U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAN C. BOECHLER and DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, Billings, MT

*Docket No. 01-1621; Submitted on the Record;*
*Issued May 24, 2002*

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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 determined that appellant had no loss of wage-earning capacity based on his actual earnings.

Appellant, born on December 9, 1948, sustained injuries to his back on April 21, 1989, May 20, 1991, September 23, 1992, September 26, 1993 and August 13, 1994 in the performance of his duties as a range technician (fire). The Office accepted that these injuries resulted in an aggravation of appellant's degenerative disc disease, and on June 1, 1995 it issued appellant a schedule award for a four percent permanent impairment of each leg.

On June 13, 1995 appellant sustained another injury to his back in the performance of his duties as a supervisory range technician, a position in which he supervised a fire helicopter crew. Appellant did not stop working at the time of this injury, but was assigned to limited duty. On September 16, 1996 Dr. Steven J. Rizzolo, a Board-certified orthopedic surgeon, performed a laminectomy and discectomy at L3-5. In a report dated August 27, 1996, Dr. Rizzolo stated that appellant's last injury resulted in the necessity for back surgery.

On December 8, 1996 appellant was reassigned to a position as an air tanker base manager.

By undated letter, received by the Office on January 11, 1999, appellant requested a rating for loss of wage-earning capacity, stating that his wage-earning capacity had declined considerably since his injury and surgery, that he was not able to pass the arduous physical test required of firefighters, that this curtailed his hours of overtime and hazardous premium pay, and that his yearly income had drastically declined especially since 1994. The Office advised appellant to file an Office Form CA-7, claim for wage-loss compensation, and appellant did so on February 12, 1999, claiming compensation beginning June 13, 1995.

By decision dated June 8, 1999, the Office found:

> "You were reemployed as a supervisory range technician with wages of $27,241.00 effective November 1995. It has been determined that this position fairly and reasonably represents your wage-earning capacity.
>
> "In accordance with the provisions of 5 U.S.C. § 8115, you are not due any additional compensation for wage loss. Your actual wages meet or exceed the wages of the job held when injured and loss of wages has occurred."

Appellant requested a hearing, which was held on April 4, 2000. By decision dated February 26, 2001, an Office hearing representative found that no loss of wages occurred because appellant's annual salary on the date of injury was $24,988.00 and his salary when he returned to work as a supervisory range technician (fire) in November 1995 was $27,241.00.

The Board finds that the case is not in posture for a decision.

Appellant's status at the time of his employment injuries was that of a "career seasonal" employee, so that the Office's use of a pay rate of a full-time permanent employee was appropriate.[1] The Office, however, ignored appellant's argument that he had a loss of wage-earning capacity after his last employment injury on June 13, 1995 because he was no longer able, because of the limitations imposed by his employment injuries, to earn overtime pay or premium pay for hazardous duty. Appellant submitted W2s from the employing establishment indicating that he earned $33,442.45 in 1994, $24,873.35 in 1995 and $28,753.90 in 1998.

Loss of premium pay, such as night, locality or Sunday differential, must be considered in determining loss of wage-earning capacity.[2] Overtime pay is generally not considered,[3] but the Office has administratively determined that premium pay for administratively uncontrollable work is included in pay rate calculations.[4] The Office did not attempt to ascertain from the employing establishment the amount appellant received in premium pay in the year immediately preceding his last employment injury on June 13, 1995, nor did it inquire whether the overtime appellant worked during that year was administratively uncontrollable.[5]

Compensation is not payable, however, on the basis that appellant's former position of fire helicopter crew supervisor was upgraded from GS-7 to GS-9 after appellant no longer

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[1] *See Frazier V. Nichol*, 37 ECAB 528 (1986) for rules regarding seasonal career employees.

[2] *Dempsey Jackson, Jr.*, 40 ECAB 942 (1989); *Thomas Donaghue*, 39 ECAB 336 (1988).

[3] 5 U.S.C. § 8114(e)(1) states that in computing pay account is not taken of overtime pay.

[4] FECA Bulletin 89-26 (issued September 29, 1989); *Ralph E. Stewart*, 41 ECAB 996 (1990) (border patrol agent).

[5] *See Billy Douglas McClellan*, 46 ECAB 208 (1994) (the Board stated that a fair loss of wage-earning capacity determination could "best be accomplished by considering appellant's employment activities during the year preceding the injury").

worked in this position, as the probability an employee, if not for his work-related condition, might have had greater earnings is no proof of a loss of wage-earning capacity.[6]

It was also inappropriate for the Office to use appellant's pay rate on September 26, 1993 as the basis of its pay rate calculation. As appellant sustained a new employment injury on June 13, 1995 which caused a new period of disability, this injury is the one on which the Office should base its pay rate calculations.[7] The Office's use of appellant's actual earnings beginning November 1995 was also inappropriate, as appellant sustained a period of disability after this date due to injury-related surgery, and thereafter returned to a different, less physically demanding position at the employing establishment on December 8, 1996. The Office's decision did not address appellant's claim that he had a loss of wage-earning capacity beginning June 13, 1995, as they only addressed appellant's wage-earning capacity after November 1995.

The case will be remanded to the Office for further development of the evidence. The Office should obtain from the employing establishment a list of dates and salaries for each position appellant worked, an account of all the premium pay he received in the one year immediately prior to June 13, 1995, and a statement of whether the overtime appellant worked in that year was administratively uncontrollable. After such further development as is necessary, the Office should issue a *de novo* decision of whether appellant had a loss of wage-earning capacity at any time on or after June 13, 1995.

The February 26, 2001 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC
May 24, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[6] *Dempsey Jackson, Jr.*, *supra* note 2.

[7] *See Frank A. Staropoli*, 31 ECAB 78 (1979).