



the evidence established that appellant had been vocationally rehabilitated. The Board further found, however, that the Office did not establish that in 1999 he earned 25 percent more in his rated position as a General Schedule (GS) 13, Step 7, automation specialist beginning in 1999. The Board also determined that the Office had “not adequately explained why it compared appellant’s current earnings under the employing establishment’s revised compensation system to the current earnings he made in his GS position which no longer exists at the employing establishment.” The Board noted that the Office did not ascertain whether it was possible to “determine the current salary for appellant’s rated position as a GS-13/7, automation specialist under the reclassified system presently used by the employing establishment.” The findings of fact and conclusions of the law from the prior decision are hereby incorporated by reference.

On August 11, 2006 the Office informed appellant’s representative that it had requested clarification of his salary from the employing establishment.<sup>2</sup> In a response dated August 15, 2006, the employing establishment provided appellant’s salary at the time of and subsequent to the October 1, 1998 conversion to the core compensation plan.

On August 28, 2006 the Office notified appellant that it proposed to modify its June 1, 1992 wage-earning capacity determination based on its finding that his earnings on or around January 1, 2002 were equal to or greater than his GS-13 salary on the date-of-injury and fairly and reasonably represented his wage-earning capacity.

By letter dated August 30, 2006, appellant’s representative argued that it had calculated the amount of overpayment incorrectly and requested that the November 24, 2003 overpayment be vacated.

By decision dated September 28, 2005, the Office finalized its modification of the prior loss of wage-earning capacity determination. The Office found that appellant was vocationally rehabilitated and earned 25 percent more beginning around January 1, 2002 than in his position as a GS-13/7 on the date of injury.

### **LEGAL PRECEDENT**

In *Ronald M. Yokota*, the Board stated:

“Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings. 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. The burden is on the Office to establish that there has been a change so as to affect the employee’s capacity to earn wages in the job determined to represent his earning capacity. Compensation for loss of

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<sup>2</sup> The letter from the Office to the employing establishment requesting additional salary information is not contained in the case record.

wage-earning capacity is based upon the loss of the capacity to earn and not on actual wages lost.”<sup>3</sup>

The Office’s procedure manual provides guidelines as to the modification of loss of wage-earning capacity:

“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) [Claims Examiner] (CE) Actions. If these earnings have continued for at least 60 days, the should:

(1) Determine the duration, exact pay, duties and responsibilities of the current job.

(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.”<sup>4</sup>

### ANALYSIS

In the previous appeal, the Board determined that the evidence established that appellant had been vocationally rehabilitated. The Board found, however, that the Office did not establish that appellant earned 25 percent more beginning in 1999 than his current earnings in the job for

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<sup>3</sup> 33 ECAB 1629 (1982); *see also Marie A. Gonzales*, 55 ECAB 395 (2004).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c)-(e) (June 1996, July 1997).

which he was rated in the June 1, 1992 wage-earning capacity determination. The Board additionally noted that in October 1998, subsequent to appellant's rating as a GS-13/7 air-traffic control specialist, the employing establishment revised its compensation system.<sup>5</sup> The Board determined that the Office provided no explanation why it compared appellant's current earnings under the new pay system to the current earnings he received under a GS pay system that was no longer in use by the employing establishment. The Board found that the Office should have clarified whether it was possible to compare his current earnings in his vocationally rehabilitated position to his current earnings in his rated position as a GS 13/7 under the new pay system now used by the employing establishment.

The Office notified appellant's attorney on August 11, 2006 that it had asked the employing establishment for additional salary information; however, the letter from the Office to the employing establishment is not contained in the case record. The employing establishment's August 15, 2006 response to the Office's inquiry provided a history of appellant's salary increases from October 1, 1998 to the present. The employing establishment did not submit any information regarding the current salary of the position for which appellant was rated in the June 1, 1992 wage-earning capacity determination. In its September 28, 2005 decision, the Office found that appellant was vocationally rehabilitated and that he earned 25 percent more on or around January 1, 2002 than in his date-of-injury position. The Office compared appellant's current earnings under the revised compensation system to the updated earnings for his date-of-injury, GS 13/7 position.

As appellant's representative argues on appeal, the Office failed to consider the Board's prior finding that it should obtain information regarding the updated salary under the revised compensation system for the rated position of air traffic control specialist before modifying appellant's wage-earning capacity. Additionally, the Board notes that the Office compared appellant's current earnings in his present position to the current earnings in his date-of-injury position in finding that his earnings had increased by 25 percent. The Office should have compared his current earnings in his present position to the current earnings in the position for which he was rated in the June 1, 1992 wage-earning capacity decision.<sup>6</sup> Consequently, the Board again finds that the Office failed to meet its burden of proof to modify its prior wage-earning capacity determination.

### **CONCLUSION**

The Board finds that the Office failed to meet its burden of proof to modify the June 1, 1992 wage-earning capacity determination.

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<sup>5</sup> The position description accompanying the June 1, 1992 wage-earning capacity determination indicated that appellant's official position was as an air traffic control specialist and his organizational title was automation specialist.

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c)-(e) (June 1996 and July 1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 28, 2006 is reversed.

Issued: July 3, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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