United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 12-1221**
	)	**Issued: February 11, 2013**
U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 15, 2012 appellant, through his attorney, filed an appeal from a March 30, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 properly modified its wage-earning capacity determination effective November 21, 2010.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated August 4, 2010, the Board affirmed July 14 and 20, 2009 OWCP overpayment decisions.[2] The Board found that

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 09-2067 (issued August 4, 2010).

OWCP properly determined that appellant received a $5,032.67 overpayment of compensation from March 28, 2008 to April 11, 2009 for the underwithholding of health insurance premiums and a $2,168.57 overpayment from March 14, 2007 to April 11, 2009 for the underwithholding of life insurance premiums. The Board further found that it properly denied waiver and required repayment of both overpayments. The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

OWCP accepted that appellant, then a 39-year-old supervisor of distribution operations, sustained an emotional condition due to his federal employment. It accepted that events occurring on November 29, 1995 resulted in anxiety; single episode depressive disorder, temporary aggravation alcoholism and gastritis. OWCP paid wage-loss compensation for disability and appellant was referred for vocational rehabilitation services after the employing establishment advised it could not accommodate his restrictions. By decision dated November 2, 2004, it determined that the selected position of administrative clerk represented his wage-earning capacity and adjusted his compensation, finding a 59 percent capacity to earn wages. OWCP found that appellant could earn $560.00 a week in the selected position.

On November 25, 2006 appellant was reinstated as supervisor of distributions. He stopped work on March 14, 2007 and did not return. On April 10, 2010, following a Merit Service Protection Board settlement, appellant returned to work as a Labor Relations Specialist. He worked in that position from April 10, 2010 until May 31, 2011, when he retired.

By letter dated October 8, 2010, OWCP advised appellant that it proposed to modify the wage-earning capacity determination and reduce his wage-loss compensation to zero. It noted that he had been rehabilitated in his position as a labor relations specialist, with weekly actual earnings of $1,099.27, as the employing establishment had provided him classroom and web-based training[3] and that his current position paid 25 percent more than the current pay for his rated job as administrative clerk.[4] OWCP applied the *Shadrick* formula[5] to appellant's actual earnings as a labor relations specialist and determined that appellant had no wage loss. It allowed appellant 30 days to submit additional evidence or argument.

In an October 22, 2010 telephone call, appellant advised OWCP that he was an Executive and Administrative Step (EAS) schedule 17 at the time of injury.

By decision dated November 10, 2010, OWCP modified its November 2, 2004 wage-earning capacity decision based on a finding that appellant had been vocationally rehabilitated and that his current job as labor relations specialist paid at least 25 percent more than the current pay rate of the job for which he was previously rated. It reduced his wage-loss

[3] The employing establishment provided a position description for appellant's labor relations specialist position and submitted records of his training history which showed that between April 22 and July 28, 2010, appellant took three web-based and two classroom training classes for his job.

[4] In a September 25, 2010 labor market survey, a rehabilitation specialist determined that the current weekly wage rate for an administrative clerk was $624.80 a week. Twenty-five percent of $624.80 is $156.20. These two numbers added ($624.80 + 156.20) equals $781.00.

[5] *Albert C. Shadrick*, 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

compensation benefits to zero after finding that he had no loss of wage-earning capacity and his actual earnings fairly and reasonably represented his wage-earning capacity. OWCP noted the correct payrate was used as appellant was a grade EAS 16, not 17, at the time of injury.[6]

On November 23, 2010 counsel requested a telephonic hearing, which was held March 9, 2011. He argued that the labor relations specialist position was an odd lot or make-shift position as it was created specifically for him. Counsel referenced a March 17, 2010 e-mail which stated a labor relation specialist position was to be created for appellant. Appellant testified that the MSPB decision directed the employing establishment to place him in a position in the Oakland District and that he was not provided with a written job description or job offer. He asserted that he was not assigned to an area in his labor relations specialist position and that his duties consisted of opening the mail, filing, making labels and answering telephones, tasks previously done by the five labor relations specialists.

In an April 25, 2011 statement, Eric Thomas, Manager Labor Relations, responded to the hearing transcript. He stated that the labor relations specialist position was created specifically for appellant as the MSPB had ordered the employing establishment to have appellant fill a legitimate position as his restoration rights had been violated. Mr. Thomas explained that when appellant had applied for labor relations specialist position, there were two vacant positions and he was not selected for either position. However due to MSPB's order appellant was working legitimate duties for the position. Mr. Thomas stated that appellant knew what was involved in the labor specialist relation job as the application process disclosed the job description and appellant had to respond to questions regarding experience, knowledge, skills and abilities. He stated that appellant had protection through the reorganization/restructuring process and if his position was eliminated, he would still have a job as other positions were usually available during reductions in force (RIF) or restructuring and postal employees have certain protection during such process. Mr. Thomas explained that appellant's job was not makeshift as appellant had advocated grievances in arbitration, handled grievances for management at step 2 of the grievance process and provided advice, guidance and counsel to Field and Plant Operations. He noted that appellant attended advocacy training and grievance and contract training. Mr. Thomas explained that the tasks performed by appellant were duties shared to some degree by all labor relations specialists and had been a part of the unit since he first became a member of the labor relations operations in 1992. He further stated that he had discussed with appellant many times his intention to assign him to an area when he became more experienced in labor relations. Mr. Thomas explained that he trained inexperienced labor relations personnel by acclimating them through the grievance process as it was critical to the success of becoming well rounded labor relations specialists. The skill of providing accurate labor relations advice to the field can only be achieved by interacting with three major labor agreements as a step 2 designee. Mr. Thomas stated that appellant has received training as a step 2 designee and currently handled grievances and arbitrations.

Also submitted were documents associated with the MSPB settlement agreement. A copy of the standard position of labor specialist was provided along with a copy of appellant's training history.

[6] This is confirmed by appellant's June 19, 1996 occupational disease claim form.

By decision dated May 16, 2011, OWCP's hearing representative remanded the case for further development. The hearing representative found that clarification was required from the employing establishment regarding if appellant had been vocationally self-rehabilitated, if he was performing the full duties of labor relations specialist and if he had training to obtain the skills to perform the full duties of that position.

On June 6, 2011 OWCP requested additional information from the employing establishment. In a July 1, 2011 response, Mr. Thomas stated that the labor relations specialist position was a full-time position that would probably not be filled should appellant vacate it. He indicated that appellant's duties and responsibilities were the same as given in his April 25, 2011 statement. Mr. Thomas noted that appellant had retired effective May 31, 2011. He also stated that the training listed on the April 25, 2011 statement was designed to enable appellant, and others, to perform the labor relations specialist job.

By decision dated September 15, 2011, OWCP modified its November 2, 2004 wage-earning capacity decision after finding that appellant had been self-rehabilitated such that he held the labor relations specialist position for an extended period, from April 10, 2010 until his retirement on May 31, 2011, that he received specific training to perform such position and that he earned wages more than the previous job for which he was rated on November 2, 2004. It determined that he had no loss of wage-earning capacity and his actual earnings fairly and reasonably represented his wage-earning capacity.

On September 25, 2011 counsel requested a telephonic hearing, which was held on January 11, 2012. He argued that the labor specialist position was "make-work" and that appellant was basically a clerk, not a labor relations specialist. Counsel contended that the employing establishment offered training, which appellant signed up for, then cancelled him from the training and then terminated his position for not attending the training. Appellant testified that he was not given a private office when he was hired, as were other labor relations specialists, and sat in the front office at a desk previously occupied by a clerk. He stated that he did the filing and telephone calls, but was not assigned cases. Appellant attended meetings and assisted other labor relations specialists, but never handled any cases himself. He attended training sessions that was offered or required for everyone in the building, but never received any specific training for his job as a labor relations specialist. Appellant stated that his training for newly hired labor relations specialists in March or April 2010 was cancelled by his supervisor, Mr. Thomas, without any reason and that approximately two weeks later, he was told that the position was being eliminated due to RIF. He retired in May 2011 as he felt he would be fired if he did not take the early out retirement package.

By decision dated March 30, 2012, OWCP's hearing representative affirmed the September 15, 2011 decision.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[7] When an employee cannot return to the date-

[7] 5 U.S.C. § 8102(a).

of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, OWCP must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.[8]

Once the wage-earning capacity 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. These are the customary criteria for modification and the burden of proof is on the party attempting to show that modification of the determination is warranted.[9]

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] 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.[11]

With respect to modification of wage-earning capacity, OWCP 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 [establishment] 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. *CE* [*Claims Examiner*] *Actions*. If these earnings have continued for at least 60 days, the CE should:
>
> > (1) *Determine the duration, exact pay, duties* and responsibilities of the current job.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

[9] *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Daniel J. Boesen*, 38 ECAB 556 (1987).

[10] *Marie A. Gonzales*, 55 ECAB 395, 399 (2004).

[11] *See Willard N. Chuey*, 34 ECAB 1018 (1983).

(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."[12]

ANALYSIS

Due to residuals of his 1995 emotional condition, appellant was unable to resume his previous position as a distribution operations supervisor. OWCP issued a November 2, 2004 wage-earning capacity determination based on a constructed position of administrative clerk. As part of a MSPB settlement, appellant returned to work as a labor relations specialist and worked in that position from April 10, 2010 until his retirement on May 31, 2011. On September 15, 2011 OWCP modified the November 2, 2004 wage-earning capacity decision to reflect that he was vocationally rehabilitated as a labor relations specialist and his current earnings fairly and reasonably represented his wage-earning capacity. It found that appellant's salary in the labor relations specialist job exceeded the current pay rate of an administrative clerk job by more than 25 percent, that he had training and held the labor relations specialist job from April 10, 2010 until his May 31, 2011 retirement, and that he was vocationally rehabilitated. OWCP's hearing representative affirmed that decision on March 30, 2012.

Appellant claimed that OWCP failed to meet its burden of proof to establish that he was vocationally rehabilitated permitting modification of the November 2, 2004 wage-earning capacity determination. The Board disagrees.

The labor relations specialist position was a permanent full-time position which had a job description, appellant was given work to perform and he was provided training to perform the position. He was placed in the labor relations specialist position under an MSPB settlement. The fact that there was no vacancy announcement or vacancy in the department when appellant was placed in such position or the fact that he did not have a private office does not establish that it was a makeshift position. The position of labor relations specialist differs from the constructed position of administrative clerk, which was strictly clerical in nature. Although appellant may have performed some clerical duties as part of his position as labor relations specialist, the evidence reflects that those duties were performed to some extent by all the labor relations specialists and that this work was part of the training process. He also underwent the same training that was offered for all new labor relations specialists: he attended and completed training courses, was acclimated through the grievance process and was advised that he would be assigned a specific workload when he was more experienced. While his training in Washington, DC, was cancelled, appellant had completed other training courses which were designed to enable him to perform the labor relations specialist position and had been performing many of

[12] *Supra* note 8 at Chapter 2.814.11(c)-(e) (October 2009).

the job duties of a labor relations specialist, including grievances resolutions. Although he asserted that his position was slated to be "riffed," he voluntarily chose instead to retire. The fact that the employing establishment may have eventually eliminated positions, does not, by itself, establish that the position held for over a year was makeshift or odd-lot work. Appellant's manager also noted that new positions were usually found when there were reorganizations. Thus there is no evidence that appellant was not vocationally rehabilitated as a labor relations specialist.

The Board finds that OWCP followed accepted procedures and adequately addressed the relevant factors for determining that appellant was vocationally rehabilitated. Further appellant has not disagreed and the evidence reflects that his current pay rate had increased significantly more than the required 25 percent than the administrative clerk job for which he was rated. Thus, OWCP met its burden of proof to modify his prior wage-earning capacity determination. It also properly applied the *Shadrick* formula to the wages received and found there was no entitlement to continuing wage-loss compensation.

On appeal, counsel argues the decision is contrary to fact and law. However, for the above reasons, OWCP properly modified its November 2, 2004 wage-earning capacity determination. 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 appellant's November 2, 2004 wage-earning capacity determination and determined he had no wage loss.

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 11, 2013
Washington, DC

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

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

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