

reduced appellant's compensation benefits to reflect his ability to earn wages in the constructed position as a bank manager trainee. By decision dated August 24, 1995, the Office modified this decision by reducing his compensation benefits to zero effective August 24, 1995 on the grounds that he had rehabilitated himself and was currently earning in excess of the pay rate for his date-of-injury job. By decision dated September 30, 1996, the Branch of Hearings and Review affirmed this decision. In a decision dated October 26, 1999,¹ the Board reversed the Office's decisions on the grounds that it failed to follow its procedures in modifying the original loss of wage-earning capacity determination. The facts and the circumstances of the Board's prior decision are adopted herein by reference.

On September 14, 2006 the Office requested that appellant provide information regarding his current earnings. Appellant responded on September 21, 2006 and reported his current earnings of \$55,700.00 per year as an Executive Director at First Chance Center. In a memorandum dated March 9, 2007, the Office noted that a management trainee had weekly wages of \$467.10. This position required the performance of assigned duties under the direction of more experienced personnel in departments such as credit, customer relations and sales to become familiar with company policies and practices.

In a letter dated March 29, 2007, the Office informed appellant that it proposed to reduce his compensation benefits to zero as he had "demonstrated self-rehabilitation in his current position of executive director." It noted that he began working at First Chance Center in 1983 and had been promoted from a Rehabilitative Specialist to the position of Executive Director in January 1986. As the Executive Director, appellant was responsible for the implementation and coordination of all programs and services, development of organizational policies, supervisor of personnel and preparation of the annual budget. His current position involved more responsibilities than that of a management trainee. The Office found that, although appellant had not undergone any specific training courses, he had gained knowledge throughout his employment with First Chance Center which allowed the expansion of his capabilities and was self-rehabilitated. It determined that he had no loss of wage-earning capacity based on the current earnings of a volunteer at the employing establishment of \$610.30 per week. The Office determined that appellant's current wage-earning capacity was 173 percent. It allowed him 30 days for a response. On April 17, 2007 appellant, through his attorney, disagreed with the proposed reduction.

By decision dated July 9, 2007, the Office modified the October 9, 1975 wage-earning capacity determination to reflect a zero percent loss of wage-earning capacity.

Appellant, through his attorney, requested an oral hearing. He testified on February 25, 2008 regarding his ongoing medical conditions and his lack of vocational rehabilitation since his promotion to Executive Director in 1986. By decision dated May 13, 2008, the hearing representative affirmed the Office's July 9, 2007 decision comparing appellant's current earnings as an Executive Director with those of a person currently working in his date-of-injury position at the employing establishment.

¹ Docket No. 97-030 (issued October 26, 1999).

LEGAL PRECEDENT

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.² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.³

An increase in pay, by itself, is not sufficient evidence that there has been a change in an employee's capacity to earn wages.⁴ Without a showing of additional qualifications obtained by appellant, it is improper to make a new loss of wage-earning capacity determination based on increased earnings.

With respect to modification of wage-earning capacity, the Office procedure manual provides:

“c. *Increased Earnings*. It may be appropriate to modify the [wage-earning capacity] 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 has returned to part-time duty with the employing agency 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., a job 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. *CE [claims examiner] Actions*. If these earnings have continued for at least 60 days, the CE 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.*

² W.G., 58 ECAB ____ (Docket No. 06-367, issued December 27, 2006).

³ *Id.*

⁴ *Marie A. Gonzales*, 55 ECAB 395, 399 (2004).

(3) *Assess whether the actual job differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated.*⁵

ANALYSIS

The Board finds that the evidence establishes that appellant has been vocationally rehabilitated. He is employed in a new job, Executive Director, rather than the constructed position of management trainee which the Office initially used to determine his wage-earning capacity. The Office properly determined the duties, pay and responsibility of the position of Executive Director and noted that appellant had not undergone any formal training or vocational preparation for this position. However, it properly found that the position of Executive Director differed significantly in duties and responsibility from the management trainee position. Due to the increased responsibilities in the position of Executive Director including managerial duties of budgeting, hiring, supervision and direct access to the Board of Directors which were not included in the position of management trainee, the Board finds that the Office properly determined that appellant was vocationally rehabilitated.

As the Office correctly determined that appellant had been vocationally rehabilitated due to the increased duties and responsibilities of the new position, it must then determine whether the new job of Executive Director pays at least 25 percent more than the current pay of the job for which appellant was rated, management trainee. In the May 13, 2008 decision, it improperly compared appellant's earnings as an Executive Director with those of his date-of-injury position as an employing establishment volunteer rather than with his earnings in the rated position of management trainee.⁶ The Office's procedures specifically require that the Office compare the earnings in the new job with "the current pay of the job for which the claimant was rated." For this reason, the Board finds that the Office failed to meet its burden of proof to modify the October 9, 1975 wage-earning capacity determination. The May 13, 2008 decision is reversed.

CONCLUSION

The Board finds that the Office did not follow its procedures in modifying appellant's October 9, 1975 wage-earning capacity determination. It failed to meet its burden of proof to reduce appellant's compensation benefits to zero.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c)(d) (July 1997).

⁶ *M.O.*, Docket No. 07-267 (issued July 3, 2007).

ORDER

IT IS HEREBY ORDERED THAT the May 13, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 23, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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