United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 08-1148**
	)	**Issued: March 13, 2009**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, GRAND TETON NATIONAL PARK, Moose, WY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 7, 2008 appellant filed a timely appeal from a January 23, 2008 merit decision of the Office of Workers' Compensation Programs reducing his compensation based on his actual earnings. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation based on its finding that his actual earnings as a customer service representative fairly and reasonably represented his wage-earning capacity.

FACTUAL HISTORY

On June 16, 1982 appellant, then a 30-year-old heavy mobile equipment operator, sustained a crush injury to his left leg when a forklift pinned him against a trailer. The Office accepted the claim for a crush injury of the left leg with comminuted fractures of the tibial

plateau with surgical repairs and myonecrosis, ankylosis of the left ankle, foot and toes and left leg atrophy. Appellant stopped work on June 16, 1982. On January 8, 1984 he resumed federal employment as an industrial engineering technician with another employing establishment.

On August 21, 1990 appellant filed a recurrence of disability claim. He related that he experienced right leg pain as a result of compensating for his weakened left leg. The Office accepted that appellant sustained a right medial meniscus tear and osteoarthritis of the right knee and authorized a November 14, 1990 partial medial meniscectomy. Appellant stopped work on November 9, 1990 and returned to work on January 15, 1991.

On June 29, 1994 appellant filed a recurrence of disability claim on April 20, 1994 causally related to his June 16, 1982 work injury. He related that he experienced problems with his right leg, knee and foot as a result of his left lower extremity injury. The Office accepted that he sustained a recurrence of disability and paid him compensation beginning April 20, 1994. Appellant retired on disability in October 1994.[1]

Appellant returned to work on November 21, 2000 as a data entry clerk. He resigned on May 18, 2001. By decision dated May 29, 2001, the Office reduced appellant's compensation on the grounds that his actual earnings as a data entry clerk fairly and reasonably represented his wage-earning capacity. In a decision dated June 14, 2001, it denied his claim for compensation from April 23, 2001 onward. By decision dated February 11, 2002, an Office hearing representative vacated the June 14, 2001 decision and remanded the case for further development of the medical evidence. Following further development, the Office paid appellant compensation beginning April 20, 2002.

In a March 6, 2007 work-restriction evaluation, Dr. Lloyd E. Witham, a Board-certified orthopedic surgeon, found that appellant could work with restrictions on sitting and reaching for two hours per day and walking and standing one hour per day. On April 4, 2007 the physician clarified that appellant could work eight hours a day performing sedentary employment.

On June 8, 2007 the Office referred appellant for vocational rehabilitation. Appellant returned to work on October 7, 2007 as a night auditor. On November 1, 2007 he began working as a customer service representative. On January 14, 2008 the Office contacted the employing establishment and obtained the current salary for appellant's date-of-injury position as a WG-10, Step 10 of $26.10 per hour.

By decision dated January 15, 2008, the Office found that appellant's actual earnings as a customer service representative effective November 1, 2007 fairly and reasonably represented his wage-earning capacity. It utilized the *Shadrick*[2] formula and determined that he had a loss of wage-earning capacity of $516.00 per week. The Office divided his actual earnings of $380.80 by his current pay for his job and step when injured of $1,047.51 to find a 36 percent wage-earning capacity. It multiplied this percentage by appellant's pay rate when his disability

[1] By decision dated September 4, 1999, the Board affirmed June 20 and May 1, 1997 decisions denying appellant's request for reimbursement of travel expenses. Docket No. 97-2371 (issued September 4, 1999).

[2] 5 ECAB 376 (1953); codified at 20 C.F.R. § 10.403(e).

recurred on April 20, 1994, $802.40, to find an adjusted wage-earning capacity of $288.86 per week. The Office subtracted his wage-earning capacity of $288.86 from his current date-of-injury wages of $1,047.51 per week to find a loss of wage-earning capacity of $513.54, adjusted to $516.00 per week for cost of living.

On January 18, 2008 appellant contended that the Office erred in finding that the current weekly pay for his job and step when he was injured was $1,287.20. He submitted salary tables and noted that he was a GS-10, Step 9.

On January 23, 2008 the employing establishment informed the Office that the current wages for the job and step appellant held at the time of injury of $26.10 per hour included locality pay for the Grand Teton area. Appellant's current date-of-injury wages for the area where he was reemployed in the Spokane locality was $24.02 per hour.

By decision dated January 23, 2008, the Office vacated the January 15, 2008 decision. It noted that it should have calculated appellant's weekly pay rate based on the locality pay where he was reemployed. The Office recalculated appellant's loss of wage-earning capacity as $484.00 per week. It noted that it utilized his current pay rate for the job and step held at the time of his original injury on April 20, 1984 in calculating his loss of wage-earning capacity in his position under *Shadrick*.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act[3] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.[4] Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[5] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[6] 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.[7] Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.[8]

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[5] *Lottie M. Williams*, 56 ECAB 302 (2005).

[6] *Supra* note 2.

[7] 20 C.F.R. § 10.403(c).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

Under the *Shadrick* formula, the Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's actual earnings by the current or updated pay rate for the position held at the time of injury. The employee's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes, defined in 20 C.F.R. § 10.5(a) as the pay rate at the time of injury, the time disability begins or the time disability recurs, whichever is greater, by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity.[9]

Section 8101(4) of the Act,[10] under which the Office determines an employee's rate of pay for the purpose of calculating compensation, states in pertinent part:

> "'[M]onthly 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."

Regarding locality pay, the Office's procedure manual provides as follows:

> "(1) Locality Pay or 'COLA' [cost-of-living allowances] Pay. When the claimant is reemployed in a new locale with a lower percentage of locality pay than the job held on date of injury or without the 'COLA' described in FECA PM 2-0900. 7b(16), the claimant may be paid less than previously even if reemployed at the same grade and step. However, the 'current pay rate for the job and step when injured' should reflect the pay in the new locale, not the original one. The claimant is not losing net pay if reemployed at a lower locality pay rate or without COLA pay, since the cost of living is less in the new location as represented by the difference in locality pay or COLA pay."[11]

ANALYSIS

The Board finds that appellant's actual earnings as a customer service representative fairly and reasonably represent his wage-earning capacity. Appellant's attending physician, Dr. Witham, opined that he could resume full-time work with restrictions. He returned to work on November 1, 2007 as a customer service representative and continued working in the position through January 23, 2008, the date the Office issued its formal loss of wage-earning capacity determination. Appellant worked in the position for more than 60 days and there is no evidence that the position was seasonal, temporary or make-shift work designed for her particular needs.[12]

[9] *Albert C. Shadrick*, *supra* note 2; 20 C.F.R. § 10.403(e).

[10] 5 U.S.C. § 8101(4).

[11] Federal (FECA) Procedure Manual, Part 2 -- Computing Compensation, *Loss of Wage-Earning Capacity*, Chapter 2.901.15(f) (July 1996).

[12] *Elbert Hicks*, 49 ECAB 283 (1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

As there is no probative evidence that his wages in his position did not fairly, and reasonably represent appellant's wage-earning capacity, they must be accepted as the best measure of his wage-earning capacity.[13]

The Board further finds that the Office properly determined appellant's loss of wage-earning capacity. Using the *Shadrick* formula, the Office divided appellant's current actual earnings of $380.80 a week by his current pay rate of the position held when injured of $964.03 to find a 40 percent wage-earning capacity. It properly utilized the current pay rate of his date-of-injury position in the locale where he was reemployed following his work injury.[14] The Office multiplied the pay rate at the time his disability recurred on April 20, 1994 of $802.40 by the 40 percent wage-earning capacity percentage. The resulting amount of $320.96 was subtracted from appellant's recurrent pay rate of $802.40 which provided a loss of wage-earning capacity of $481.44 per week. The Office then multiplied this amount by the appropriate compensation rate of three-fourths which yielded $361.08. It found that cost-of-living adjustments increased this amount to $484.00 or $1,936.00 every four weeks.

On appeal, appellant argued that, his consequential injury to his right leg constituted a new injury. He noted that the Office accepted a consequential injury to his right knee on January 24, 1991 while he was employed as a GS-10, Step 9 industrial engineering technician. Appellant cited to the injury compensation handbook for employing establishment personnel as support for his contention that a consequential injury constituted a new injury. He maintained that his date-of-injury wages for purposes of determining his loss of wage-earning capacity should reflect his GS-10, Step 9 salary as an industrial engineer.

The statute defines pay rate for compensation purposes as the greater of the employee's pay as of the date of injury, the date disability begins or the date of recurrence of disability if more than six months after returning to regular work with the federal employment.[15] The Office's procedure manual's definition of a recurrence of disability includes a "return or increase in disability caused by an accepted consequential injury."[16] Therefore, disability due to an accepted consequential injury constitutes a recurrence of disability and may, if it occurs after the employee resumes regular full-time work with the Federal Government for six months, establish a recurrent pay rate. It does not establish a pay rate based on a new injury.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation based on its finding that his actual earnings as a customer service representative fairly and reasonably represented his wage-earning capacity.

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[13] *See Loni J. Cleveland*, *supra* note 4.

[14] Federal (FECA) Procedure Manual, Part 2 -- *Claims Computing Compensation*, Chapter 2.901.15(f) (July 1996).

[15] 5 U.S.C. § 8101(4); *Carlos Perez*, 50 ECAB 493 (1999).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b) (May 1997).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 23, 2008 is affirmed.

Issued: March 13, 2009
Washington, DC

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

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

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