United States Department of Labor
Employees' Compensation Appeals Board

MARTIN A. OTERO, Appellant **and** **DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Albuquerque, NM, Employer**	)	**Docket No. 06-89** **Issued: June 14, 2006**

Appearances:
Edward L. Daniel, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 13, 2005 appellant, through his representative, filed a timely appeal from a July 19, 2005 merit decision of a hearing representative of the Office of Workers' Compensation Programs affirming a modification of his loss of wage-earning capacity and a finding that he received an overpayment of compensation for which he was at fault. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to modify appellant's June 1, 1992 wage-earning capacity determination; (2) whether appellant received an overpayment of compensation in the amount of $18,279.90; and (3) whether the Office properly determined that he was at fault in creating the overpayment.

FACTUAL HISTORY

On September 28, 1987 appellant, then a 44-year-old air traffic controller, filed a claim for stress and trauma occurring on August 28, 1987 while in the performance of duty. The

Office accepted his claim for a temporary aggravation of anxiety disorder.[1] Appellant stopped work on September 14, 1987 and returned to work on December 21, 1987, in a reassigned position as an air traffic control (ATC) specialist.

By decision dated June 1, 1992, the Office found that appellant's actual earnings as an ATC specialist effective December 21, 1987 fairly and reasonably represented his wage-earning capacity. The attached position description showed that the official title of appellant's position was an ATC specialist and his organizational title was automation specialist.[2]

The Office received information from the employing establishment regarding appellant's salary increases and positions held from 1998 through January 12, 2003.

By decision dated March 10, 2003, the Office modified its June 1, 1992 wage-earning capacity determination on the grounds that appellant was rehabilitated and his salary on or around January 1, 1999 equaled or exceeded his date-of-injury pay as a GS-13, Step 7, including his loss of premium pay, Sunday pay and night differential.

In a decision dated April 15, 2003, the Office finalized a finding that appellant received an overpayment of $15,799.90 because he received monetary compensation on or after October 1, 1998 while receiving earnings that equaled or exceeded those of his date-of-injury position. The Office found that he was at fault in the creation of the overpayment because he knew or should have known that he received incorrect payments.

By decision dated August 25, 2003, a hearing representative reversed the March 10 and April 15, 2003 decisions, on the grounds that the record contained insufficient evidence to establish that appellant had been retrained or vocationally rehabilitated. The hearing representative found that the Office had not determined the exact duties of his current position or whether he had received additional training.

In a letter dated September 18, 2003, an official with the employing establishment submitted a history of appellant's promotions and a list of courses completed from 1992 to 2000. The official indicated that he received a promotion to a GS-13/7 in 1992 and to a GS-14, Step 4 in 1993. On October 14, 1995 appellant was reassigned to a GS-13, Step 10 position as a quality assurance specialist. He was permanently reassigned to that position on March 13, 1996 "in

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[1] By decision dated December 23, 1987, the Office denied appellant's claim on the grounds that he had not established a stress-related condition due to his federal employment. On March 16, 1990 a hearing representative set aside the December 23, 1987 decision and remanded the case for further development. In a decision dated November 21, 1990, the Office accepted the claim for a temporary aggravation of anxiety disorder and found that he had no employment-related disability after April 1989. Appellant appealed to the Board; however, on May 20, 1991 the Board dismissed the appeal at his request. Order dismissing appeal, Docket No. 91-529 (issued May 20, 1991).

[2] In a decision dated September 17, 1992, the Office determined that appellant received an overpayment of compensation in the amount of $51,006.58 because he received compensation for temporary total disability from November 18, 1987 to April 30, 1999 when he was only entitled to 178 hours of compensation. The Office found that he was without fault in the creation of the overpayment and that the amount owed him due to his loss of wage-earning capacity beginning December 21, 1987 would be applied to the balance. The Office then determined that it would withhold $238.00, the amount to which he was entitled due to his loss of wage-earning capacity, from his continuing compensation effective June 1, 1992 to recover the overpayment.

order to gain additional administrative and management experience he previously requested in his [i]ndividual [d]evelopment [p]lan." The official stated: "On October 1, 1998 [appellant] was converted to ATC compensation pay. He was reclassified from 2152-13/10 $71,503.00 to 2152 II $77,019.00." Appellant subsequently received a promotion to an operations specialist with a salary of $99,711.00 on November 19, 2000.

By decision dated October 22, 2003, the Office modified its June 1, 1992 wage-earning capacity determination after finding that appellant had been self-rehabilitated such that he earned wages equal to or more than his date-of-injury position on January 1, 1999. The Office determined that he had no loss of wage-earning capacity as of January 1, 1999 and that his actual earnings fairly and reasonably represented his wage-earning capacity. The Office listed the courses he completed and promotions he received from 1987 to November 19, 2000. The Office found that in 1999 his salary ranged from $76,711.00 to $84,000.00 and his date-of-injury salary as a GS-13/7 was $74,922.00; in 2000 his salary ranged from $87,921.00 to $98,048.00 and his date-of-injury salary was $78,579.00; in 2001 his salary was $105,070.00 and his date-of-injury salary was $81,538.00; in 2002 his salary was $111,733.00 and his date-of-injury salary was $85,384.00; and in 2003 his salary was $113,451.00 and his date-of-injury salary was $87,766.00. The Office included premium pay in its determination of appellant's date-of-injury salary.

On October 22, 2003 the Office notified appellant of its preliminary determination that he received an overpayment in the amount of $18,279.90 as he continued to received monetary compensation after his promotion on October 1, 1998, the date that his salary was equal to or greater than his date-of-injury position as a GS-13/7. The Office further informed him of its preliminary determination that he was at fault in the creation of the overpayment as he should have known his benefits changed due to his promotion. The Office specified that the period of the overpayment was from January 1, 1999 through October 4, 2003.

By decision dated November 24, 2003, the Office finalized its finding that appellant received an overpayment of $18,279.90 and that he was at fault in the creation of the overpayment.

In a letter dated November 21, 2003, received by the Office on December 23, 2003, appellant requested a prerecoupment hearing before an Office hearing representative. He argued that the record contained no "documentation showing the differences in the pay systems between air traffic controllers that were previously GS-13/7 and are now recognized as ATC Level [1], Grade 9 within the new pay system to which they were converted in 1998." Appellant contended that his current position was not 25 percent higher than that of air traffic controller under the current core compensation system.[3]

In a statement received by the Office on August 23, 2004, appellant contended that his date-of-injury position as a GS-13/7 ATC would pay $104,717.00 today under the reclassification system. He further contended that the Office should compare his current

[3] Appellant additionally raised questions at the hearing about the Office's attempt to recover the previously declared overpayment found in the September 17, 1992 decision, from his wages now that he was not receiving continuing compensation. This issue, however, is not before the Board at this time.

earnings to that of "today's air traffic controllers within the core compensation system" to determine his wage-earning capacity. Appellant submitted a reclassification from the employing establishment listing pay scales for various facilities.

At the hearing, held on August 11, 2004, appellant related:

> "My present salary in 2003 is $115,333.00 as a regional operations specialist at core compensation level J. That [is] equivalent to a GS[-]13, Step 10, 1998, which I was in my present job as a controller. The 2003 ATC salary comparatively speaking is $119,256.00 and that [is] a certified professional controller under core compensation ATC level [10]…. My position as an air traffic controller recognized with [the Office] is a GS[-]13, Step 7 in 1998 when all other air traffic controllers were reclassified would today pay $104,711.00. I was actually a GS[-]13, Step 10 on that date."

He noted that the base pay of his date-of-injury position "has increased at least 30 percent since 1998." Appellant again argued that the Office should not compare his current core compensation salary with the GS grades. He further contended that he had not been retrained or vocationally rehabilitated as he was still employed as an ATC specialist. Appellant stated:

> "I am not employed in a job that differs significantly in duties, responsibilities or technical expertise from the jobs, which I was rated in from 1987 through 2003. I have not undergone training or vocational preparation to earn my increased salary. My current position as an air traffic control staff specialist must be compared to the wages of an active air traffic controller to correctly determine lost wage[-]earning capacity."

In a letter dated October 14, 2004, an official with the employing establishment related that appellant returned to work as an automation specialist with retained pay in Albuquerque, New Mexico after his employment injury. The official described training courses appellant received and his selection as a traffic management specialist in Herndon, Virginia in August 1993. The official noted that, at appellant's request, he returned to Albuquerque as an automation specialist in October 15, 1995 as a GS-13/10. In 1996, he received a permanent reassignment to a quality assurance specialist position, GS-13/10, in Oklahoma City, Oklahoma in order to gain management experience in accordance with his Individual Development Plan. On November 19, 2000 appellant was selected for an operations specialist position with a promotion to FV-2142-J-00. The official challenged appellant's contention that his job does not differ significantly from his rated position, stating:

> "In summary, [appellant] continued to improve his potential for promotion, by volunteering and accepting new career positions of greater responsibility, complexities and knowledge. The decision concerning his pay and job enhancements have been of his own volition. The effects of [appellant's] pay, since 1993, are solely of his request for career enhancements. As stated earlier, it is the [employing establishment's] opinion that [appellant] exceeded his date[-]of[-]injury salary as GS-2152-13, Step 7, on November 28, 1993 when he accepted the [t]raffic [m]anagement [s]pecialist position, GS-2152-14, Step 4…."

The employing establishment submitted position descriptions and appellant's Standard Form 50s showing personnel actions.

In a response dated October 28, 2004, appellant contended that the positions of automation specialist and quality assurance specialist were "closely related." He further argued that the Office rated him as an air traffic controller rather than an automation specialist in its wage-earning capacity determination. Appellant asserted that the salary estimate for a GS-13/7 on June 13, 2004 was $92,688.00, which when increased by a locality pay of 12.74 percent for his current work location of Dallas/Fort Worth, equaled $104,534.00. He noted that his present salary was $115,333.00 with locality pay, which was less than 25 percent more than his date-of-injury position. Appellant reiterated that his date-of-injury position "today pays significantly more than I earn in my present position."

By decision dated July 19, 2005, the hearing representative affirmed the October 22, 2003 decision modifying appellant's wage-earning capacity and finalized a finding that he received overpayment of compensation and that he was at fault in the creation of the overpayment.[4] The hearing representative found that appellant took training courses and received promotions to positions with more responsibility and thus was vocationally rehabilitated. The hearing representative further determined that appellant's wage-earning capacity should be based on the current salary of a GS-13/7 rather than the salary for the reclassified position. The hearing representative affirmed the finding that appellant received an overpayment of $18,279.90, for which he was at fault in the creation.

LEGAL PRECEDENT

In *Ronald M. Yokota*, the Board stated:

> "Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings. 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. The burden is on the Office to establish that there has been a change so as to effect the employee's capacity to earn wages in the job determined to represent his earning capacity. Compensation for loss of wage-earning capacity is based upon the loss of the capacity to earn and not on actual wages lost."[5]

[4] The hearing representative found that appellant requested a prerecoupment hearing on April 3, 2003, prior to the Office's April 15, 2003 finalizing of the overpayment of compensation.

[5] 33 ECAB 1629 (1982); *see also Marie A. Gonzales*, 55 ECAB ___ (Docket No. 03-1808, issued March 18, 2004).

The Office's procedure manual provides guidelines as to the modification of loss of wage-earning capacity:

> "(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:
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> > (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…."[6]

ANALYSIS

Following his accepted employment injury, appellant returned to work on December 21, 1987 as an ATC specialist with the position title of automation specialist. In a decision dated June 1, 1992, the Office reduced appellant's compensation based on its finding that his actual earnings as an ATC specialist effective December 21, 1987 fairly and reasonably represented his wage-earning capacity. Appellant completed additional training courses and subsequently worked as a traffic management specialist before returning to work as an automation specialist in October 15, 1995 as a GS-13/10. He began working as a quality assurance specialist in 1996, in order to gain management experience. On November 19, 2000 he received a promotion to the position of operations specialist. By decision dated October 22, 2003, the Office modified its

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[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c)-(e) (June 1996 and July 1997).

June 1, 1992 decision to reflect that appellant was not entitled to compensation for a loss of wage-earning capacity effective January 1, 1999 as he was retrained or otherwise vocationally rehabilitated and his current earnings fairly and reasonably represented his wage-earning capacity. The Office found that appellant's actual earnings from 1999 onward were greater than the current earnings for his date-of-injury position as a GS-13/7 including premium pay.

An increase in pay by itself is not sufficient evidence that there has been a change in an employee's capacity to earn wages. 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.[7] 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.[8]

The Office hearing representative found that appellant's position descriptions revealed increasing levels of responsibility and corresponding salary increases, which demonstrated that he was vocationally rehabilitated. The record shows that appellant completed additional training courses and received promotions as a result of his increased training and experience. An official with the employing establishment maintained that appellant had improved his position within the work force by "volunteering and accepting new career positions of greater responsibility, complexities and knowledge." While appellant continued to work as an ATC specialist, his job title is now operations specialist rather than automation specialist and he has significantly increased responsibilities. The Board, consequently, finds that appellant has been vocationally rehabilitated.

The Office, however, has not established that appellant was employed in a job that paid at least 25 percent more than the current pay of the GS-13/7 automation specialist job, for which he was rated beginning in 1999. The Office found that he was vocationally rehabilitated because he obtained positions "in which he earned equal to or more than his grade and step as of the date of his injury and as such has suffered no loss of wages as a result of his work injury of August 28, 1987." Under the Office's procedures, however, the relevant issue is whether appellant earned 25 percent more than the current pay of the job, for which he was rated rather than his date-of-injury position. Additionally, the Office did not determine whether appellant earned 25 percent more than his GS-13/7 position beginning in 1999, but instead found merely that he earned "equal to or more than" his date-of-injury position. The Office's comparison of appellant's date-of-injury salary to his current salary in its October 22, 2003 decision, shows that he earned 25 percent more in his current position than he made as a GS-13/7 only beginning in 2002.

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[7] *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).

[8] *See Billy R. Beasley*, *supra* note 7.

Additionally, the Office has not adequately explained why it compared appellant's current earnings under the employing establishment's revised compensation system to the current earnings he made in a GS position, which no longer exists at the employing establishment. The Board stated in *Albert C. Shadrick*[9] that "[i]n computing claimant's loss of earnings if his present increased wage is used as one of the factors, then the present increased wage for his original job should also be used. The difference would be an indication of the deficiency in earning power." In this case, the Office did not determine whether it is possible to determine the current salary for appellant's rated position as a GS-13/7 automation specialist under the reclassified system presently used by the employing establishment.

As noted above, it is the Office's burden to establish that appellant has been vocationally rehabilitated such that he is employed in a new job earning a salary at least 25 percent more than the current pay of his rated position. Since the Office failed to follow its procedures, the Board finds that the Office failed to meet its burden of proof in this case.[10]

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 decision of the Office of Workers' Compensation Programs dated July 19, 2005 is reversed.

Issued: June 14, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

[9] 5 ECAB 276 (1953).

[10] In view of the Board's reversal of the Office's modification of appellant's wage-earning capacity determination, it is premature to address the issue of whether he received an overpayment of compensation in the amount of $18,279.90 and whether the Office properly determined that he was at fault in creating the overpayment.