

FACTUAL HISTORY

On June 11, 1982 appellant, then a 29-year-old distribution clerk machine operator, filed an occupational disease claim asserting that her bilateral carpal tunnel condition was a result of her work duties. The Office accepted appellant's claim for temporary aggravation of preexisting carpal tunnel syndrome and aggravation of thoracic outlet syndrome. Appellant received appropriate compensation benefits.

Effective February 4, 1984, appellant changed her position from a distribution clerk machine operator, earning \$23,290.00 a year, to a flat sorting clerk machine operator with earnings of \$22,839.00 a year. She later accepted a limited-duty assignment effective June 23, 1984, earning \$22,963.00 per year. The record further reflects that the Office accepted recurrences dated July 8 and 25, and November 3, 1983, February 2, 1986 and November 20, 1987. The weekly pay rates were determined as: \$429.51 for June 11, 1982 the date of injury/date of disability; \$443.31 for July 8, 1983 recurrence; \$449.75 for July 25, 1983 recurrence; \$457.80 for November 3, 1983 recurrence; \$494.00 for February 2, 1986 recurrence and \$537.20 for November 20, 1987 recurrence.

Following her November 20, 1987 recurrence, appellant returned to work on November 23, 1988 for four hours per day with hours to increase based on physician's approval in a limited-duty capacity as a modified distribution clerk. In an April 28, 1999 decision, the Office determined that appellant's position as a modified distribution clerk fairly and reasonably represented her wage-earning capacity. In its calculation of the compensation rate, the Office determined that appellant had a weekly pay rate of \$541.48 and a weekly compensation rate of \$184.10. The pay rate was based on appellant's earnings on the date her disability had recurred on November 20, 1987.¹

By decision dated June 17, 1999, the Office determined that appellant received an overpayment of compensation in the amount of \$3,593.94 and that she was at fault in the creation of the overpayment. By decision dated July 13, 2000, an Office hearing representative affirmed the June 17, 1999 overpayment decision and noted that there was an outstanding issue regarding premium pay which could result in additional compensation owed to appellant. In a separate decision also dated July 13, 2000, the Office hearing representative set aside the wage-earning capacity decision of April 28, 1999 and remanded the case to the Office to develop the issue of appellant's entitlement to premium pay.

By decision dated March 25, 2002, the Board affirmed the Office's July 13, 2000 overpayment decision. It further noted that the repayment issue was not addressed as the Office had not resolved the issue of appellant's entitlement to premium pay and the correct amount of her wage-earning capacity.²

¹ The Board notes that as the Office calculated the weekly recurrence rate of November 20, 1987 as being \$541.48 as opposed to the weekly rate of \$537.20 it previously found, the higher rate will prevail.

² Docket No. 01-431 (issued March 25, 2002).

On remand from the Board, the Office contacted the employing establishment on August 13 and September 6, 2002 to gather information for a determination on whether appellant was entitled to premium pay for the year prior to her work-related injury. On September 6, 2002 the employing establishment notified the Office that they could not supply this information as their records did not go back that far. The employing establishment advised that it would ask appellant to supply copies of her pay stubs. Appellant submitted several documents and pay stubs from 1981 to 1984. The pay stubs reflected that appellant was paid “W” or weekend, “N” or night and “O” or overtime pay.

By decision dated February 21, 2003, the Office found that appellant’s actual earnings in the November 23, 1998 part-time modified distribution clerk position, with weekly earnings of \$541.48, fairly and reasonably represented her wage-earning capacity effective March 23, 1999. Appellant was noted to have been in the November 23, 1998 position for two or more months, there was no evidence that the position was temporary and the medical evidence in 1998, as noted by the July 7, 1998 report of Dr. Michael Karathanos, supported that appellant’s November 1998 employment fairly and reasonably represented her earning capacity. The Office further found that there was no basis to disturb the previously issued loss of wage-earning capacity rating with regard to the premium pay issue. The Office, therefore, notified appellant that her entitlement to compensation was being reduced effective November 23, 1998 according to the provisions of 5 U.S.C. §§ 8106 and 8115.

In a March 21, 2003 letter, appellant requested an oral hearing before an Office hearing representative. She contended that the check stubs she submitted show that premium pay in the form of a night differential was received prior to her accommodation by the employing establishment in February 1984.³ She indicated that her pay rate changed to a lower salary prior to her accommodation and that she lost the premium pay she had previously received. Appellant stated that the Office had accepted several recurrences of her condition and, since February 25, 2002, she no longer worked in the position she was given on November 23, 1998.

In an August 12, 2003 letter, appellant requested a subpoena of the employing establishment for the necessary documents pertaining to her pay rate and premium pay issues as the employing establishment failed to supply the necessary information to the Office. In a letter dated October 8, 2003, the Office’s hearing representative denied the request for a subpoena. Appeal rights were noted to attach after the issuance of the decision following the hearing.

A hearing was held on November 18, 2003 during which time appellant testified. Also submitted were duplicate copies of previously submitted pay stubs along with a completed EN-1032 dated October 23, 2003.

By decision dated February 4, 2004, the Office hearing representative affirmed the Office’s February 21, 2003 decision, finding that there was no basis to modify such decision. The hearing representative found that there was insufficient evidence to determine that appellant received premium pay; that she received premium pay for a full year prior to reassignment in 1984; and/or that the amount of the premium could be calculated.

³ The evidence reflects that appellant’s limited-duty assignment was effective June 23, 1984.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act provides that the United States "shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty."⁴ Section 8106(a) provides in pertinent part as follows:

"If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to $66\frac{2}{3}$ percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability."⁵

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 her wage-earning capacity.⁶ Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁷ The formula for determining loss of wage-earning capacity, developed in the *Albert C. Shadrick* decision,⁸ has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.⁹

ANALYSIS -- ISSUE 1

Appellant returned to a modified distribution clerk position on November 23, 1998 working four hours per day, with no work on Saturday and Sunday. The contemporaneous medical evidence established that she could perform these duties for four hours per day and she continued to earn wages in this position for several years, further supporting her capacity to earn such wages.¹⁰ As there is no evidence showing that these wages did not fairly and reasonably represent her wage-earning capacity, appellant's actual earnings in this limited-duty position must be accepted as the best measure of her wage-earning capacity.¹¹ The question for determination, therefore, is whether the Office properly calculated appellant's loss in

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* § 8106(a).

⁶ 5 U.S.C § 8115(a); see *Loni J. Cleveland*, 52 ECAB 171, 176-77 (2000).

⁷ *Loni J. Cleveland*, *supra* note 6.

⁸ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁹ 20 C.F.R. § 10.403(c).

¹⁰ In her March 21, 2003 letter, appellant advised that she worked in the November 23, 1998 position until February 25, 2002, when the employing establishment accommodated her in another position.

¹¹ *Supra* note 6.

wage-earning capacity (LWEC) based on her actual earnings in the modified distribution clerk position she held on November 23, 1998.

After reviewing the calculations in the Office's February 21, 2003 decision on appellant's LWEC, the Board finds that the Office properly applied the *Shadrick* formula. Under *Shadrick*, the Office's determination rests on three variables: (1) appellant's base annual pay at the time of injury, the time disability began or the time compensable disability recurs;¹² (2) the base annual pay for the same grade and step on November 23, 1998 the date the Office used to compare pay rates under *Shadrick*¹³; and (3) appellant's base annual pay on November 23, 1998 in her limited-duty position. If any of these figures are incorrect or unreliable, then the Office did not properly determine appellant's LWEC.¹⁴

In this case, the Office utilized appellant's weekly pay rate when her disability recurred on November 20, 1987 as the base pay, which amounted to \$541.48. The Office found that appellant earned \$373.20 per week in her November 23, 1998 position, that the current pay rate for appellant's date-of-injury position was \$727.52 and that appellant had a wage-earning capacity of 51 percent. Appellant contends, however, that the incorrect pay rate was used in calculating her actual weekly earnings as a part-time distribution clerk beginning November 23, 1998, as the pay rate of \$541.48 failed to take into account the premium pay she had received prior to being reemployed in 1998. Specifically, appellant argues she is entitled to premium pay for her work prior to her reassignment in 1984, as she was no longer eligible for premium pay thereafter.

Pay rate for compensation purposes is defined in section 8101(4) as the monthly pay at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.¹⁵ In computing one's pay rate, section 8114(e) of the Act provides for the inclusion of certain "premium pay"

¹² See 5 U.S.C. § 8101(4) ("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 six months after the injured employee resumes regular full-time employment with the United States whichever is greater, except when otherwise determined under section 8113 of the Act with respect to any period); 5 U.S.C. § 8114(c) (when compensation is paid on a weekly basis, the weekly equivalent of monthly pay is deemed one-fifty-second of the average annual earnings); 5 U.S.C. § 8114(d)(1)(A) (if the employee worked in the employment, in which he or she was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which the annual rate of pay was fixed, the average annual earnings are the annual rate of pay).

¹³ In determining wage-earning capacity, the comparison of wage rates (*i.e.*, the claimant's actual earnings or the salary of the selected position and the "current" salary of the job held at time of injury/disability) need not be made as of the beginning of the period of disability. Any convenient date may be chosen for making the wage rate comparison, as long as the two wage rates are in effect on the date used for the comparison. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.901.15 (December 1995).

¹⁴ See *Loni J. Cleveland*, *supra* note 6 at 171 (2000) (finding the Office did not meet its burden of proof in determining the claimant's wage-earning capacity); *William H. Woods*, 51 ECAB 619 (2000) (finding the Office did not meet its burden of proof to reduce the claimant's compensation).

¹⁵ 5 U.S.C. §§ 8101(4); 8114; *see also* 20 C.F.R. § 10.5(s).

received.¹⁶ However, overtime pay, among other things, is excluded from consideration in determining one's rate of pay.¹⁷ Where the evidence of record indicates additional amounts received in Sunday or night differential pay fluctuated or may have fluctuated, the Office determines the amount of additional pay received during the one-year period prior to injury.¹⁸

On June 11, 1982 the date of injury, the record reflects that appellant's weekly pay was \$429.51. The record also reflects that the Office accepted several recurrences. Appellant's weekly pay was \$443.31 for the July 8, 1983 recurrence; \$449.75 for the July 25, 1983 recurrence; \$457.80 for the November 3, 1983 recurrence; \$494.00 for the February 2, 1986 recurrence; \$541.48 for the November 20, 1987 recurrence. Based on the Office's calculations and the evidence of record, the Board finds that the greater weekly pay rate among appellant's time of injury and her multiple recurrences is the November 20, 1987 recurrence, which had a weekly pay rate of \$541.48. There is no evidence of record to support that appellant was entitled to premium pay for the year prior to 1987. Although there is some evidence to support that appellant had received premium pay in the year prior to her June 11, 1982 injury, there is insufficient evidence of record to determine whether appellant received premium pay for a full year prior to her date of injury or that the amount of premium pay could be calculated. Although appellant contends that she should be entitled to the premium pay she received prior to her 1984 reassignment, there is no evidence that she had a recurrence of disability in 1984 or that there was any other basis on which to calculate her pay rate at that time. As compensation benefits can only be computed based on an employee's pay rate during the relevant time frame, appellant is not entitled to a pay rate calculation during that period which does not comport with the statute.¹⁹

Since, as noted above, appellant's monthly pay was greater on the date of recurrence of disability, at issue is the computation of appellant's compensation based upon her monthly pay on the date of recurrence of disability. The Office in this case computed appellant's compensation based upon her "average annual earnings" in her date of recurrence position. While it is evident that appellant's wages in the date of recurrence position did not reflect her average earning capacity at the time of her injury, where she was earning premium pay, appellant's wages in the date of recurrence position properly reflected her annual earning capacity on the date of recurrence of disability and the evidence of record indicates that this was the greatest of the three alternatives for determining monthly pay under section 8101(4). Thus, the Office properly determined that the date of recurrence of disability was the proper date to be used for computation of monthly pay and the Office properly calculated appellant's monthly pay based upon her "average annual earnings" on the date of recurrence of disability.²⁰

¹⁶ 5 U.S.C. § 8114(e).

¹⁷ *Id.*

¹⁸ See Federal (FECA) Procedural Manual Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.8(b) (April 2002).

¹⁹ See 5 U.S.C. §§ 8101(4), 8114; see also *Helen A. Pryor*, 32 ECAB 1313 (1981).

²⁰ See *Gerald A. Karth*, 48 ECAB 194 (1996).

Appellant's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes, \$541.48, by the percentage of wage-earning capacity, 51 percent. The resulting dollar amount of \$276.15 is then subtracted from the pay rate for compensation purposes to obtain \$265.33 for the loss of wage-earning capacity as of November 23, 1998.²¹ The Office then properly determined that appellant, with no dependents, was entitled to two-thirds of that amount or \$176.89. Compensation payable was then adjusted by the applicable cost-of-living adjustments. The Office's mathematical calculations are proper.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel attendance of witnesses within a radius of 100 miles.²² This provision gives the Office discretion to grant or reject requests for subpoenas. The Office regulation states that subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.²³

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena "is the best method or opportunity to obtain such evidence because there is no other means by which, the testimony could have been obtained."²⁴ The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.²⁵

ANALYSIS -- ISSUE 2

By letter dated August 12, 2003, appellant requested that the Office hearing representative issue a subpoena to compel the employing establishment to issue employment records from June 11, 1982 through May 31, 1984, to provide information on wages and premium pay during that period and whether her February 1984 reassignment resulted in loss of premium pay as she no longer worked Saturdays and Sundays. The Office hearing representative denied the request as appellant provided no reason explaining how the requested information was necessary for the hearing, the employing establishment had submitted information concerning the premium pay rate issue which was of record and there was no more information to submit concerning the premium pay rate issue.

²¹ 20 C.F.R. § 10.403(e).

²² 5 U.S.C. § 8126.

²³ 20 C.F.R. § 10.619.

²⁴ *Id.*

²⁵ *Martha A. McConnell*, 50 ECAB 128 (1998).

In this case, appellant did not provide any explanation for her request for a subpoena or show why such an avenue would be the best way to ascertain the facts of her premium pay rate issue or why relevant evidence could not be obtained by other means. The Board, therefore, finds that the Office hearing representative acted within his discretion in not issuing a subpoena to the employing establishment as requested by appellant.

CONCLUSION

The Board finds that the Office properly determined appellant's actual wages as a modified distribution clerk fairly and reasonably represented her wage-earning capacity. The Board also finds that the Office's hearing representative's denial of a subpoena was proper.

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 3, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member