

FACTUAL HISTORY

On March 21, 2003 appellant, then a 40-year-old clerk, filed an occupational disease claim alleging pain in her neck and right upper extremity after keying and reaching for parcels. She did not stop work but was reassigned. OWCP accepted appellant's claim for right shoulder impingement syndrome.

Appellant underwent arthroscopic right shoulder surgery on March 16, 2004. She stopped work again on May 18, 2009 before undergoing revision surgery on July 13, 2009. OWCP accepted a right shoulder ganglion cyst. Appellant received compensation for temporary total disability on the periodic rolls based on her May 18, 2009 pay rate.

Effective January 15, 2012, OWCP reduced appellant's wage-loss compensation based on her capacity to earn wages in the selected position of administrative secretary.

On August 9, 2012 OWCP's hearing representative found that the selected position fairly and accurately reflected appellant's wage-earning capacity and that OWCP met its burden in reducing her wage-loss compensation. The hearing representative also found, however, that OWCP did not properly calculate the loss of wage-earning capacity. OWCP had used the pay rate when disability began on May 18, 2009, but disability first began when appellant stopped work for her right shoulder surgery on March 16, 2004. Appellant returned to modified duty following the surgery and continued in this modified capacity until she stopped work again on May 18, 2009. Further, as the evidence supported that she continued working full-time regular duty after her injury until she stopped work for surgery on March 16, 2004, the hearing representative found that the date of injury was the date of her last exposure to the work factors that caused her condition on March 15, 2004.

OWCP's hearing representative affirmed its reduction of wage-loss compensation based on the selected position of administrative secretary but ordered OWCP to determine appellant's pay rate as of March 15 and 16, 2004 and to determine whether she was entitled to a date of recurrence pay rate any time thereafter. The hearing representative affirmed OWCP's decision in part and remanded the case for a proper recalculation of the loss of wage-earning capacity according to OWCP regulations and procedures.

After receiving pay rate information from the employing establishment, OWCP recalculated appellant's loss of wage-earning capacity on December 5, 2012. It compared the current weekly pay rate for the position she held on the date of injury (\$1,183.25)³ with the weekly wages she was capable of earning in the selected position (\$480.00). OWCP then applied this wage-earning capacity (41 percent) to appellant's weekly pay rate when disability recurred effective May 18, 2009 (\$1,212.14). It subtracted that amount from the recurrent pay rate to find the loss of wage-earning capacity. OWCP applied the compensation rate of two-thirds, increased this amount by applicable cost-of-living adjustments and subtracted premiums for health benefits, basic life insurance and optional life insurance. It notified appellant of the revision as instructed by OWCP's hearing representative.

³ This figure represents the base weekly pay rate increased by Night Differential and Sunday Premium Pay.

On appeal, counsel cites two cases: *Marvin Elder*, Docket No. 03-1421 (issued January 26, 2005) and *Terry L. Hewitt*, Docket No. 96-2563 (issued November 16, 1998).

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁵

If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between monthly pay and monthly wage-earning capacity after the beginning of the partial disability.⁶

The method for determining loss of wage-earning capacity was set out by the Board in the case of *Albert C. Shadrick*.⁷ The Board established a principle to eliminate economic factors such as inflation or recession when computing the amount of monetary compensation due for partial disability. According to this rule, the injured worker is paid compensation based on the ratio of post-injury wage-earning capacity to the current pay rate of the date-of-injury job. After such percentage is determined, compensation for partial disability is computed on the basis of monthly pay.⁸

“Monthly pay” means the monthly pay at the time of injury or the monthly pay at the time disability began or the monthly pay at the time compensable disability recurred if the recurrence began more than six months after the injured employee resumed regular full-time employment with the United States, whichever is greater.⁹

ANALYSIS

Under the *Shadrick* formula the ratio of the post-injury wages appellant is capable of earning in the selected position is compared to the current pay rate for the position she held on the date of injury. This step is the same in every case, regardless of when disability began or recurred.

OWCP’s hearing representative found that the date of injury was the date of appellant’s last exposure to the work factors that caused her condition. As she continued to work full-time

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.5(f).

⁶ 5 U.S.C. § 8106(a).

⁷ 5 ECAB 376 (1953).

⁸ *Johnny A. Muro*, 17 ECAB 537 (1966); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.15.c (October 2009) (Shadrick formula codified at 20 C.F.R. § 10.403).

⁹ 5 U.S.C. § 8101(4); *John D. Williamson*, 40 ECAB 1179 (1989).

regular duty after her injury until she stopped work for surgery on March 16, 2004, the hearing representative determined that her date of injury was March 15, 2004. The employing establishment advised that the current pay rate for the position appellant held on March 15, 2004 was \$1,183.25.

OWCP's hearing representative affirmed that appellant had the capacity to earn \$480.00 a week in the selected position of administrative secretary. The ratio of the postinjury wages appellant is capable of earning in this position (\$480.00) to the current pay rate for the position she held on March 15, 2004 (\$1,183.25) is 41 percent, which OWCP correctly determined.

The second step is to apply this percentage to the pay at the time of injury or the pay at the time disability began or the pay at the time compensable disability recurred if the recurrence began more than six months after the injured employee resumed regular full-time employment with the United States, whichever is greater. OWCP applied 41 percent to appellant's pay when her disability recurred on May 18, 2009. There is no evidence that she ever resumed regular full-time employment with the United States following her May 16, 2004 right shoulder surgery. As OWCP's hearing representative indicated, appellant returned to modified duty following the May 16, 2004 surgery and continued in this modified capacity until she stopped work again on May 18, 2009. The Board therefore finds that OWCP erroneously applied the percentage of wage-earning capacity to appellant's pay at the time compensable disability recurred on May 18, 2009.

OWCP should have applied this figure to the pay rate when disability began on March 16, 2004. Accordingly, the Board will set aside OWCP's December 5, 2012 decision and remand the case for a proper calculation of appellant's compensation for partial disability.

On appeal, counsel cites two cases addressing the issue of preexisting conditions. That issue was addressed by OWCP's hearing representative in his August 9, 2012 decision which is not before the Board on this appeal.

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 improperly calculated appellant's loss of wage-earning capacity. Further development is warranted.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: July 9, 2013
Washington, DC

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

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

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