

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

M.K., Appellant

and

**DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD,
Philadelphia, PA, Employer**

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**Docket No. 13-259
Issued: August 12, 2013**

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

On November 9, 2012 appellant filed a timely appeal from June 25 and October 31, 2012 merit decisions of the Office of Workers' Compensation Programs (OWCP) denying modification of a loss of wage-earning capacity decision.¹ The Board assigned Docket No. 13-259.

The Board, having duly considered the matter, concludes that the case is not in posture for decision and must be remanded for further development. This case has been before the Board previously. Regarding the relevant decisions in the first appeal, the Board issued a May 15, 2003 decision affirming October 29, 2001 and January 28, 2002 decisions of OWCP, finding that it properly reduced appellant's compensation benefits effective August 15, 1999 based on the selected position of cashier II.² In the second appeal, the Board, on December 14, 2004, affirmed OWCP's April 12, 2004 decision denying modification of the loss of wage-

¹ On March 15, 1982 appellant, then a molder, injured his right hand in the performance of duty. OWCP accepted the claim for fracture of the fifth right metacarpal and authorized nerve entrapment surgery.

² Docket No. 02-2265 (issued May 15, 2003). The Board also found that appellant failed to establish that his claimed recurrence of disability on or after August 28, 2000 was causally related to the March 15, 1982 employment injury.

earning capacity determination, but remanded the case for clarification of OWCP's calculation of appellant's wage rate by using a mean rate.³ By decision dated October 24, 2006, the Board, on the third appeal, affirmed an April 5, 2005 OWCP decision regarding appellant's pay rate.⁴

By decision dated June 25, 2012, OWCP found that it had correctly applied the *Shadrick* formula,⁵ and noted that appellant had requested the application of a grade and step that he had not reached. It concluded that the figures used for computation were correct as they were based on the position he actually held on the date of injury. OWCP, in its October 31, 2012 decision, again found that it applied the correct pay rate, *i.e.*, date of injury, when computing his wage-earning capacity using the *Shadrick* formula and added that it had previously answered his questions regarding the matter.

Section 8124(a) of the Federal Employees' Compensation Act provides: "[OWCP] shall determine and make a finding of fact and make an award for or against payment of compensation...."⁶ Section 10.126 of Title 20 of the Code of Federal Regulations provides: "The decision shall contain findings of fact and a statement of reasons."⁷ Moreover, OWCP's procedures provide: "The reasoning behind [OWCP's] evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it."⁸

In its June 25 and October 31, 2012 decisions, OWCP did not discharge its responsibility to provide appellant a statement explaining the disposition so that he could understand the basis for the decision, including the evidence required to show that the rate of pay calculation for the loss of wage-earning capacity decision was incorrect. It did not discharge its responsibility to provide appellant a statement explaining the disposition so that he could understand the basis for the decision as well as the precise defect and the evidence required to overcome this defect when it issued its June 25 and October 31, 2012 decisions finding that the rate of pay used to calculate his loss of wage-earning capacity was correct when applying the *Shadrick* formula and that it had previously addressed this issue. OWCP failed to make any determination regarding whether appellant's requests for reconsideration were timely or untimely pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607, did not include any further explanation concerning the actual computation of the rate of pay and did not provide any appeal rights for either decision. Thus, OWCP, in its June 25 and October 31, 2012 decisions, did not discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition so that

³ Docket No. 04-1438 (issued December 14, 2004).

⁴ Docket No. 06-40 (issued October 24, 2006), *order granting Director's petition for recon. for correction and denying appellant's petition for recon.*, Docket No. 06-40 (issued July 30, 2007).

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

⁶ 5 U.S.C. § 8124(a); see *Hubert Jones, Jr.*, 57 ECAB 467 (2006); *Paul M. Colosi*, 56 ECAB 294 (2005).

⁷ 20 C.F.R. § 10.126. See *O.R.*, 59 ECAB 432 (2008); *Teresa A. Ripley*, 56 ECAB 528 (2005); *Tonja R. Hiebert*, 55 ECAB 706 (2004) (it is a well-established principle that OWCP must make proper findings of fact and a statement of reasons in its final decisions).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4(e) (March 1997).

appellant could understand the basis for the decision, *i.e.*, the evidence required to establish that his rate of pay was incorrectly calculated for the loss of wage-earning capacity determination.

The case must be returned to OWCP for a proper decision which includes findings of fact and a clear and precise statement regarding appellant's request for reconsideration on the rate of pay calculation for his loss of wage-earning capacity determination, including advising appellant regarding the evidence required to show that the rate of pay had been incorrectly calculated. Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

IT IS HEREBY ORDERED THAT the October 31 and June 25, 2012 Office of Workers' Compensation Programs' decisions be set aside and the case remanded for further action consistent with this order of the Board.

Issued: August 12, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board