP received Dr. Featheringill's July 7, 2003 report. Dr. Featheringill stated that appellant had experienced low back pain since his 1985 work injury which had placed him on total disability since that time. He explained that appellant had recently experienced severe pain and leg numbness since being involved in a motor vehicle accident on May 17, 2003. Dr. Featheringill diagnosed severe degenerative arthritis of the lumbar spine at L4-5 and L5-S1. In its October 12, 2012 decision, OWCP noted that appellant neglected to mention in his request for modification that he had aggravated his lower back condition as a result of his May 2003 automobile accident. Dr. Borlaza, his treating physician, stated in his November 20, 2006 report that appellant had experienced lower back pain since the 1985 injury but did not indicate that he had sustained a nonwork-related automobile accident in May 2003 which had caused an increase in his back pain. He advised that appellant underwent a lumbar MRI scan on May 17, 2006 which revealed degenerative changes with mild to moderate facet hypertrophic changes and mild disc bulges at

¹² *Shadrick*, *supra* note 3.

L5-S1, and stated that his condition was due to residual symptoms from lumbar radiculopathy. The Board finds that his opinion lacks probative value and does not support that appellant's condition had materially worsened since the July 16, 2003 wage-earning capacity determination. Dr. Borlaza did not mention appellant's May 2003 automobile accident, which indicated that he did not have an accurate history of appellant's condition. As noted, the Board has held that a new injury does not constitute a material change in the nature and extent of the original injury-related condition such that a wage-earning capacity determination should be modified.¹³ Dr. Borlaza attributed much of appellant's worsening condition to degenerative arthritis, as indicated by the May 2006 MRI scan, which was not an accepted condition.

In a December 23, 2010 report, Dr. Borlaza indicated that appellant continued to have chronic low back pain and residual symptoms from his lumbar radiculopathy and degenerative disc disease. He reiterated that appellant's most recent lumbar MRI scan, on May 17, 2006, showed degenerative changes with mild to moderate facet hypertrophic changes and mild disc bulges at L2-S1 and L2 vertebral body contusion or edema and that his condition was due to residual symptoms from his lumbar radiculopathy. Dr. Borlaza reiterated that appellant could not do any meaningful full-time or part-time work and that his condition would not improve due to his lower back condition. However, he did not provide a probative, rationalized medical report demonstrating that appellant experienced a worsening of the accepted condition.

By decision dated October 19, 2012, OWCP properly denied modification of the July 16, 2003 LWEC decision, finding that he failed to submit evidence sufficient to establish one of the three criteria required to modify the LWEC decision. Appellant subsequently submitted a November 16, 2012 report from Dr. Borlaza. Again the physician merely reiterated his previous conclusions. The reports from Drs. Featheringill and Borlaza are not sufficient to establish a material change in the nature and extent of his accepted condition. The Board therefore finds that OWCP properly found in its October 12 and December 19, 2012 decisions that appellant failed to establish a material change in the nature and extent of the injury-related condition, sufficient to warrant modification of the July 16, 2003 LWEC determination.

LEGAL PRECEDENT -- ISSUE 2

Under section 8101 (4) of FECA, monthly pay for compensation purposes is the greater of the employee's pay as of the date of injury, the date disability begins or the date of recurrence of disability if more than six months after returning to work.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision regarding the calculation of appellant's pay rate.

OWCP calculated that appellant had the capacity to earn wages as a credit authorizer, DOT #249.367.022, at the rate of \$343.20 per week, in accordance with the factors outlined in

¹³ See *supra* note 7.

¹⁴ 5 U.S.C. § 8101(4)

5 U.S.C. § 8115.¹⁵ It calculated that his compensation rate should be adjusted to using the *Shadrick*¹⁶ formula. OWCP indicated that appellant's salary as of August 7, 1985, the date he stopped working, was \$608.20 per week; this included \$539.20 in base salary and \$69.00 which represented 15 percent premium pay for law enforcement personnel. It found that his current adjusted compensation rate, per four-week period, was \$2,145.00.

Appellant has contended that OWCP erred in its original wage-earning capacity by failing to calculate his premium pay at a 25 percent rate. In a factually similar case, wherein the date of disability occurred in 1979, the Board remanded the case for OWCP to address the administrative inclusion provided in its procedure for calculating availability pay for criminal investigators.¹⁷ OWCP's procedure manual provides:

"It has been determined administratively that the following elements will be included in computing an employee's pay rate:

(8) Availability for criminal investigators pursuant to 5 U.S.C. § 5545a.

"This increment (25 percent of basic pay) is paid to ensure the availability of investigators for unscheduled duty, and replaces [administratively uncontrollable overtime] ... for these employees."¹⁸

OWCP did not address the administrative inclusion provided in its procedure manual in calculating appellant's pay rate. It did not explain why 15 percent of \$11.50 an hour was utilized in calculation of appellant's premium pay. The Board therefore finds that the case is not in posture for decision on the issue of pay rate. The Board will remand the case for OWCP to make an appropriate determination as to whether availability pay for criminal investigators, at the 25 percent premium rate, should be included in computing appellant's pay rate as of date of disability, for purposes of calculating his LWEC. After such development as OWCP deems necessary, it should issue an appropriate merit decision.¹⁹

CONCLUSION

The Board finds that appellant did not meet his burden of proof to modify OWCP's July 16, 2003 wage-earning capacity determination regarding the position of credit authorizer. The Board finds that the case is not in posture for decision as to whether OWCP correctly calculated appellant's pay rate in its July 16, 2003 decision.

¹⁵ 5 U.S.C. § 8115.

¹⁶ *Albert C. Shadrick*, *supra* note 3; see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

¹⁷ *C.S.*, Docket No. 11-567 (issued January 17, 2012); *petition for recon. granted* August 17, 2012.

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.6(b)(8) (March 2011). The Board notes that the prior relevant section of the FECA Procedure Manual, dated December 1995, Chapter 2.900.7(b)(8) contained substantially the same language.

¹⁹ The Board finds that issue three is moot in light of the disposition of issue two.

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2013, December 11 and October 19, 2012 decisions of the Office of Workers' Compensation Programs are affirmed in part and set aside in part. The case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: February 25, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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