

On appeal, counsel argued that OWCP shared responsibility for developing the factual evidence and did not request evidence from appellant's private sector employer.

FACTUAL HISTORY

On January 26, 2004 appellant, then a 59-year-old supervisor veterinary medical officer, filed a traumatic injury claim alleging that she injured her right hip, the right side of her back, right shoulder and neck when she slipped on fat in the performance of duty. OWCP accepted her claim for sprain and strain of her ribs, sprain and strain of the sacroiliac region and injury of the face and neck. On September 15, 2005 it referred appellant for vocational rehabilitation services. By decision dated October 24, 2006, OWCP reduced her wage-loss benefits based on her capacity to earn wages as a dispatcher effective October 29, 2006. Appellant requested an oral hearing and by decision dated March 15, 2007, an OWCP hearing representative reversed the October 24, 2006 decision. OWCP entered her on the periodic rolls on July 25, 2007.

On January 15, 2008 appellant returned to work in the private sector at Vet-Co working between 2 and 3.5 days a week. She earned \$400.00 a day and \$200.00 for the half day. Appellant must have two consecutive days off. She provided her time sheet from January 15 through March 31, 2008 during which she worked 190 hours. On June 5, 2008 appellant notified OWCP of her work hours for April and May 2008. She stated that her hours were reduced and that she was earning \$100.00 a day for working two hours.

On August 12, 2008 counsel provided appellant's work hours from February 15 through June 8, 2008. The documents indicated that she worked 34 hours in June 2008, working two hours a day on June 2, 3, 5, 6, 9, 10, 11, 13, 16, 17, 19, 20, 23, 24, 26, 27 and 30, 2008.

In a letter dated December 9, 2006, OWCP requested appellant's pay stubs for six months. It noted that it had received her print time cards only. OWCP made a second request on March 12, 2009. In response, appellant submitted a signed affidavit of Charles Olinder, DVM, owner of Vet-Co who stated that she became an employee on January 15, 2008 and was paid \$400.00 for an eight-hour day and \$200.00 for a four-hour day or an hourly rate of \$50.00. Dr. Olinder stated that from January 15 through June 30, 2008 she worked a minimum of two hours a day and a maximum of eight hours a day. Appellant resubmitted her time cards for January through March, April, May and June 2008. On March 18, 2009 counsel stated that she was laid off from her employment with Vet-Co on March 12, 2009. In a letter dated April 8, 2009, OWCP reduced appellant's monetary compensation effective January 16, 2008 based on her actual earnings.

By decision dated June 24, 2009, OWCP issued a retroactive loss of wage-earning capacity determination finding that appellant had wages of \$962.50 a week effective January 15, 2008 in the position of a veterinarian with Vet-Co. It reduced her wage-loss benefits.

Appellant requested an oral hearing on June 23, 2009.

In a decision dated January 8, 2010, OWCP's hearing representative reversed the June 24, 2009 decision. Although appellant worked over 60 days as a part-time veterinarian the evidence did not establish that the position fairly and reasonably represented her wage-earning capacity. Based on the evidence of record her earnings from January 15 through June 30, 2008 were based on 309 hours at \$50.00 an hour or \$15,450.00 resulting in a weekly payrate of \$643.75. The hearing representative noted that appellant had not provided evidence of earnings for the entire period that she worked. He concluded that her actual earnings were not calculated correctly in the loss of wage-earning capacity determination. The hearing representative further found that appellant stopped work due to a worsening of her medical condition and that a retroactive wage-earning capacity determination was not appropriate. He directed OWCP to reinstate appellant's total disability benefits effective March 12, 2009 and to calculate the difference in what she was paid from January 15, 2008 through the most recent pay period and pay her the difference based on section 2.814.7(d)(4) of Federal (FECA) Procedure Manual.³ The hearing representative remanded the case for OWCP for appellant to provide evidence of her actual earnings for the entire period of January 15, 2008 through March 12, 2009.

In a letter dated February 3, 2010, OWCP requested that appellant provide documentation of her actual earnings from January 15, 2008 through March 12, 2009. It allowed 30 days for a response and stated that if she did not submit the information a correct determination of her wage-earning capacity during that period would not be possible. Counsel responded on March 2, 2010 that he was providing appellant's earning records from Vet-Co from September 16 through 30, and December 1 through 31, 2008 and January 1 through 15 and February 1 through 28 and March 1 through 15, 2009. He noted that she did not work from January 16 through 31, 2009 due to a family emergency. Counsel further noted that Vet-Co had not yet provided earnings records from January 1 through August 31, 2008 and from October 1 through November 30, 2008. From September 16 through 30, 2008 appellant's gross earnings were \$600.00. She earned \$3,000.00 from December 1 through 15, 2008. The records indicated that appellant had a year-to-date amount of \$56,600.00 on December 15, 2008. She earned \$2,000.00 from December 16 through 31, 2008. For the period January 1 through 15, 2009 appellant earned \$2,800.00 and from February 1 through 15, 2009 she earned \$2,400.00. She earned \$2,800.00 from February 16 through 28, 2009 and \$2,800.00 from March 1 through 15, 2009.

By decision dated March 10, 2010, OWCP denied appellant's claim for additional compensation benefits on the grounds that she failed to submit all the information requested. In order to correctly determine her wage earning for the entire period, it must review her complete actual earnings rather than verification for partial periods.

Counsel requested an oral hearing regarding the March 10, 2010 decision. On March 19, 2010 he changed this request to a request for reconsideration. In a letter dated April 29, 2010, counsel submitted additional pay records. Appellant earned \$3,000.00 during the period June 16 to 30, 2008 with year-to-date earnings of \$30,600.00. She earned \$2,000.00 for the period July 1 to 15, 2008 and \$3,200.00 from July 16 through 31, 2008. Appellant had earnings of \$2,000.00 during the period August 1 to 15, 2008 and \$2,400.00 for the period August 16 through 31, 2008.

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*:

Determining Wage-Earning Capacity, Chapter 2.814.7(d)(4) (October 2009).

During the period September 1 through 14, 2008 she earned \$2,400.00. Appellant earned \$2,800.00 during the period October 1 through 15, 2008 and \$3,000.00 from October 16 through 31, 2008. She earned \$1,800.00 from November 1 through 15, 2008 and \$2,800.00 from November 16 through 30, 2008.

By decision dated July 22, 2010, OWCP reviewed the merits of appellant's claim and denied modification of its prior decision. It found that as she had not submitted evidence of her earnings from January 14 through June 17, 2008 or from December 1, 2008 to March 12, 2009 she had not complied with the request for information.

Counsel requested reconsideration on August 5, 2010 and resubmitted the affidavit from Dr. Olinger regarding appellant's earnings from January 15 to June 30, 2008 and her time cards from January 15 through March 31, April 1 to 29 and May 1 to 30, 2008 and the time summary for June 2 through 30, 2008 of 34 hours. He resubmitted his March 2, 2010 request for reconsideration and the pay records from September 15 to 30 and December 2008 and January, February and March 2009.

By decision dated April 20, 2011, OWCP denied modification of the prior decision finding that appellant had not provided the necessary factual evidence for the period January 15, 2008 through March 12, 2009 as there was a discrepancy for the month of June 2008.

LEGAL PRECEDENT

When an employee has earnings from employment, she is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁴ Under these circumstances, OWCP offsets actual earnings pursuant to the *Shadrick* formula.⁵ If a reduction of benefits based upon actual earnings is not accompanied by a determination that the earnings fairly and reasonably represent the employee's wage-earning capacity, an informal reduction of benefits utilizing the *Shadrick* formula is proper rather than a formal loss of wage-earning capacity determination.⁶

FECA provides that where OWCP learns of actual earnings that span a lengthy period of time, several months or more, the compensation entitlement should be determined by averaging the earnings for the entire period, determining the average pay rate and applying the *Shadrick* formula (comparing the average pay rate for the entire period to the pay rate of the date-of-injury job in effect at the end of the period of actual earnings).⁷

⁴ *L.S.*, 59 ECAB 350 (2008).

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

⁶ *See supra* note 3 at Chapter 2.814.7(b)(2) (December 1993).

⁷ *Supra* note 3.

ANALYSIS

OWCP reduced appellant's compensation benefits based on her actual earnings in the private sector working for Vet-Co beginning January 15, 2008. OWCP's hearing representative found that these earnings did not fairly and reasonably represent her wage-earning capacity reversing the wage-earning capacity determination and remanding the case for OWCP to correctly determine appellant's earnings from January 15, 2008 through March 12, 2009 to determine the compensation due for her partial disability.

Appellant responded to OWCP's request for additional information regarding her earnings. She submitted a pay stub for the period June 16 to 30, 2008. This pay stub indicated that appellant's year-to-date earnings at Vet-Co were \$30,600.00. Appellant provided pay stubs for the remainder of her employment with Vet-Co earning \$5,200.00 in July, \$4,400.00 in August, \$3,000.00 in September, \$5,800.00 in October, \$4,600.00 in November and \$5,000.00 in December 2008. She also provided pay stubs indicating that she earned \$2,800.00 in January, \$5,200.00 in February and \$2,800.00 in March 2009.

The Board finds that OWCP has the necessary information to apply the formula for determining appellant's compensation due for partial disability during the period January 15, 2008 to March 12, 2009. The detailed information in the record establishes that appellant earned \$30,600.00 for the period January 15 to June 30, 2008. The Board agrees that there is some discrepancy between the work hours provided by appellant's time records and the pay amount reported on her earnings statement for the month of June. The Board finds that the earnings statement constitutes the best evidence of the earnings she received from January 15 through June 2008. This evidence is not based on appellant's recollection of her pay rate or hours worked, but instead the earnings reported to the Social Security Administration by her employer. OWCP has pay stubs for each month that appellant worked at Vet-Co from June 30, 2008. In accordance with the procedure manual, it has the information necessary to average her earnings for the period January 15, 2008 through March 12, 2009 and determine her average pay rate. OWCP can then comply with *Shadrick* formula as codified in section 10.403.

On remand, OWCP shall utilize the evidence of appellant's earnings as provided by her earnings statements, apply the appropriate formula and determine if she is entitled to any additional compensation for partial disability during the period January 15, 2008 through March 12, 2009.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2011 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: June 25, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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