

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY E. DELONG and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Minneapolis, MN

*Docket No. 03-1169; Submitted on the Record;
Issued November 18, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly modified appellant's loss of wage-earning capacity.

The Office accepted that on April 25, 1986 appellant, a former registered nurse, with the employing establishment sustained a neck strain and levator scapular syndrome while helping to transfer a patient from his bed to a wheelchair. The Office also accepted that appellant suffered right shoulder and low back strains on June 26, 1986 while lifting a patient. The two cases were doubled into one by the Office on August 19, 1986. Appellant stopped work for the employing establishment on September 2, 1986.

The record reflects that on September 15, 1986 appellant began work outside of the federal government as a registered nurse for the International Weight Loss Clinic until February 19, 1987.

On February 23, 1987 appellant began a new job as a claims examiner for Northwestern National Life Company and earned \$16,190.00 a year. The Office determined that this position represented appellant's wage-earning capacity and calculated her compensation based on her actual earnings in this position. She received a net rate of compensation of \$383.10 in November 1987 and increases for overtime.

According to an EN1032 form of record dated May 18, 1989, appellant took employment as a nurse/secretary on July 28, 1988 at the Noran Neurology Clinic earning \$8.56 an hour. In a May 24, 1993 EN1032 form, appellant noted that she worked as a triage registered nurse with Group Health Inc. from September 1991 through November 1992 earning \$13.00 an hour and then as a nurse reviewer for United Health Care Corporation beginning November 30, 1992 earning \$14.00 an hour. The record reflects that appellant left this position in 1995 earning \$16.00 an hour. An EN1032 form dated May 7, 1997 indicated that appellant began working as a nurse case manager for Blue Cross/Blue Shield on June 5, 1995 earning \$18.49 an hour.

Following a request by the Office, appellant, in a letter dated August 18, 1997, discussed the responsibilities of her position as a nurse case manager and enclosed a job posting, which detailed the duties and qualifications for the position, which was officially titled workers' compensation case management administrator.

In a letter dated January 25, 2001, the Office requested pay rate information from the employing establishment, particularly the Office inquired about the highest step appellant held at the time she was injured and the current pay rate for that grade and step. The record reflects that as of January 30, 2001, appellant was earning \$25.72 an hour at Blue Cross/Blue Shield.

On March 12, 2001 the Office proposed to reduce appellant's compensation on the basis that her wage-earning capacity increased through self-rehabilitation efforts and that her current actual earnings as a nurse case manager fairly and reasonably represented her wage-earning capacity. The Office forwarded a copy of the pay rate information and the wage-earning capacity (Form CA-816) with the proposed notice.

In a letter dated April 5, 2001, appellant, through her counsel, disagreed with the proposed decision. Appellant's counsel argued that the decision was incomplete in that it did not provide the relevant pay rate information as required by federal regulation and did not provide a description of duties and responsibilities, which differed from the position in which she was initially rated. Appellant's counsel further argued that the Office concluded in error that appellant had been vocationally rehabilitated.

By decision dated April 19, 2001, the Office issued a final decision modifying the 1987 wage-earning capacity decision to reflect that appellant was successfully rehabilitated and that the position of workers' compensation case manager fairly and reasonably represented her wage-earning capacity. The Office determined that as appellant's current wages in this position were \$1,028.80 a week, she increased her wage-earning capacity from 66 to 97 percent and, therefore, reduced her compensation benefits accordingly.

In a letter dated May 17, 2001, appellant requested an oral hearing, which was held on April 24, 2002. During the hearing appellant's counsel initially challenged the June 25, 1986 pay rate and later challenged only the current salary that was used in determining appellant's loss of wage-earning capacity in the April 19, 2001 decision. Appellant's counsel characterized the information received by the employing establishment as unsubstantiated information and requested verification as to how that information was determined.

Following the hearing, the Office hearing representative requested that the employing establishment provide the documentation used to determine appellant's current salary, which the record reflects was received on May 2, 2002. In a letter dated May 7, 2002, the Office hearing representative informed appellant's counsel that documentation was received from the employing establishment which supported appellant's financial wage information supplied to the Office. The hearing representative indicated that she received a copy of appellant's personnel action form dated January 21, 1986, which noted that appellant's initial salary as a Junior Nurse, GS-6, Step 10 was \$20,150.00 and a payment chart, which indicated that a nurse at her original grade level currently earned \$48,501.00 as of January 14, 2001. The record reflects that appellant's counsel received a copy of the wage information.

Appellant's counsel submitted a letter dated May 22, 2002, in which he stated that the Office failed to meet its burden of proof when it filed the notice of proposed reduction of compensation on April 19, 2001 without the documentary record that supported the proposed reduction and that its burden was not met until he received the May 7, 2002 letter and attached documentation. Appellant's counsel argued that the notice of proposed reduction of compensation should not be effective until May 7, 2002.

In a decision dated September 23, 2002, the Office hearing representative indicated that he reviewed the evidence of record, including the testimony and arguments raised at and after the hearing and determined that the Office appropriately modified appellant's compensation to reflect her current wage-earning capacity and affirmed the prior decision. The Office hearing representative noted the arguments made by appellant's counsel and indicated that many were discussed in the Office's April 19, 2001 decision. The hearing representative also noted the arguments made by appellant's counsel in his May 22, 2002 letter, specifically, that the Office in having failed to provide the documentary record that supported the proposed reduction with the April 19, 2001 notice, deprived appellant of sufficient opportunity to investigate the matter. The Office hearing representative noted that the Office did request pay rate information from the employing establishment to make a determination on wage-earning capacity and although a copy of the Office's January 25, 2001 request to the employing establishment was not forwarded to the claimant, the pay information (Form CA-816) and wage-earning capacity calculations were included in the proposed notice of March 12, 2001. The Office hearing representative found that the evidence established that appellant's counsel was aware of the pay rate information used in the Office decision, as he noted what the information contained. The hearing representative then stated that appellant's counsel did not mention the Office's failure to supply appellant with a copy of their request to the employing establishment as a basis for his disagreement with the proposed decision. The Office hearing representative concluded that the Office's decision to modify appellant's compensation was based on valid and accurate pay rate data from the employing establishment and that the evidence of record failed to demonstrate that the wage-earning capacity decision was erroneous.

The Board finds that the Office improperly modified appellant's loss of wage-earning capacity determination.

In order to modify a formal loss of wage-earning capacity determination, the Office must establish either that the original rating was in error, that the claimant's medical condition had changed or that the claimant has been vocationally rehabilitated.¹ The burden of proof is on the party seeking modification in this case of the Office.² The Office may modify a wage-earning

¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(a) (June 1996). See also *Mildred Alder-Johnson*, 50 ECAB 474 (1999); *Charles D. Thompson*, 35 ECAB 22 (1983); *Elmer Strong*, 17 ECAB 226 (1965).

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(b) (June 1996). See also *Jack E. Rohrbaugh*, 38 ECAB 186 (1986).

capacity determination if the claimant is employed in a new job earning 25 percent more than the current rate of pay for the job for which the claimant was rated.³ The Office must:

“(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.”⁴

As the Office had previously determined appellant’s loss of wage-earning capacity in November 1987, it had the burden of justifying its modification of appellant’s compensation. In the instant case, modification was not based on a material change in nature and extent of injury-related condition or on the fact that the original determination was erroneous. The Office modified appellant’s previous loss of wage-earning capacity determination, because she was found to be self-rehabilitated.

In this case, the Office, in accordance with the Federal Employees’ Compensation Act, gathered information regarding appellant’s employment, including a list of duties and qualifications, in addition to wages earned for the various positions held following her federal employment. By notice of proposed reduction dated March 12, 2001, the Office advised appellant of its proposal to reduce her compensation. The Office specifically outlined that appellant accepted the most recent position as a nurse case manager for Blue Cross Blue Shield on June 5, 1995 at \$18.00 an hour and that her current salary as denoted by an EN1032 form dated January 30, 2001 was \$25.72 an hour or \$1,028.80 a week. The Office then outlined the current salary for appellant’s date-of-injury position of registered nurse, at the salary level of Grade 6, step-10, which was equivalent to \$48, 501.00 a year or \$932.71 a week.

The Office further noted that the responsibilities of the case manager position involved patient contact in the field, independent decision making and extensive verbal and written communication in showing projected savings and preparing monthly reports. The Office found that over the 13 years since appellant’s wage-earning capacity was established that she had enhanced her skill level through actual work experience. The Office specifically noted that her prior experience as a registered nurse case manager at United Health Care Corporation, provided a basis of knowledge upon which she has expanded, which qualified her for the current position. The Office further discussed how the new job differed significantly in duties and responsibilities from the claims examiner position. The Office discussed that the claims examiner position was strictly office-based; that all the work was completed on the computer and her effectiveness was evaluated in terms of processing claims and resolving bills whereas, in the current nurse case

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c) (June 1996).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(d) (June 1996).

manager position appellant had patient contact, was more engaged in verbal and written communication and was held to a higher standard of productivity. The Office based its modification of appellant's compensation benefits on the factors outlined above.

Based on the evidence of record, the Office has sufficiently determined that appellant secured a new position as nurse case manager, different from the claims examiner job upon which appellant's compensation entitlement was determined and that her on-the-job training qualified her for the new position. Self-rehabilitation is evidenced in this case, by the fact that appellant had obtained a series of progressively more responsible positions related to nursing, her initial field of training, for which she earned an increase of salary. However, very importantly, the record does not establish that the new job, *i.e.*, the nurse case manager position pays at least 25 percent more than the current pay for the claims examiner job appellant held when rated. The Board notes that the Office focused on the date-of-injury position and not the claims examiner job, which appellant held when she was rated.

As stated above, in order to justify modification in this case, Chapter 2.814.11(c)(2) of the Office's procedure manual provides that the Office must show that appellant had a "new" job other than the job for which she was rated, which pays at least 25 percent more than the current pay of the job which appellant was rated. The record supports that on January 25, 2001 the Office requested that the employing establishment provide pay rate information regarding the grade and step appellant held on June 25, 1986, the date of injury and also the current pay rate for this grade and step. On March 8, 2001 a representative of the employing establishment responded that appellant was a Grade 6, step 10 registered nurses at the time of her injury and according to the nurse schedule conversion chart, the salary rate for a nurse at that level was currently \$48,501.00. In the modification decision the Office utilized this information and improperly compared appellant's current earnings to the current pay of a registered nurse, the date-of-injury position to determine that her wage-earning capacity instead of determining the current pay rate of the claims examiner position held at the time she was rated.

As the Office failed to follow its own procedures in modifying the original wage-loss determination, in showing that the new job, *i.e.*, the nurse case manager position pays at least 25 percent more than the current pay for appellant, when rated in the claims examiner job, in 1987, the Office did not meet its burden of proof to formally modify the original loss of wage-earning capacity decision.⁵

⁵ The Board notes that appellant's counsel offered various arguments in this case, regarding the pay rate information submitted by the employing establishment for appellant's date-of-injury position and the information of record regarding her current salary in contesting the modification of benefits. The Board notes that such information is relevant only when applying the principles set forth in *Albert C. Shadrick*, 5 ECAB 376 (1953), after the basis for modification has been established, which is not the case here.

The September 23, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
November 18, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member