

2004 on the grounds appellant refused an offer of suitable work.² The Board found that the part-time position offered to appellant was inappropriate.³ The history of the case as provided by the Board is incorporated herein by reference.

Appellant completed a (Form CA-1032) regarding her employment activities on August 15, 2006. She indicated that since April 28, 2005 she had worked as an assistant professor and also worked for a dermatology practice. According to appellant, she earned \$65,436.51 in 2005. In a January 8, 2007 response, the dermatology firm stated that she had been employed as a nurse practitioner since January 3, 2005, initially beginning at 16 to 20 hours a week and as of January 2007 she was working 40 hours a week.

On February 21, 2007 OWCP received an itemized statement of earnings for appellant from 2003 to 2005 from the Social Security Administration. The statement indicated that she had earnings of \$38,125.40 in 2003, \$66,530.50 in 2004 and \$65,436.51 in 2005. In a February 22, 2008 response, the dermatology firm reported the dates of employment as January 7, 2005 to the present, noting appellant earned \$1,923.08 a week on January 1, 2007, increased to \$2,038.46 a week as of March 1, 2007. On February 26, 2008 appellant submitted evidence of actual earnings in 2006 of \$78,473.19 based on wage and tax statements.

In a decision dated September 30, 2008, OWCP found the actual earnings as of January 1, 2008 were \$2,038.46 a week and these fairly and reasonably represented wage-earning capacity. The compensation worksheet showed a weekly pay rate of \$313.79 a week, with an adjusted earning capacity of \$1,000.99 a week, for no loss of wage-earning capacity.

In a decision dated June 26, 2009, OWCP's hearing representative set aside the September 30, 2008 decision. OWCP's hearing representative found OWCP had used an incorrect pay rate for the date-of-injury position and the case was remanded for a proper calculation. By decision dated August 6, 2009, OWCP found that actual earnings as a nurse practitioner fairly and reasonably represented wage-earning capacity. It stated that appellant had been employed as of January 7, 2005, with earnings of \$2,038.46 a week. The decision found she had no loss of wage-earning capacity; the weekly pay rate for the date-of-injury position used in the calculations was \$721.20 a week.

Appellant requested a hearing before OWCP's hearing representative, which was held on December 11, 2009. By decision dated April 14, 2010, OWCP's hearing representative determined that the effective date of the wage-earning capacity determination was January 1, 2007, when appellant began working full time as a nurse practitioner. OWCP's hearing representative found that actual earnings at that time were \$1,923.08 a week, with a weekly pay rate of \$746.50 when injured, and a current pay rate for the date-of-injury position of \$1,478.95 a week. The hearing representative found appellant had no loss of wage-earning capacity as of January 1, 2007. In addition, OWCP's hearing representative calculated her entitlement to compensation for periods July 11, 2004 to December 31, 2006. The actual earnings were based

² *K.N.*, Docket No. 05-1710 (issued May 16, 2006).

³ Appellant, a nurse, had filed a claim for injury on October 15, 1989, which was accepted for back strain and L5-S1 herniated disc due to moving a patient.

on evidence from Social Security Administration and the hearing representative applied the *Shadrick* formula to determine the compensation amounts.⁴

LEGAL PRECEDENT

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity.⁵ 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.⁶

OWCP procedures state that, after a claimant has been working for 60 days, OWCP will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.⁷ OWCP's Procedure Manual provides guidelines for determining wage-earning capacity based on actual earnings:

a. *Factors considered.* To determine whether the claimant's work fairly and reasonably represents his or her wage-earning capacity, the claims examiner (CE) should consider whether the kind of appointment and tour of duty (see *FECA PM 2-900.3*) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.

For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:

- (1) *The job is part-time* (unless the claimant was apart-time worker at the time of injury) or sporadic in nature;
- (2) *The job is seasonal* in an area where year-round employment is available....
- (3) *The job is temporary* where the claimant's previous job was permanent.⁸

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Shadrick* decision,⁹ has been codified at 20 C.F.R. § 10.403. OWCP first

⁴ See *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁵ 5 U.S.C. § 8115(a).

⁶ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1995).

⁸ *Id.* at Chapter 2.814.7(a) (July 1997).

⁹ *Supra* note 4.

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 position.¹⁰

ANALYSIS

In the present case, OWCP's hearing representative found that appellant began working full time as a nurse practitioner for a dermatology practice as of January 1, 2007. This finding is supported by the evidence from the employing establishment and is not contested by appellant, who worked in the position for more than 60 days and there was no evidence that the position was part time, seasonal or temporary. As noted above, wages earned are generally the best measure of wage-earning capacity.

OWCP's hearing representative applied the *Shadrick* formula and determined that appellant had no loss of wage-earning capacity as of January 1, 2007. The employing establishment indicated that she earned \$1,923.08 a week as of January 1, 2007. OWCP's hearing representative calculated that the current pay rate of appellant's date-of-injury position was \$1,478.95 a week. Appellant did not contest the calculations provided in the April 14, 2010 decision. The Board finds the evidence of record supports OWCP's findings that appellant had no loss of wage-earning capacity as of January 1, 2007.

The Board notes that for periods prior to the effective date of the wage-earning capacity determination, OWCP may offset actual earnings in determining the compensation owed, using the *Shadrick* formula.¹¹ OWCP's hearing representative used the information as to actual earnings from the Social Security Administration and information provided by appellant to calculate her entitlement to compensation from July 11, 2004 to December 31, 2006, prior to the effective date of the wage-earning capacity determination.

On appeal, appellant's representative states that the "sole reason" for filing the appeal was that OWCP's hearing representative failed to order OWCP to pay retroactive compensation benefits from October 15, 1989 based on the pay rate he used in the calculations. The issue of additional compensation claimed from October 15, 1989 to July 11, 2004 was not before the hearing representative and he did not address the issue. The Board's jurisdiction is limited to review of the final decisions of OWCP.¹² Since OWCP's hearing representative did not address the issue of compensation from October 15, 1989 to July 11, 2004, that issue is not before the Board on this appeal. Appellant may pursue the issue before OWCP, and may then pursue available appeal rights for any adverse final decision issued. OWCP also noted that appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

¹⁰ 20 C.F.R. § 10.403(d).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d)(3) (October 2009). Although OWCP's hearing representative referred to loss of wage-earning capacity (LWEC) compensation from July 11, 2004, this is an actual earnings calculation, not an LWEC determination. See also *James B. McCarten*, Docket No. 03-1271 (issued October 28, 2003).

¹² 20 C.F.R. § 501.2(c).

CONCLUSION

The Board finds OWCP properly determined that appellant's actual earnings as of January 1, 2007 fairly and reasonably represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 14, 2010 is affirmed.

Issued: August 17, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board