

FACTUAL HISTORY

Appellant, a 29-year-old engineering equipment operator, injured his neck and upper back in the performance of duty on December 30, 1982. He filed a claim for benefits on January 3, 1983, which OWCP accepted for upper back and neck strain.

Appellant filed several additional claims which were accepted by OWCP. He sustained injury on April 29, 1987, which OWCP accepted for a neck strain; a left knee injury on July 31, 2003, which it accepted for a meniscal tear; a facial injury on May 30, 2011, which it accepted for foreign object in the eye, lacerations of the face, fractured teeth, dental caries and loss of teeth; an occupational disease claim for cervical degenerative disc disease on September 12, 2008, accepted by OWCP, and a subsequent claim for aggravation of cervical degenerative disc disease.

On July 26, 2006 Dr. Terry Struck, Board-certified in physical medicine and rehabilitation and appellant's treating physician, outlined work restrictions. He could return to full-time work with intermittent lifting/carrying 0 to 10 pounds for no more than two-thirds of the workday; limited lifting/carrying of 10 to 20 pounds for no more than one-third of the workday; no lifting/carrying exceeding 20 pounds; no pushing/pulling exceeding 30 pounds for no more than one and two-thirds of the workday; no pushing/pulling exceeding 20 pounds for no more than two-thirds of the workday; sitting not exceeding six to eight hours per day, while alternating positions; standing not exceeding four to six hours per day, while alternating positions as needed; walking not exceeding four to six hours per day, while alternating positions as needed; limited ladder climbing, kneeling, bending, stooping, twisting, and reaching above the shoulder; intermittent stair climbing, simple hand grasping, fine hand manipulation and pinch gripping. Dr. Struck indicated that any new job would require ergonomic evaluation.

On December 11, 2006 the employing establishment removed appellant from his position as an engineering equipment operator for failure to perform the duties essential to his position. The decision indicated that he had most recently been employed in a light-duty position, within restrictions imposed by his treating physician, in July 2006. The employing establishment noted that appellant's treating physician had determined that he could no longer perform the essential functions of his position. It indicated that there was no merit to appellant's allegations that the doctors' reports had been misquoted and used against him and that he had been forced to apply for disability retirement.

In a report dated January 16, 2007, Dr. Struck advised that appellant had been experiencing an aggravation of his pain syndrome due to cold, snowy weather changes. She related having constant neck, shoulder girdle, interscapular and temporomandibular joint (TMJ) pain, with occipital headaches two to five hours per day. Dr. Struck noted that appellant had been placed on disability as of December 14, 2006 and had left the employing establishment on January 5, 2007. She indicated that appellant had been released from work and was free to begin looking for jobs in the civilian market, which he had just started doing. Dr. Struck stated that he could continue to function within his permanent limitations and restrictions.

In an April 4, 2008 report, Dr. Struck stated that appellant had undergone a de-escalation of the previous flare-up of pain syndrome and noted that he would continue with his pain

management program. She advised that he could continue to function within his permanent limitations and restrictions.

In a report dated May 8, 2008, Dr. Struck advised that appellant continued to have constant neck, shoulder girdle, interscapular, and TMJ pain, with constant occipital headaches. Appellant related that his right hand, thumb, and index fingers tingled and cramped periodically into flexion especially during shoulder extension, rotation and abduction activities. The pain was aggravated by immobility, stress, illnesses, lifting, driving, and static or repetitive as well as reaching and overhead neck and upper extremity activities. Dr. Struck advised that appellant described being medically and surgically stable since she last saw him without undergoing any other diagnostic workup or treatment. Appellant had quit his job at the Holiday Inn because he was required to set up tables and equipment for banquets which he was unable to do without aggravating his pain syndrome. Dr. Struck stated that appellant was looking for a new job but had not been able to find one within his limitations and restrictions.

In order to determine appellant's current condition and his ability to work, OWCP referred him to Dr. Hendrick J. Arnold, Board-certified in orthopedic surgery, for a second opinion examination. In a report dated June 25, 2009, Dr. Arnold noted that appellant had medically retired on January 6, 2007. He stated that appellant was capable of working only at a sedentary job, with breaks for getting up and stretching every hour for 10 minutes. Dr. Arnold restricted him from lifting no more than 10 pounds, with no overhead lifting, with only intermittent standing and walking.

On July 27, 2009 appellant filed a Form CA-7 claim for benefits, claiming compensation for wage loss from January 7, 2007 to July 27, 2009.

By letter to appellant dated September 15, 2010, OWCP noted that appellant had claimed compensation for wage loss from January 7, 2007 to July 27, 2009. It advised appellant that he could not receive both Office of Personnel Management (OPM) retirement benefits and OWCP wage-loss compensation at the same time. OWCP noted that he was not totally disabled upon retirement and that it required additional information regarding the private sector jobs at which he worked after retirement. It asked him to submit information regarding any postretirement jobs, including the dates he started and stopped working, hours per week and hourly wages.

By letter to his attorney dated September 15, 2010, appellant stated that he received disability retirement from OPM on January 6, 2007. He worked at the Holiday Inn as a shuttle driver within Dr. Struck's limitations from March 2007 through May 2008 for 40 hours a week at a salary of \$8.50 per hour.

In a January 3, 2011 letter to OWCP, appellant asserted:

“In January 2007 I was put in the situation where OWCP denied my claim, and Fort Carson refused to find me work. In March 2007 I accepted a job at the Holiday Inn, 40 hours a week at \$8.50 an hour. My job consisted of driving people back and forth to the airport, I was expected to help people in and out of the van, and lifting their bags within my restriction, (which) at that time was 30 pounds, inspecting the property three times per shift, each time I had to climb 3 flights of steps at the Holiday Inn and 3 flights of steps at the Holiday Express,

also set up banquet rooms and dumped the trash. At the beginning of the shift my pain level would be between 3 and 4 and by the end of the shift my pain level would be between 7 and 8, sometimes reaching 10. After each shift I would come home with a bad headache and excruciating pain. I would have to use pain killers, muscle relaxers and heat packs to get my pain level back down. As time went on it was hard to get the pain level down. In April 2008 I had a hard time raising my arm to help people in and out of the vehicle and lifting their bags. Weeks later while I was returning from the airport I needed to get into the left lane to go to the Holiday Inn and I couldn't turn my neck to see the blind spot, I almost had an accident, so that was when I decided I needed to find a new job where I wouldn't put myself or others in danger."

By decision dated April 15, 2011, OWCP advised appellant that it was reducing his monetary compensation effective April 15, 2011 because the medical evidence established that he was no longer totally disabled due to the effects of his accepted cervical conditions. It found that his actual earnings as a shuttle driver fairly and reasonably represented his wage-earning capacity. It based its wage-earning capacity determination on appellant's actual wages. It found that the job of shuttle driver for the Holiday Inn in Capri Colorado Springs, with a weekly wage of \$341.14 per week and was effective on March 1, 2007.²

OWCP stated that appellant had demonstrated the ability to perform the duties of this job for two months or more and found that the position was suitable because it was within the restrictions outlined by Dr. Struck, his treating physician. The medical evidence did not indicate that he stopped working at his shuttle driver job because he experienced a significant worsening of his accepted condition. The record showed that he quit the shuttle driver job voluntarily due to subjective complaints of pain. OWCP found that appellant had the capacity to earn wages as a shuttle driver at the adjusted rate of \$341.00 per week, in accordance with the factors outlined in 5 U.S.C. § 8115.³ It calculated that appellant's compensation rate should be adjusted to \$1,549.00 using the *Shadrick*⁴ formula. OWCP noted that appellant's salary as of January 6, 2007, the date he stopped working with the employing establishment, was \$508.08 per week, that his current, adjusted pay rate for his job on the date of injury was \$811.92, and that appellant was currently capable of earning \$341.01 per week, the rate of a shuttle driver. It determined that he had a 42 percent wage-earning capacity, an adjusted wage-earning capacity of \$470.91, which when multiplied by three fourths amounted to a compensation rate of \$353.18. OWCP found that his current adjusted compensation rate, per four-week period, was \$863.00.

By decision dated May 24, 2011, OWCP paid compensation for wage loss for the period January 7 to February 28, 2007 finding that appellant sustained a recurrence of total disability due to the employing establishment's inability to accommodate his work restrictions. With

² OWCP found that appellant's start date as a shuttle driver for Holiday Inn in Capri Colorado Springs was March 1, 2007. It noted that the fact that he stated that he began working full time as a shuttle driver in March of 2007 and did not provide the exact date that he commenced this employment. March 1, 2007 was an appropriate start date. OWCP found that he worked at this position until an unidentified date in May 2008.

³ 5 U.S.C. § 8115.

⁴ *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

regard to the period March 1, 2007 to July 27, 2009, it denied compensation for wage loss because he demonstrated the ability to perform the duties of a shuttle driver during this period.

By letter dated June 7, 2011, appellant, through his attorney, requested an oral hearing, which was held on October 14, 2011.

In a June 16, 2011 report, Dr. Jack L. Rook, Board-certified in physical medicine and rehabilitation, noted that two years prior Dr. Arnold had opined that appellant was unable to return to work following his medical retirement. He advised that appellant had attempted to return to work as a shuttle driver with Holiday Inn but had developed worsening neck, head and right upper extremity symptoms. Dr. Rook related that Dr. Struck, who was no longer treating appellant, told appellant that he should only drive to and from the workplace in a truck equipped with an extra-large mirror to avoid excessive movement of his neck. Dr. Struck also instructed him to drive only on smooth roads. Dr. Rook concurred with Dr. Arnold's opinion that appellant was unable to return to work as a shuttle driver because of his cervical and right upper extremity conditions. He stated, however, that appellant was capable of returning to work at another job within the restrictions provided by Dr. Arnold.

At the October 14, 2011 hearing, appellant related that he returned to work because he was experiencing financial difficulties. He was initially able to perform the shuttle driver job with some difficulty; but eventually stopped work because he was required to set up tables and equipment for banquets, which aggravated his neck condition. In addition, appellant was tasked with helping people that had difficulty getting in and out of his vehicle. His initial supervisor in the private sector accommodated his physical limitations but eventually left the workplace; the new supervisor wanted him to undertake additional duties which exceeded Dr. Struck's work restrictions and aggravated his cervical condition.

By decision dated January 18, 2012, an OWCP hearing representative affirmed the April 15, 2011 wage-earning capacity determination. He also affirmed the May 24, 2011 decision which denied compensation for wage loss; finding that appellant was working full-time as a shuttle driver for Holiday Inn during the period he had requested compensation for wage loss. The hearing representative denied compensation for wage loss for the period March 1, 2007 to July 27, 2009. He further found that there was a presumption that appellant and his attorney had received a copy of the April 15, 2011 decision.

By letter dated March 30, 2012, appellant's attorney requested reconsideration. He reiterated that he had not received the April 15, 2011 decision. Counsel stated that, once he informed OWCP that he did not receive the April 15, 2011 decision, the presumption of receipt "burst" and OWCP was required to prove both that it was mailed and not returned.

By decision dated June 21, 2012, OWCP denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden to justify termination or modification of compensation benefits.⁵

Section 8115(a) of FECA provides that the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity. 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

After the claimant has been working for 60 days, OWCP will determine whether the claimant's actual earnings fairly and reasonably represent his or her wage-earning capacity. If so, a formal decision should be issued no later than 90 days after the date of return to work.⁷

Where OWCP learns that the claimant has returned to alternative work more than 60 days after the fact, OWCP may consider a retroactive loss of wage-earning capacity determination (loss of wage-earning capacity). Such a determination may be appropriate where an investigation reveals that a claimant held private employment and had earnings which were not reported to OWCP. A retroactive decision may be made if:

“(1) The claimant has worked in the position for at least 60 days;

“(2) OWCP has determined that the employment fairly and reasonably represents the wage-earning capacity (an assessment of suitability need not be made); and

“(3) The work stoppage did not occur because of any change in the claimant's injury-related condition affecting ability to work.”⁸

If no formal loss of wage-earning capacity decision has been issued, OWCP should consider whether it is appropriate to issue a retroactive loss of wage-earning capacity determination. OWCP will also need to ask the claimant to provide his or her reasons for ceasing work.⁹

ANALYSIS -- ISSUE 1

The question that arises in this case is whether it was appropriate for OWCP to issue a retroactive loss of wage-earning capacity determination. Appellant's attorney argues on appeal that OWCP's April 15, 2011 loss of wage-earning capacity decision was erroneous because the

⁵ *Harold S. McGough*, 36 ECAB 332 (1984).

⁶ *Don J. Mazurek*, 46 ECAB 447 (1995).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (December 1993).

⁸ *Id.* at Chapter 2.814.9(b).

⁹ *Id.* at Chapter 2.814.9(b)(1).

medical and factual evidence indicates that the position did not demonstrate his wage-earning capacity. He argues that appellant tried to return to work but was forced to quit because the job's work duties exceeded his work restrictions and aggravated his accepted upper back and cervical conditions.

While OWCP did not learn that appellant had returned to work as a shuttle driver on March 1, 2007 until September 2010, once it learned that appellant had stopped working at this job in approximately May 2008, it should have asked appellant to provide his reasons for ceasing work.

The medical evidence reflects complaints of increasing neck and shoulder pain in May 2008. Dr. Struck stated in her May 8, 2008 report that appellant continued to have constant neck, shoulder, interscapular, and TMJ pain, with constant occipital headaches. She asserted that appellant experienced tingling and cramps his right hand, thumb, and index fingers, particularly when engaged in shoulder extension, rotation and abduction activities. Dr. Struck stated that appellant's pain was aggravated by immobility, stress, illnesses, lifting, driving, and by reaching and overhead neck and upper extremity activities. She advised that appellant had quit his job at the Holiday Inn because they required him to set up tables and equipment for banquets which he was unable to do without aggravating his pain syndrome. In addition, Dr. Rook stated in his June 16, 2011 report that appellant had attempted to return to work as a shuttle driver with Holiday Inn but had developed worsening neck, head and right upper extremity symptoms. He related that Dr. Struck had told appellant that he should only drive to and from the workplace on smooth roads, in a truck equipped with special requirements including an extra-large mirror to avoid excessive movement of his neck. Dr. Rook agreed with Dr. Arnold that he was unable to continue working as a shuttle driver because of his cervical and right upper extremity conditions.

The Board finds that OWCP issued a loss of wage-earning capacity determination when the evidence raised a substantial question as to whether appellant's work stoppage on or about May 2008 occurred because of a change in the injury-related conditions affecting his ability to work.

The Board will therefore reverse OWCP's January 18, 2012 decision which affirmed the April 15, 2011 loss of wage-earning capacity decision.

LEGAL PRECEDENT -- ISSUE 2

It is the employee's burden of proof to establish disability during the period of time for which wage-loss compensation is claimed. The term "disability" is defined by implementing regulations as "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total."¹⁰ The Board has long held that whether a particular injury causes an employee disability for employment is a medical question which must be resolved by competent medical evidence.¹¹

¹⁰ 20 C.F.R. § 10.5(f).

¹¹ See *Donald E. Ewals*, 51 ECAB 428 (2000).

ANALYSIS -- ISSUE 2

OWCP accepted that appellant sustained work-related upper back and cervical conditions. Appellant filed a claim for wage-loss compensation for January 7, 2007 to July 27, 2009 and submitted reports from Dr. Struck. By decision dated May 24, 2011, OWCP awarded compensation for wage loss for the period January 7 to February 28, 2007 because he sustained a recurrence of total disability due to the employing establishment's inability to continue accommodating his work restrictions during this period. With regard to the period March 1, 2007 to July 27, 2009, OWCP denied compensation for wage loss because he demonstrated the ability to perform the duties of a shuttle driver until at least May 2008, when he stopped working. Appellant requested a hearing and submitted Dr. Rook's June 16, 2011 report asserting that he was unable to return to work at the employing establishment. Dr. Struck's reports from that period, appellant's September 15, 2010 letter to his attorney and his January 3, 2011 letter to OWCP indicate that he was working full time as a shuttle driver from March 2007 to May 2008 and was therefore not totally disabled during this period.

Appellant alleged that he was earning \$8.50 per hour as a shuttle bus driver, an amount less than his earnings in his federal employment. He remained entitled to partial disability benefits, offset by actual earnings, if his federal employment remained unavailable to him due to his accepted injury. OWCP improperly determined that appellant was not entitled to partial disability benefits, simply because he was working during this time period. OWCP did not make the necessary findings to determine whether appellant's accepted condition continued to cause partial disability during this time period.

The Board also finds that OWCP did not properly determine appellant's entitlement to partial wage loss after his return to work at the Holiday Inn. During the relevant time period, OWCP's procedures stated:

"If the claimant is entitled to compensation for partial wage loss after return to work, the CE [claims examiner] should compute entitlement using the Shadrick formula (see FECA PM 2-0901.15) and authorize compensation on a 28-day payment cycle. The CE should make every effort to avoid interruption of income to the claimant.

"The CE will advise the claimant (see Exhibit 2) that compensation will be paid based on actual earnings, and that the claimant remains entitled to payment of medical expenses for treatment of the accepted condition. This letter will not constitute a formal decision and will have no appeal rights attached."¹²

Furthermore, pursuant to OWCP procedures, when determining entitlement using the *Shadrick* formula (see FECA PM 2-0901.15), the claims examiner should confirm the respective pay rates for each job by telephone and document the file accordingly.¹³ The record does not substantiate that OWCP verified appellant's pay rate or earnings regarding his Holiday Inn employment.

¹² *Supra* note 1 at Chapter 2.814.7(b).

¹³ *See id.* at Chapter 2.814.7(c)(2).

OWCP procedures also require that, if the file shows that the claimant has an approved OPM annuity, a new election of benefits must be obtained and OPM advised of the election.¹⁴ The record does not establish that OWCP received an election of benefits for the appropriate time period.

On remand, OWCP shall further develop the issue of appellant's partial disability as of March 1, 2007. After such further development as necessary, it shall issue a merit decision regarding appellant's entitlement to monetary compensation for the period March 1, 2007 to July 27, 2009, with proper application of the *Shadrick* formula.

CONCLUSION

The Board finds that OWCP did not meet its burden regarding the loss of wage-earning capacity determination. The case is remanded as to the issue of appellant's partial disability as of March 1, 2007 and election of benefits.

ORDER

IT IS HEREBY ORDERED THAT the January 18, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: August 20, 2013
Washington, DC

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

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

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

¹⁴ *Id.*