

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

R.B., Appellant)

and)

**DEPARTMENT OF HOUSING & URBAN)
DEVELOPMENT, Washington, DC, Employer**)

**Docket No. 14-1459
Issued: December 3, 2015**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

ALEC J. KOROMILAS, Alternate Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 12, 2014 appellant, through counsel, filed a timely appeal of a March 13, 2014 decision of the Office of Workers' Compensation Programs (OWCP). 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 OWCP properly reduced appellant's compensation effective June 30, 2013 based on his capacity to earn wages in the constructed position of civil engineer.

FACTUAL HISTORY

On May 14, 2010 appellant, then a 49-year-old quality assurance inspector, filed a traumatic injury claim (Form CA-1) alleging that on May 11, 2010 he sustained cervical, lumbosacral, and left wrist sprains, left shoulder bursitis, left rotator cuff, a left slap tear, and left

¹ 5 U.S.C. § 8101 *et seq.*

biceps tendinitis when he slipped and fell down a soft incline onto his left side. OWCP accepted the claim for left wrist, lumbosacral, and neck strains, which was expanded to include a left rotator cuff tear. It authorized left arthroscopic rotator cuff repair surgery, which occurred on September 7, 2010. Appellant stopped work at the time of his injury. In an October 20, 2010 letter, OWCP placed appellant on the periodic rolls for temporary total disability.

On February 29, 2012 Dr. Kevin J. Paley, a treating Board-certified orthopedic surgeon, opined that appellant was unable to return to his date-of-injury position, but was capable of performing a light-duty job with restrictions. Work restrictions included limitations on standing, reaching, reaching above the shoulder, twisting, and no lifting more than 10 pounds.

On March 19, 2012 OWCP referred appellant for vocational rehabilitation services.

On April 16, 2012 a functional capacity evaluation (FCE) was performed to determine appellant's work restrictions. The test indicated that appellant was disabled from performing his date-of-injury position, but was capable of performing light-to-medium physical demand category jobs.

On July 6, 2012 appellant underwent a second FCE which showed that he was incapable of performing his date-of-injury position. The test noted that appellant was capable of performing in the medium-to-medium heavy physical demands category except for overhead lifting where his restrictions were consistent with light physical demands.

On October 9, 2012 the vocational rehabilitation specialist and appellant identified the positions of mechanical engineer, Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 007.061-014 and civil engineer, DOT No. 005.061-014. The weekly wages were \$1,357.20 for the mechanical engineer position and \$1,452.40 for the civil engineer position.

On October 12, 2012 OWCP received a September 26, 2012 report from Dr. Paley, who reviewed the FCE results and concluded that appellant was capable of working a job with the restrictions noted in the FCE.

On October 15, 2012 OWCP received labor market surveys dated September 2, 2012 from the vocational rehabilitation counselor containing information for the positions of mechanical engineer and civil engineer. The median hourly rate was noted as \$36.31 (weekly wages of \$1,452.40) for the civil engineer position and \$33.93 (weekly wages of \$1,357.29) for the mechanical engineer position as noted by information from the Ohio Labor Market Survey. OWCP also received a September 25, 2012 Individual Rehabilitation Placement Plan and Job Search Plan and agreement from the vocational rehabilitation counselor which identified Dayton, Ohio and Cincinnati, Ohio as the geographic region and within appellant's commuting area.

In a November 2, 2012 summary of contacts, the vocational rehabilitation counselor detailed contacts with appellant for the period October 1 to November 2, 2012. On October 17 and November 2, 2012 the rehabilitation counselor sent appellant a list of six job openings on each date for a total of 12 job openings.

On December 19, 2012 the vocational rehabilitation counselor provided an updated summary of contacts. On November 19, 2013 appellant was provided with six job openings and on December 12, 2013 a list of four job openings were provided.

On April 11, 2013 the vocational rehabilitation specialist indicated that vocational rehabilitation was closed. She reported that she had identified the positions of mechanical engineer and civil engineer and that both positions were performed in sufficient numbers in appellant's commuting area. The vocational rehabilitation specialist noted the weekly wages were \$1,357.20 for the mechanical engineer position and \$1,452.40 for the civil engineer position. She indicated that updated labor market surveys for these positions would be submitted by the vocational rehabilitation counselor to ensure that the information provided was current.

On April 22, 2013 OWCP received labor market surveys dated April 22, 2013 from the vocational rehabilitation counselor containing updated information for the positions of mechanical engineer and civil engineer. The median hourly rate was noted as \$36.39 for the civil engineer position and \$34.78 for the mechanical engineer position as noted by information from the Ohio Labor Market Survey as of April 20, 2013. A 2011 state and national wages -- civil engineers for Ohio reported a median hourly wage of \$34.19. The median hourly rate for mechanical engineers in Ohio was noted as \$33.25. In an attached occupational wage survey estimate for civil engineers, the median hourly rates under Data for JobsOhio Network Regions were listed as \$36.53 for the Cincinnati Region and \$37.06 for the Dayton Region. An attached occupational wage survey estimate for mechanical engineer reported medial hourly rates under Data for JobsOhio Network Regions as \$36.57 for the Cincinnati Region and \$32.90 for the Dayton Region.

On April 26, 2013 OWCP issued a notice proposing to reduce appellant's compensation as it determined that the position of civil engineer was medically and vocationally suitable for him and represented his wage-earning capacity. It advised appellant that she had the capacity to earn wages as a civil engineer at a rate of \$1,452.40 per week, in accordance with the factors outlined in 5 U.S.C. § 8115.² OWCP calculated that appellant's compensation should be adjusted to \$201.00 using the *Albert C. Shadrick*³ formula. It indicated that the salary for his job when injured was \$1,437.22, that the current salary for his job and step as of April 25, 2013 was \$1,535.85 and that appellant was currently capable of earning \$1,452.40 per week, as a civil engineer. OWCP therefore determined that appellant had a 95 percent wage-earning capacity. It found that his current adjusted compensation rate per four-week period was \$201.00. OWCP stated that the case had been referred to a vocational rehabilitation counselor who determined that the civil engineer position was suitable for appellant, given his work restrictions, and was reasonably available in his commuting area. It allowed appellant 30 days in which to submit any contrary evidence.

In a letter dated May 14, 2013 appellant responded to OWCP's proposal to reduce his wage-loss compensation. He noted that his cervical, shoulder, and upper back pain had become

² 5 U.S.C. § 8113.

³ 5 ECAB 376 (1953).

more acute over the recent months. Appellant contended that as a result of this pain he is unable to sit or use his left hand and arm without pain and adversely impacts his ability to work.

By decision dated June 24, 2013, OWCP reduced appellant's benefits effective that date to reflect that he was capable of performing the duties of a civil engineer earning \$1,452.40 per week.

On July 5, 2013 appellant requested a review of the written record by an OWCP hearing representative.

On July 15, 2013 appellant's counsel changed appellant's request for a review of the written record to a telephonic oral hearing before an OWCP hearing representative. The hearing was held on December 2, 2013. At the hearing appellant testified that he had accepted and was soon to start a new job with the employing establishment. He testified that OWCP should have afforded him more time to find a position as engineering positions were not readily available due to the slow economy and high number of applicants.

On September 27, 2013 the employing establishment offered appellant the position of construction analyst, which appellant accepted on October 18, 2013. He returned to work with the employing establishment on December 9, 2013.

By amended decision dated March 13, 2014, OWCP's hearing representative affirmed the June 24, 2013 loss of wage-earning capacity (LWEC) determination.⁴

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on LWEC.⁶

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee, if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of

⁴ The hearing representative initially issued a decision on January 14, 2014 which referenced a female appellant. Counsel pointed out the mistake in a letter dated March 6, 2014.

⁵ *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁶ 20 C.F.R. §§ 10.402, 10.403.

suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁷

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open market, that fit the employee's capabilities with regard to his physical limitations, education, age, and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Shadrick*⁸ and codified by regulations at 20 C.F.R. § 10.403⁹ should be applied. Subsection(d) of the regulations provide that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by OWCP, by the current pay rate for the job held at the time of the injury.¹⁰

In determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post-injury or subsequently acquired conditions.¹¹ Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation. Additionally, the job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.¹²

ANALYSIS

OWCP accepted appellant's claim for left wrist, lumbosacral and neck strains, and left rotator cuff tear. It authorized left arthroscopic rotator cuff repair surgery, which occurred on September 7, 2010. By decision dated June 24, 2013, OWCP reduced his wage-loss compensation effective that day based on his capacity to earn wages as a civil engineer. An OWCP hearing representative affirmed the June 24, 2013 decision in an amended March 13, 2014 decision. The issue on appeal is whether OWCP properly calculated appellant's LWEC.

OWCP procedures instruct that, in cases where a claimant has undergone vocational rehabilitation, the vocational rehabilitation counselor will submit a report summarizing why the

⁷ 5 U.S.C. § 8115(a); see *N.J.*, 59 ECAB 171 (2007); *T.O.*, 58 ECAB 377 (2007); *Dorothy Lams*, 47 ECAB 584 (1996).

⁸ *Supra* note 2.

⁹ 20 C.F.R. § 10.403.

¹⁰ 20 C.F.R. § 10.403(d).

¹¹ *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹² *Id.*

vocational rehabilitation was successful and list jobs that are medically and vocationally suitable for appellant.

Pursuant to the procedure manual, OWCP initially utilized the median wage rate which was correctly selected as appellant had a Bachelor of Science degree from the University of Cincinnati with significant experience in design software and applicable work experience. Under these circumstances, it is appropriate to assign a median hourly wage instead of the default entry wage.¹³ OWCP went on to determine that appellant had a wage-earning capacity with a median hourly rate of \$36.31 per hour or weekly wage of \$1,452.40 as a civil engineer. This determination was based upon an October 15, 2012 labor market survey. On April 13, 2013 the vocational rehabilitation counselor provided an updated labor market survey which noted a median hourly rate of \$36.39 or weekly rate of \$1,455.60 for civil engineer. The attachments to his updated report contain conflicting median hourly rates for the position of civil engineer in Ohio. A 2011 state and national wages -- civil engineers for Ohio indicated a median hourly wage of \$34.19 or weekly wages of \$1,367.60 while an occupational wage survey estimates for civil engineers provided different median hourly rates. The occupational wage survey reported median hourly rates Data for JobsOhio Network Regions as \$36.53 (weekly wages of \$1,461.20) for the Cincinnati Region and \$37.06 (weekly wages of \$1,482.40) for the Dayton Region. It is unclear from the record how vocational rehabilitation counselor determined the weekly wage rate for the constructed position of civil engineer. The attachments submitted by the vocational rehabilitation counselor with an updated labor market survey contain weekly wage rates different from the wage rates originally given on October 9, 2012 and used by OWCP in setting appellant's loss of wage-earning capacity determination. Moreover, the attachments report different wage rates for the Dayton and Cincinnati region. On September 25, 2012 the vocational rehabilitation counselor identified Dayton, Ohio and Cincinnati, Ohio as within appellant's commuting area. However, the determination of the wage rate for the constructed position of civil engineer, remains unclear as to which city was used by the vocational rehabilitation counselor as appellant's commuting area when calculating appellant's wage rate. Thus, the Board is unable, from the evidence in the record, to determine what the actual weekly pay rate was for the constructed position of civil engineer and which city or cities were used in determining appellant's commuting area. It is OWCP's burden to establish wage-earning capacity and thus it failed to meet its burden of proof in this case.

The Board finds that OWCP improperly determined appellant's loss of wage-earning capacity based on the median wages for the constructed position of civil engineer. Accordingly, the case will be reversed.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof in reducing appellant's wage-loss compensation based on the constructed position of civil engineer.

¹³ Federal (FECA) Procedural Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Constructed Position*, Chapter 2.816(5)(b) (June 2013).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 13, 2014 is reversed.¹⁴

Issued: December 3, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

¹⁴ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.