

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

C.S., Appellant)

and)

DEPARTMENT OF THE NAVY, NAVAL)
CRIMINAL INVESTIGATIVE SERVICE,)
New Orleans, LA, Employer)

Docket No. 11-567
Issued: January 17, 2012

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 5, 2011 appellant filed a timely appeal of the October 19, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) modifying a loss of wage-earning capacity determination. 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.

ISSUE

The issue is whether OWCP met its burden of proof to modify its determination of appellant's wage-earning capacity effective June 11, 2010.

On appeal, appellant contends that OWCP used incorrect pay rates and a salary schedule to modify its loss of wage-earning capacity determination. He further contends that it did not consider his age, nature of injury and degree of permanent impairment in modifying his loss of wage-earning capacity.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on April 7, 1976 appellant, then a 42-year-old GS-12, Step 4 investigator, sustained a herniated disc at L4-5 while in the performance of duty. It authorized an L5-S1 decompression and discectomy which were performed on April 20, 1977.

The employing establishment was unable to provide appellant with employment within his permanent work restrictions. Appellant retired on disability effective July 27, 1978. On May 7, 1979 he elected to receive total disability compensation benefits from OWCP rather than retirement benefits from the Office of Personnel Management.

On March 15, 1982 appellant advised OWCP that he earned \$16,000.00 per year based on a full-time 48-hour workweek as a loss prevention manager at Mervyn's department store in El Paso, Texas.

In a May 5, 1982 decision, OWCP found that appellant's actual earnings as a loss prevention manager fairly and reasonably represented his wage-earning capacity.

In an October 31, 1991 Form CA-1032, appellant stated that he had been working as a teacher in Washington state since January 1, 1991. He worked as a substitute teacher on an on-call basis from January 7 to May 1991 earning \$42.50 per day. Appellant worked as a regular teacher commencing August 19, 1991 earning \$20,007.00 per year. In CA-1032 forms dated October 30, 1992 through October 4, 1999, he reported yearly earnings as a teacher which included \$21,366.00 in 1992; \$24,858.00 in 1994; \$26,812.00 in 1996, \$35,055.00 in 1997, \$41,500.00 in 1998 and \$41,040.00 in 1999.

A July 7, 1994 transcript from the University of Texas showed that appellant had been enrolled in a Master of Education program commencing in the fall of 1990. He enrolled in courses entitled "Intro to Exceptional Children" and "Educational Law." In the spring of 1991, appellant enrolled in a course entitled "Teach Learning Disabled Reading." In the fall of 1991 and spring of 1992, he was enrolled in courses entitled "Teach Child with Learning Disability" and "Students Learning Disability," respectively. On October 15, 1996 appellant received a special education teaching certificate for grades kindergarten through 12 from the State of Washington.

In a May 26, 2000 decision, OWCP modified its May 5, 1982 wage-earning capacity determination effective that date, finding that appellant had been vocationally rehabilitated as a special education teacher and that his earnings in this position were greater than his earnings in his date-of-injury position. It concluded that the special education teacher position fairly and reasonably represented his wage-earning capacity.

By letter dated June 16, 2000, appellant requested an oral hearing.

In a decision dated February 5, 2002, an OWCP hearing representative reversed the May 26, 2000 decision. He found that appellant had been vocationally retrained as his special education teacher position was substantially different than his loss prevention manager position for which he was originally rated. Also, appellant had obtained additional qualifications for employment through retraining before working as a special education teacher. The hearing

representative, however, found that OWCP did not establish that his earnings in this position were 25 percent or more than his earnings as a loss prevention manager.

In a Form CA-1032 dated October 18, 2009, appellant advised OWCP that he had been employed as a special education teacher with the Auburn School District in Auburn, Washington since September 1, 2002. He earned \$79,332.00 in this position.

In a November 24, 2009 medical report, Dr. Kenneth Takemura, an attending Board-certified physiatrist, obtained a history of the April 7, 1976 employment injury and appellant's medical and social background. He had not evaluated appellant in nearly three years. On physical examination of the lower extremities, Dr. Takemura reported essentially normal findings with the exception of tightness in the hamstrings and hip flexors, and mild hip flexion contraction on the right side based on a Thomas test. On neurological examination of the lumbar spine and lower extremities, he found mild restriction with both lumbar flexion and extension. Straight leg raise testing evoked pain in the right hamstring. Deep tendon reflexes were traced in the lower limbs. There was decreased sensation along the right lateral foot. Strength was relatively well preserved in the lower extremities, except for some mild weakness in hip extension on the right side in comparison to the left side. Dr. Takemura advised that appellant was able to walk without any abnormal features except for slight flexed posture. He diagnosed chronic right S1 radiculopathy due to the accepted employment injury and resultant surgery. Dr. Takemura stated that appellant's condition remained stable without any significant change since his last evaluation in December 2006. Appellant was still restricted to light-duty work, but he did not have any new physical restrictions. Dr. Takemura stated that appellant could not clearly return to his date-of-injury position. Despite his older age appellant appeared to be doing well and thrived in his teaching position. Dr. Takemura concluded that appellant should be allowed to continue performing such less physically demanding type of work as long as he was capable.

On February 12, 2010 OWCP requested that a vocational rehabilitation counselor provide market data for appellant's former loss prevention manager position. In a March 5, 2010 report, a rehabilitation counselor advised that the correct title for his loss prevention manager position which he held at Mervyns and J.C. Penney was an internal security manager according to the Department of Labor's *Dictionary of Occupational Titles*. He obtained wage information from J.C. Penney stores in Washington State and Texas and determined that the average yearly wage was from \$30,000.00 to \$54,000.00.

On May 5, 2010 OWCP issued a notice of proposed modification of its 1982 wage-earning capacity decision based on appellant's employment as a special education teacher. It found that his teacher position was substantially different from his department store security manager position. OWCP also found that appellant had obtained additional qualifications for employment through retraining. It noted that he had received his license to teach subsequent to its 1982 wage-earning capacity determination. OWCP stated that the current pay rate for a loss prevention manager was \$30,000.00 to \$54,000.00 per year. It found that appellant's current earnings of \$79,332.00 per year as a special education teacher were at least 25 percent more than the highest salary range of a loss prevention manager. OWCP found that as he had worked in the special education position since September 1, 2002, the position represented his wage-earning capacity.

In a May 28, 2010 letter, appellant disagreed with the proposed action. He reported an incorrect salary on the October 18, 2009 Form CA-1032. Appellant's correct salary was \$76,246.89. He stated that he was a GS-12, Step 5 when he retired from the employing establishment on June 28, 1978 and contended that OWCP incorrectly used the general schedule salary table rather than the general schedule-law enforcement officer table to calculate his loss of wage-earning capacity which was applicable to special agents from GS-3 through GS-13. Appellant questioned why OWCP took approximately nine years from February 5, 2002 to May 5, 2010 to propose a change in his compensation. He asserted that it used an incorrect pay rate. Appellant stated that a May 5, 2010 OWCP letter indicated that he was a GS-12, Step 4 with a pay rate of \$452.84 per week while an April 26, 1977 Form CA-816 indicated that he was a GS-12, Step 5 with a weekly pay rate of \$524.84 on the date of recurrence, resulting in a difference of \$70.00 per week. He contended that the April 26, 1977 Form CA-816 did not consider cost-of-living increases as required by 5 U.S.C. § 8114(3). Appellant further contended that OWCP incorrectly determined that he was entitled to 15 percent rather than 25 percent premium pay of a GS-10. He submitted documents which stated that the premium pay rate for special agents was 25 percent. Appellant alleged that OWCP did not consider his age, nature of injury and degree of permanent impairment in modifying his loss of wage-earning capacity.

The record reveals that a pay adjustment effective October 9, 1977 noted that appellant's base and premium pay was \$27,291.70 a year or \$524.84 per week as a GS-12, Step 5.

In a June 11, 2010 decision, OWCP finalized the modification of its May 5, 1982 wage-earning capacity determination. It reduced appellant's compensation effective June 11, 2010 based on its finding that his actual earnings as a special education teacher for at least 60 days fairly and reasonably represented his wage-earning capacity. OWCP applied the formula in *Albert C. Shadrick*² to determine that his pay rate on the date his disability recurred on December 16, 1977 was \$524.84 per week; that the current adjusted pay rate of his date-of-injury position was \$1,713.93 per week effective March 5, 2010;³ and that his current special education teacher position paid \$76,246.89 per year or \$1,466.29 per week.⁴ It determined that appellant had an 86 percent wage-earning capacity, which resulted in a loss of wage-earning capacity of \$451.36 per week. OWCP concluded that, based on a three-fourths compensation rate which was increased by the applicable cost-of-living adjustments, his new compensation rate was \$675.00 every four weeks, less health benefits premium of \$370.12, for a net compensation every four weeks of \$304.88.

On July 5, 2010 appellant requested a review of the written record by an OWCP hearing representative. He reiterated his prior contentions, including that OWCP improperly calculated his wage-earning capacity as it was not based on his recurrent pay rate in 1977 and OWCP failed to consider his age, nature of injury and degree of impairment.

² 5 ECAB 376 (1953).

³ This figure was comprised of the sum of \$80,761.00 (base salary of a GS-12, Step 4) and \$8,363.10 (administratively uncontrollable overtime pay (base salary of a GS-10, Step 1) times 15 percent) divided by 52 weeks.

⁴ Appellant's 2009 W-2 forms showed earnings of \$76,246.89 per year.

A July 31, 1977 notification of personnel action (Form SF-50) listed that appellant received a within-grade increase from a GS-12, Step 4 to a GS-12, Step 5, earning \$25,494.60 in base and premium pay per year and that he was Fair Labor Standards Act exempt.

A Form CA-816 computation of wage-earning capacity dated April 26, 1979 indicated that he was a GS-12, Step 5 when he sustained an employment-related recurrence of disability on December 16, 1977.

In a June 21, 2010 e-mail, Carlos Saavedra, an employing establishment compensation program manager, advised that special agents were covered by the law enforcement officer pay schedule. He stated that this schedule only included law enforcement officer special base pay for agents classified as GS-3 through GS-10. The regular applicable locality based general schedule rates covered positions classified above GS-10.

In an October 19, 2010 decision, an OWCP hearing representative affirmed the June 11, 2010 decision. She found that appellant took education-related courses and was vocationally rehabilitated as a special education teacher. The hearing representative also found that his loss of wage-earning capacity was properly determined as his actual earnings in this position exceeded his former earnings as a loss prevention manager for which he was originally rated in by 25 percent or more. She found that the medical evidence established that appellant could continue working as a special education teacher.

LEGAL PRECEDENT

Section 8115(a) of FECA provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings, if actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.⁵

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the work-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.⁶ The burden of proof is on the party attempting to show the award should be modified.⁷

⁵ 5 U.S.C. § 8115(a).

⁶ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁷ *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

OWCP'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:

(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.”⁸

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 for the United States.⁹

ANALYSIS

The Board finds that the evidence establishes that appellant has been vocationally rehabilitated. Appellant was employed in a new job, special education teacher, rather than the position of loss prevention manager which OWCP initially used to determine his wage-earning capacity. His position as a special education teacher meets the applicable criteria. Appellant

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c)-(e) (October 2009).

⁹ 5 U.S.C. § 8101(4).

underwent training to obtain this position and the position differs significantly in duties and responsibilities from that of prevention loss manager, the position in which he was previously rated. The record shows that he enrolled in a Master of Education program at the University of Texas in the fall of 1990. Appellant completed education courses during the fall of 1990 through the spring of 1991. He received a teaching certificate for grades kindergarten through 12 from the State of Washington on October 15, 1996. Appellant worked as a substitute teacher in Washington from January 7 to May 1991. He worked as a regular teacher commencing August 19, 1991 with salary increases through 1999. The Board finds that these facts, coupled with the increased earnings appellant was able to obtain in his position as a special education teacher, establish that he has been vocationally rehabilitated.

As OWCP correctly determined that appellant had been vocationally rehabilitated due to the increased duties and responsibilities of the new position, it must then determine whether the new job of special education teacher pays at least 25 percent more than the current pay of the job for which appellant was rated, prevention loss manager.¹⁰ The Board finds that it properly compared appellant's earnings as a special education teacher with his earnings in the previously rated position of prevention loss manager and calculated his loss of wage-earning capacity using the *Shadrick* formula.¹¹ For the stated reasons, the Board finds that OWCP met its burden of proof to modify the May 5, 1982 wage-earning capacity determination.

Appellant contended that OWCP improperly calculated his loss of wage-earning capacity. He asserted that it did not use the correct pay rate in effect on December 16, 1997, the date of his recurrence of disability. Appellant stated that he was a GS-12, Step 5 on that date and not a GS-12, Step 4, his pay rate on the date of his accepted employment injury. He asserted that OWCP incorrectly applied the general schedule salary table rather than the general schedule-law enforcement officer table and calculated his premium pay using a 15 percent pay rate rather than a 25 percent pay rate of a GS-10, Step 1 from the general-law enforcement officer salary table. Appellant contended that OWCP failed to consider cost-of-living increases as required by section 8114(3) of FECA in determining his loss of wage-earning capacity. The Board finds that OWCP properly determined appellant's rate of pay in this case. The record documents that effective October 9, 1977 he earned \$27,291.70 a year or \$524.84 per week based on his base and premium pay as a GS-12, Step 5. OWCP also properly included the 15 percent administratively uncontrollable overtime pay rate in appellant's base pay.¹² Mr. Saavedra stated that, although special agents were covered by the law enforcement officer pay schedule, the special base rates only applied to GS-3 through GS-10 agents. He stated that the regular applicable locality based general schedule rates applied to positions classified above GS-10. As appellant was a GS-12, Step 5 December 16, 1997, OWCP correctly used the 15 percent premium pay rate. Lastly, it specifically stated in the June 11, 2010 decision, that his loss of wage-earning capacity included applicable cost-of-living adjustments. The Board finds that OWCP properly based its

¹⁰ See *supra* note 8.

¹¹ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.814.11(c)(d) (October 2009).

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.8(b) (December 1995).

calculations on the \$524.84 per week pay rate and correctly applied the *Shadrick* formula to calculate appellant's loss of wage-earning capacity.

Appellant contended that OWCP did not consider his age, nature of injury and degree of permanent impairment in modifying his loss of wage-earning capacity. The Board finds, however, that OWCP properly considered the factors in modifying its 1982 wage-earning capacity determination. The Board reviewed the relevant medical evidence, which included Dr. Takemura's November 24, 2009 report who found that appellant was physically capable of continuing work as a teacher. Dr. Takemura listed essentially normal findings on examination of the lower extremities and lumbar spine and advised that appellant's condition remained stable without any significant change since his last evaluation in December 2006. He also advised that appellant was unable to return to his date-of-injury position. Dr. Takemura stated that he was still restricted to light-duty work, but he had no new physical restrictions. He concluded that despite appellant's older age he appeared to be doing well and thrived in his teaching position. The Board finds that OWCP appropriately considered the required factors in determining that appellant's actual earnings as a special education teacher fairly and reasonably represented his wage-earning capacity. There is no evidence of record establishing that modification of the loss of wage-earning capacity decision was not warranted.

Appellant may request modification of the wage-earning capacity determination supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP met its burden of proof to modify its determination of appellant's loss of wage-earning capacity effective June 11, 2010.

ORDER

IT IS HEREBY ORDERED THAT the October 19, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 17, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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