

filed a petition for reconsideration of the Board's decision and by order dated March 25, 2002, the Board granted the petition and requested that the Office transmit the case record to the Board for proper consideration of the arguments raised.² By order dated April 30, 2002, the Board remanded the case to the Office for an appropriate decision.³

The history of the case is provided in the Board's October 17, 2000 decision and is incorporated herein by reference. To summarize the relevant factual background, the Office, in this case, accepted that appellant sustained cervical and thoracic strain, subluxations at C3-5, indivertible disc degeneration at L5-S1 and compression of right-sided nerve roots of L4-5 and S1, causally related to July 14, 1977 and November 8, 1978 employment injuries. He continued to work as a special agent until July 21, 1981, when the employing establishment notified appellant that he would be placed in light-duty status due to his continuing medical problems. A July 20, 1981 employing establishment letter stated that the initial period of the light duty would not exceed 30 days, at which time a new determination would be made as to continued light duty. The letter advised appellant that the light-duty position did not include administratively uncontrolled overtime. He continued to work in the light-duty position until November 28, 1981, when he retired from federal employment.

Appellant initially selected disability retirement benefits through the Office of Personnel Management (OPM). In a letter dated April 22, 1982, his representative requested information regarding entitlement to compensation benefits. Appellant submitted a claim for compensation (Form CA-7) dated May 17, 1982 commencing November 29, 1981. The Office referred him for examination by Dr. Claude Holmes, a Board-certified orthopedic surgeon, for an opinion as to his continuing condition. In a report dated July 1, 1983, Dr. Holmes opined that appellant's intermittent acute low back and right leg pain represented an aggravation of a back condition secondary to the 1977 and 1978 employment injuries. Dr. Holmes completed a work restriction evaluation dated June 28, 2003, indicating that appellant could work 8 hours a day with restrictions that included a 10-pound lifting restriction, no climbing or squatting and intermittent sitting, walking and standing. An Office medical adviser opined in an August 30, 1983 report that he agreed with Dr. Holmes and recommended a sedentary work situation for appellant.

With respect to appellant's pay rate for compensation purposes, the record contains a memorandum of telephone call discussing appellant's eligibility for uncontrolled overtime. In a letter dated August 13, 1983, he argued that even though he was not performing the duties of a special agent and was not paid uncontrolled overtime after July 21, 1981, his light-duty status was temporary and did not change his status as a special agent, therefore, his pay rate as of November 28, 1981 should include his base pay of \$32,011.20 plus uncontrolled overtime of \$5,363.76 for a total of \$37,374.96 per year. An employing establishment form (DOJ-50) reports that base pay on July 21, 1981 for grade 12/04 employee was \$29,645.00; base pay for Grade 12/05 on November 28, 1981 was \$32,013.00. The employing establishment advised the Office that appellant's pay rate as of July 20, 1981, including uncontrolled overtime, was \$34,762.00. An Office memorandum dated November 3, 1983 noted that as of July 21, 1981 appellant had a reduction in earnings since he could no longer earn uncontrolled overtime and,

² Docket No. 98-2526 (issued March 25, 2002).

³ Docket No. 98-2526 (issued April 30, 2002).

therefore, his pay rate should be determined as of July 21, 1981 or \$668.50 per week based on \$34,762 per year.

A job classification (Form CA-66) dated November 3, 1983 indicated that the position of telephone solicitor was available in appellant's area with wages of \$134.00 per week. The job is sedentary with a 10-pound lifting restriction. In a note dated November 8, 1983, an Office medical adviser indicated that he had reviewed the case file and appellant was capable of performing the telephone solicitor position.

In a decision dated November 25, 1983, the Office found that appellant was entitled to compensation based on a capacity to earn wages in the selected position of telephone solicitor. The Office determined that based on a pay rate of \$688.50 per week and adjusted earning capacity of \$133.70 per week as a telephone solicitor, his loss of wage-earning capacity was \$534.80 per week resulting in a compensation rate of \$1,667.00 every four weeks. In a separate letter dated November 25, 1983, appellant was requested to select either the Federal Employees' Compensation Act or OPM benefits. He selected the Act benefits and began receiving compensation.

Appellant requested reconsideration by letter dated March 4, 1998, arguing that the Office had used an incorrect pay rate and that the Office had failed to meet its burden of proof to reduce his compensation under 5 U.S.C. § 8115. He submitted an undated report from Dr. Russell Windsor, a surgeon, stating that appellant was last seen on July 9, 1997 and that he had made improvements with physiotherapy but still had lower back symptoms and radicular symptoms into the legs. Dr. Windsor stated, "it appears that [appellant's] spine pain is related to degenerative and traumatic disc disease that he sustained in the past and these changes were related to his compensation-related injuries. He, however, did not go into detail of these injuries, but the magnetic resonances imaging (MRI) scan suggests that he may have had a congenital predisposition toward spinal injury, which now has contributed to giving him significant symptoms with these MRI scan findings." Dr. Windsor opined that appellant was totally disabled and completed a work restriction evaluation dated July 9, 1997.

By decision dated May 27, 1998, the Office found that the reconsideration request was insufficient to warrant merit review of the claim. Following the Board's April 30, 2002 order, the Office issued a decision dated July 3, 2003, denying modification of the wage-earning capacity determination.

LEGAL PRECEDENT

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his

qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁴

Once the wage-earning capacity of an injured employee 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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

ANALYSIS

Appellant has argued that the November 25, 1983 wage-earning capacity determination was erroneous in that it was not in accord with 5 U.S.C. § 8115(a) and also that an incorrect pay rate was applied in determining the loss of wage-earning capacity. With respect to the first argument, the medical evidence of record indicates that the selected position was within his medical restrictions. The second opinion physician, Dr. Holmes indicated that appellant could work sedentary duties with a 10-pound lifting restriction. The selected position is a sedentary position, with a 10-pound lifting restriction that did not involve any climbing or kneeling. An Office medical adviser also reviewed the position and the medical evidence of record and found that appellant was capable of performing the job duties. There is no probative medical evidence of record showing that he could not perform the sedentary duties of the telephone solicitor position as of November 25, 1983. The Board accordingly finds that the selected position was medically appropriate.

The position was found to be reasonably available in appellant's area with wages of \$134.00 per week based on evidence from the state employment agency. Although appellant argued that the selected position was not appropriate for a wage-earning capacity determination, the record supports that the position was both medically and vocationally appropriate and consistent with the requirements of section 8115(a).

With respect to the pay rate for compensation purposes, the Office used a pay rate of \$668.50 per week, based on an annual pay rate of \$34,762.00 on July 21, 1981. The pay rate was based on an annual salary of \$29,645.00 plus the uncontrolled overtime that appellant earned as a special agent.⁷ Under 5 U.S.C. § 8101(2), monthly pay means "the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater..."

⁴ See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

⁵ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁶ *Id.*

⁷ Although overtime pay is not included in computing pay rate pursuant to 5 U.S.C. § 8114(e), the Office has determined administratively that uncontrolled overtime will be included in determining pay rate for compensation purposes. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7(b) (December 1995).

The date disability began was determined to be July 21, 1981, because at that time appellant was provided with a light-duty job with wages that did not include uncontrolled overtime.⁸ He argued that the appropriate date was November 28, 1981 and his pay rate at that time should include his base pay of \$32,013.00 as well as uncontrolled overtime of over \$5,000.00. The record is clear, however, that he was not earning uncontrolled overtime after July 21, 1981. His pay rate on November 28, 1981 was his base pay at that time of \$32,013.00, for a grade 12/05, because that represented the current annual earnings.⁹ The Office used the greater pay rate of \$34,762.00 on July 21, 1981 because appellant was no longer able to earn the wages he was earning as a special agent with uncontrolled overtime. The Board finds no error in the pay rate for compensation purposes used in this case.

The Office applied the *Shadrick* formula using the applicable pay rates and earnings of a telephone solicitor.¹⁰ There is no probative evidence establishing error in the November 25, 1983 decision.

Appellant may also obtain modification of the wage-earning capacity determination if the evidence shows a material change in his employment-related condition. Dr. Windsor submitted a report opining that appellant was totally disabled as of July 9, 1997, but he did not provide a reasoned medical opinion with respect to the employment-related condition. He did not provide a complete history and noted that appellant had not provided details regarding his employment injuries. Dr. Windsor did not provide a reasoned medical opinion showing a change in the employment-related condition that rendered him unable to perform the selected position. The Board finds no probative evidence sufficient to warrant a modification on the wage-earning capacity determination in this case.

CONCLUSION

The Board finds that the evidence does not establish that a modification of the November 25, 1983 wage-earning capacity determination is warranted.

⁸ Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. 20 C.F.R. § 10.5(f).

⁹ See 5 U.S.C. § 8114(d). On appeal, appellant appeared to argue that his base pay on November 28, 1981 was over \$37,000.00 without including uncontrolled overtime, but the record indicated that his base pay was \$32,013.00.

¹⁰ 5 ECAB 376 (1953); 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 3, 2003 is affirmed.

Issued: April 21, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member