United States Department of Labor
Employees' Compensation Appeals Board

G.D., Appellant	)	
and	)	**Docket No. 13-1754**
	)	**Issued: April 4, 2014**
DEPARTMENT OF COMMERCE, U.S. CENSUS BUREAU, Marienville, PA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 16, 2013 appellant, through his representative, filed a timely appeal from the January 17, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of its loss of wage-earning capacity (LWEC) determination. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant has met one of the standards for obtaining modification of the March 1, 2012 LWEC determination.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant does not appeal from OWCP's June 11, 2013 decision on wage-loss compensation due to postsurgery recovery and treatment. Thus, the Board will not review it on this appeal. *See* 20 C.F.R. § 501.3(a).

FACTUAL HISTORY

On May 5, 2010 appellant, then a 55-year-old census enumerator, sustained a traumatic injury in the performance of duty when he jumped to avoid stepping on an active anthill. OWCP accepted his claim for left medial meniscus tear. Appellant received compensation for wage loss on the periodic rolls. His pay rate at the time of injury was $11.50 an hour.

In July 2011, appellant returned to work as a field representative. The employing establishment advised that the appointment and tour of duty were identical to those of the date-of-injury position. Appellant's new pay rate was $11.95 an hour.

Appellant's temporary appointment expired on December 17, 2011. The employing establishment updated his actual earnings: For the 84-day period from September 25 through December 17, 2011, appellant earned $1,867.19 or an average of $155.60 a week.

In a decision dated March 1, 2012, OWCP determined that appellant's actual earnings as a field representative fairly and reasonably represented his LWEC. As appellant's actual earnings in alternative employment exceeded the current wages of the job he held when injured -- a weekly pay rate of $155.60 compared to $149.28 -- OWCP determined that he had no LWEC as a result of the accepted employment injury.[3]

On September 24, 2012 OWCP's hearing representative affirmed the LWEC determination after a slight modification of appellant's pay rate in 2011. As the wages appellant earned in alternative employment were greater than the wages he earned on the date disability began, the hearing representative found that he had no LWEC.

On October 11, 2012 appellant requested reconsideration. To support overturning the LWEC determination, he argued that he did not meet the 60-day duration requirement: from September 25 through December 17, 2011 -- the period used by OWCP to determine his LWEC -- he worked 43 days through November 6, 2011, then abandoned his job for 8 days through November 14, 2011 while he sought the advice of his attending physicians and then resumed employment for 33 days through December 17, 2011. Appellant added that a change in medical condition was grounds for modifying the LWEC determination.

Appellant argued that his actual earnings in the alternative employment did not fairly and reasonably represent his LWEC, as the limitation on walking and standing (up to 15 minutes a day) would prove difficult or impossible, thereby limiting his realistic work potential to 3.5 hours a day and making his reemployment not equivalent to his date-of-injury enumerator position.

Appellant took issue with the calculation of his LWEC. He stated that, while he was allowed to work up to 4 hours a day, OWCP used a provisional 4.5 hours when applying the "150 formula." Appellant argued that employment records showed that he worked 114.95 hours over 49 days from September 25 through December 17, 2011 or an average of 2.35 hours a day,

[3] OWCP appeared to use the "150 formula" under 5 U.S.C. § 8114(d)(3) to determine appellant's date-of-injury pay rate: 4.5 hours a day (provisional) x $11.50 per hour x 150/52 weeks a year = $149.28 per week.

4.9 days a week.[4] He noted that even using four hours a day would give him a weekly pay rate of $137.88, which was less than his $149.28 weekly pay rate at the time of injury. Appellant added that OWCP did not follow its procedures for calculating his weekly pay rate at the time of injury.

The employing establishment responded that appellant was rehired on July 6, 2011, entered a pay status shortly thereafter and remained continuously employed until December 17, 2011. Appellant's temporary, nonstatus position was extended several times with no breaks in employment and no personnel action taken when he sought clarification from his physicians. The employing establishment noted that standing, walking and sitting were entirely at his discretion. With respect to the very limited nature of job requirements, it stated: "This is perhaps the lightest duty, temporary, intermittent, part-time job imaginable." Further, there was no medical evidence that appellant was for any reason disabled from performing this job.

The employing establishment explained that appellant was, at the time of injury, a temporary, intermittent employee. The type of employment and tour of duty of his alternative employment were exactly that which he held at the time of injury.

In a decision dated January 17, 2013, OWCP denied modification of its March 1, 2012 LWEC determination. There was no evidence of a material change in the nature and extent of the injury-related condition and no evidence of retraining or vocational rehabilitation. OWCP also found that appellant submitted no evidence of error in its execution of the "150 formula" used in the calculation of its March 1, 2012 LWEC determination. As appellant did not meet at least one of the standards for justifying modification of the LWEC determination, it denied modification.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.[5] "Disability" means 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.[6]

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[7] 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 or her wage-earning capacity.[8] While wages actually earned are

[4] Earnings and leave statements show that from September 25 through December 17, 2011, a period of 84 days or 12 weeks, appellant worked 156.25 hours and earned $1,867.19.

[5] 5 U.S.C. § 8102(a).

[6] 20 C.F.R. § 10.5(f).

[7] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[8] 5 U.S.C. § 8115(a).

generally the best measure of an injured worker's capacity for employment, such wages may not be based on make-shift or sheltered employment.[9]

Once LWEC 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.[10]

ANALYSIS

As appellant requested reconsideration and argued that the March 1, 2012 LWEC determination should be overturned, he has the burden of proof to establish at least one of the grounds for modification.

Appellant did not support his request for modification with evidence of a material change in the nature and extent of the accepted left medial meniscus tear, such that he could no longer perform the duties of his alternative employment. Indeed, the record establishes that his alternative employment did not end for medical reasons, but rather because the temporary appointment expired on December 17, 2011 without further extension.

Appellant made no argument that he was retrained or otherwise vocationally rehabilitated.[11]

Appellant did argue that the original determination was, in fact, erroneous. His theory that he abandoned his alternative employment, breaking his employment from September 25 through December 17, 2011 into two smaller periods, neither of which was 60 days, is not established. Appellant's temporary appointment began in July 2011 and continued unbroken, as verified by the employing establishment, until December 2011, a period of nearly five months. Moreover, his continuous employment from September 25 through December 17, 2011, upon which OWCP based its LWEC determination, was more than 60 days.

To determine whether the claimant's actual earnings in alternative employment fairly and reasonably represents his LWEC, OWCP should consider whether the kind of appointment and tour of duty were at least equivalent to those of the job held on the date of injury.[12] The employing establishment confirmed they were identical. Appellant's actual earnings in alternative employment performed successfully for more than 60 days fairly and reasonably represented his wage-earning capacity.

[9] *A.J.*, Docket No. 10-619 (issued June 29, 2010); *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

[10] *Daniel J. Boesen*, 38 ECAB 556 (1987).

[11] *Supra* note 10.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.a (October -2009).

Parsing the physical demands of his alternative employment, appellant argued that walking and standing for 15 minutes a day would prove difficult or impossible, thereby reducing the number of hours he worked on a daily basis to 3.5. The Board has reviewed the physical demands and notes that there is no requirement that he walk or stand for 15 minutes. To be precise, both are described as "up to" 15 minutes a day, usually no more than several moments or minutes at a time. Further, the demands are described as intermittent and seldom and both are left entirely to the employee's discretion. The position was essentially sedentary and performed at home with minimal physical demands in the performance of typical administrative functions. Indeed, appellant successfully demonstrated that he could perform the duties of his alternative employment. His argument concerning walking and standing does not establish that the accepted medical condition limited him to working only 3.5 hours a day.

The record shows that appellant's alternative employment came with a higher pay rate. His date-of-injury position as an enumerator paid $11.50 an hour. Appellant's alternative employment as a field representative paid $11.95 an hour. As noted above, the tours of duty were identical. On its face, at least, appellant's left medial meniscus injury no longer caused a loss of wage-earning capacity: he was able to earn higher hourly wages than he did when he was injured.

Appellant argues, however, that OWCP did not follow its procedures when comparing weekly pay rates. OWCP's FECA Procedure Manual sets forth rules for determining pay rates based on unusual terms of employment, pay scales or increments of pay, including the pay rate for census enumerators, the position he held at the time of injury.[13] For the 2010 census, the Bureau of the Census (Bureau) hired individuals in Local Census Offices (LCO's) throughout the United States. Most employees in LCO's were either enumerators or crew leaders on temporary (not-to-exceed 180 days) appointments. All temporary-hire positions, including enumerators and crew leaders, were paid on an hourly basis. Wages in the LCO's varied by geographical area and pay types were assigned accordingly. Enumerators were paid from $10.93 to $22.10 an hour.

Based on an analysis of the 2000 Census data, the Bureau determined that, on average, enumerators worked 4.5 hours a day, 4 days a week. The work patterns for the 2010 census were anticipated to be similar to the 2000 Census. However, individuals may have worked more or less depending on the LCO's operational requirements and the factual evidence should be evaluated carefully. Because of their irregular federal employment, these employees are usually paid under the provision of 5 U.S.C. § 8114(d)(3).

In its March 1, 2012 LWEC determination, OWCP found that appellant's pay rate in alternative employment as a field representative exceeded the pay rate of his date-of-injury position as an enumerator. In calculating his pay rate as a field representative, it used employment records showing that for the 12-week period from September 25 through December 17, 2011, appellant earned $1,867.19 or an average of $155.60 per week.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.12.e (March 2011).

In calculating his pay rate as an enumerator, however, OWCP used a provisional workday of 4.5 hours, an average based on an analysis of the 2000 Census. FECA procedures make clear that individuals may have worked more or less, "and the factual evidence should be evaluated carefully."

Before OWCP can properly compare appellant's pay rate in alternative employment to his pay rate at the time of injury, it must carefully evaluate the factual evidence to determine the latter. Under 5 U.S.C. § 8114(d)(3), it must give regard to the earnings of the employee in federal employment for the year prior to injury. OWCP should then review the earnings of other employees in the same or most similar class working the same or most similar employment in the same or neighboring location. Finally, it must consider any other employment of the employee or other relevant factors. FECA procedures discuss how OWCP may obtain such information, but the Board can find no evidence that it developed this evidence.

To determine the employee's average annual earnings after development is complete, FECA procedures state that OWCP should take the highest of:

> "(1) the earnings of the employee in the year prior to the injury, including any similar nonfederal employment;
>
> "(2) the earnings of a similarly situated employee; or
>
> "(3) the pay rate determined by the "150 formula."[14]

FECA procedures state that OWCP should prepare a memorandum setting forth this determination and explaining the basis for it. This memorandum, which is subject to the certifier's concurrence, should be made part of the record.[15] It does not appear that OWCP followed these procedures. Rather, it seems that OWCP arbitrarily opted to apply the "150 formula" as a first resort, using a provisional 4.5 hours a day rather than a pay rate drawn from the carefully evaluated factual evidence.[16]

For this reason, the Board finds that this case is not in posture for decision on whether the March 1, 2012 LWEC determination was, in fact, erroneous and therefore should be modified. The Board will set aside OWCP's January 17, 2013 decision denying modification and will remand the case to OWCP for further development consistent with its FECA procedures. Following such further development as may become necessary, OWCP shall issue a *de novo* decision on appellant's request for modification.[17]

[14] *Id.* at *Determining Pay Rates*, Chapter 2.900.4.c(5) (March 2011).

[15] *Id*., Chapter 2.900.4.c(6).

[16] *Id*., Chapter 2.900.12.e(3).

[17] *See Leonard D. Canfield*, Docket No. 04-2017 (issued February 1, 2005) (OWCP seemed to arbitrarily apply the "150 formula" and may not have applied that formula correctly).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: April 4, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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