

**United States Department of Labor
Employees' Compensation Appeals Board**

G.S., Appellant)

and)

DEPARTMENT OF AGRICULTURE,)
CLEVELAND NATIONAL FOREST,)
San Diego, CA, Employer)

Docket No. 12-1082
Issued: December 5, 2012

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 20, 2012 appellant filed a timely appeal from the January 24, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of his loss of wage-earning capacity. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 appellant has established that OWCP's July 28, 1989 loss of wage-earning capacity determination should be modified.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 1, 1966 appellant, a 19-year-old seasonal fire control aide, suffered traumatic injuries in the performance of duty when he became trapped by flames while fighting a fire in the Angeles National Forest. He was burned extensively and critically and lost the little finger on his right hand. OWCP accepted appellant's claim for multiple burns and later expanded its acceptance to include post-traumatic stress disorder. Appellant received compensation for temporary total disability on the periodic rolls.

In 1976 an OWCP hearing representative set aside a wage-earning capacity determination and raised the question of whether section 8113(a) of FECA applied.² "At the time of the claimant's employment he was 19 years old. If under the laws of the State of California he was considered a minor, the above[-]cited section of law may have application to his pay rate after he attained his majority."

In 1979 OWCP determined that section 8113(a) did not apply because the age of majority in California was 18, so no adjustment of compensation was required.

On July 28, 1989 OWCP reduced appellant's wage-loss compensation on the grounds that his actual earnings as a registered nurse fairly and reasonably represented his wage-earning capacity. Comparing his actual earnings as a nurse with the current pay rate for the job and step when injured, OWCP found that appellant no longer suffered wage loss as a result of the accepted injuries.

Appellant noted that he was a minor at the time of his injury. He advised that the age of majority in California was 21 at that time and did not become 18 until March 4, 1972. Therefore, appellant argued, OWCP never fairly recomputed his pay rate under section 8113(a) to establish his loss of wage-earning capacity.

In a January 24, 2012 decision, OWCP denied modification of its July 28, 1989 loss of wage-earning capacity determination. It found that appellant met none of the criteria for modification: "The claimant studied nursing on his own and although he was trained for a different job, his compensation should be based on his actual earnings as a registered nurse."

Appellant argues on appeal that OWCP failed to address the fact that he was a minor at the time of his injuries. He argues that OWCP did not fairly compute his loss of wage-earning capacity.

² If the individual was a minor at the time of injury, and was not physically or mentally handicapped before the injury, OWCP, on review under section 8128 after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity. 5 U.S.C. § 8113(a).

LEGAL PRECEDENT

Section 8102(a) of FECA 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.”³

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee’s actual earnings if the employee’s actual earnings fairly and reasonably represent his wage-earning capacity.⁴

If the individual was a minor at the time of injury, and was not physically or mentally handicapped before the injury, OWCP, on review under section 8128 after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity.⁵

OWCP procedures note that, because FECA does not define the term “minor,” whether a person has attained his majority must be determined under state law of the claimant’s domicile. Further, since the interpretation of state laws and judicial decisions is involved, any case where this issue arises should be referred to the National Office for a determination.⁶

Once the loss of wage-earning capacity 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. The burden of proof is on the party attempting to show modification of the award.⁷

ANALYSIS

Effective March 4, 1972, the California Legislature reduced the age of majority from 21 to 18 years.⁸ Appellant, who had recently turned 19 at the time of his November 1, 1966 injuries, was therefore a minor under California law. Pursuant to section 8113(a) of FECA,

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8115(a).

⁵ *Id.* at § 8113(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.0900.12.a (March 2011). *Cf. Dorothea Creager*, 20 ECAB 18 (1968) (affirming, without reference to State law, the computation of compensation based on the assumed monthly pay at the time the claimant reached the age of 21); *Carlos E. Martinez*, 39 ECAB 821 (1988) (holding that the age of majority is 21 for the purpose of section 8113(a)).

⁷ *Daniel J. Boesen*, 38 ECAB 556 (1987).

⁸ *Wodicka v. Wodicka*, 17 Cal. 3d 181 (1976). *See* 1971 Cal. Stat 1748 (effective March 4, 1972); Cal. Fam. Code § 6502 (before March 4, 1972, the word “minor” makes reference to individuals younger than 21 years of age).

OWCP should have recomputed prospectively the monetary compensation payable for his disability on the basis of an assumed monthly pay corresponding to his probable increase in wage-earning capacity but for the injury.

The Board has held that this section of FECA contemplates but one probable increase in wage-earning capacity upon the minor's reaching the age of majority; it does not contemplate such factors as future promotions, increases in salary or advancements, as these rest upon a number of indefinite and uncertain contingencies that place the happening of the event in the realm of possibility, not probability.⁹ Thus, in the case of *Dorothea Creager*,¹⁰ the Board found that OWCP (then known as the Bureau) properly applied this statutory provision when it computed the claimant's compensation based on her assumed monthly pay in October 1928, when she reached 21 years of age, for the teaching job she held at the time of injury.

An OWCP hearing representative raised this issue in 1976. OWCP found, however, that section 8113(a) did not apply because the current age of majority in California was 18. That was not the case, of course, in 1966. Appellant was a minor at the time of injury, and OWCP should have recomputed his compensation for wage loss based on an assumed later pay rate.

This bears directly on OWCP's July 28, 1989 loss of wage-earning capacity determination. It determined the loss by comparing two pay rates: appellant's current pay rate as a registered nurse and the current pay rate for the job and step when injured.¹¹ It is the second pay rate that appellant correctly questions. Under section 8113(a), OWCP should have compared appellant's current pay rate as a registered nurse with the current pay rate of the job and step he probably would have held, but for the injury, when he turned 21.

The Board therefore finds that appellant has met one of the criteria for modification: he has shown that the July 28, 1989 loss of wage-earning capacity determination was erroneous. Although the assumed pay rate corresponding to the probable increase in his wage-earning capacity might not change the outcome, *i.e.*, appellant's actual earnings as a registered nurse might still exceed any wage loss caused by his injuries, appellant has shown that OWCP did not compare the proper pay rates when it determined his loss of wage-earning capacity.

The Board will set aside OWCP's January 24, 2012 decision and will remand the case for further action pursuant to section 8113(a) and OWCP procedures.

⁹ *Robert H. Merritt*, 11 ECAB 64 (1959). On September 6, 1966 Congress enacted a law that recodified Title 5 of the United States Code. 80 Stat. 378 *et seq.* FECA was recodified as 5 U.S.C. § 8101 *et seq.* 80 Stat. 531 *et seq.* Section 6(d), as it was known in *Merritt*, became section 8113(a). 80 Stat. 540.

¹⁰ 20 ECAB 18 (1968).

¹¹ See *Albert C. Shadrick*, 5 ECAB 376 (1953) (in computing a claimant's loss of earnings, if his present increased wage is used as one of the factors, then the present increased wage for his original job should also be used).

CONCLUSION

The Board finds that this case is not in posture for determination. Further action is warranted.

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: December 5, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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