

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

A.P., Appellant

and

**DEPARTMENT OF AGRICULTURE, FOREST
SERVICE, Ironwood, MI, Employer**

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**Docket No. 14-0995
Issued: July 9, 2015**

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
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 21, 2014 appellant, through counsel, filed a timely appeal from a January 13, 2014 merit 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 based on the capacity to earn wages in the selected position of paralegal.

FACTUAL HISTORY

This case was before the Board on a prior appeal.² As the Board noted, appellant was an emergency casual firefighter who claimed a left knee injury while climbing a hill in the

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 06-1428 (issued November 29, 2006).

performance of duty on July 5, 2002. OWCP initially accepted the claim for left knee internal derangement and medial meniscus tear. By decision dated January 5, 2005, it found appellant's wage-earning capacity was represented by the actual wages earned as an information receptionist at the employing establishment from November 1, 2004 to February 5, 2005. The Board affirmed the wage-earning capacity determination, noting that appellant was in a temporary position at the time of injury. The history of the case as provided by the Board is incorporated herein by reference.

Appellant received a schedule award for 24 percent left leg impairment by decision dated February 22, 2005 and received compensation from October 31, 2004 to February 26, 2006. On June 11, 2009 OWCP accepted the claim for patellofemoral pain syndrome and patellofemoral compartment osteoarthritis. On July 28, 2009 appellant underwent left knee surgery and began receiving compensation for wage loss.

OWCP referred appellant for vocational rehabilitation services in February 2011. As part of his vocational rehabilitation plan, appellant pursued a Senior Paralegal Certificate Program from the Washington Online Learning Institute and successfully received the certification in September 2012. In a report dated October 10, 2012, the rehabilitation counselor noted that appellant's address was Iron River, Michigan, but noted that he had plans to relocate to a larger city in central Wisconsin, Green Bay, Wisconsin. In a December 14, 2012 report, she indicated that appellant had found an apartment in Green Bay, Wisconsin and was seeking employment.

In a report dated December 21, 2012, the attending physician, Dr. Timothy Mologne, a Board-certified orthopedic surgeon, found that appellant could continue to work with existing work restrictions. He reported that appellant could lift 40 pounds, with no kneeling on the left knee, no left leg squatting and no jumping or hopping onto the left leg.

The record contains a status report (OWCP-3) from an OWCP rehabilitation counselor stating that the position of paralegal was being performed in sufficient numbers within appellant's commuting area with weekly wages of \$673.07. In the rehabilitation report, the vocational rehabilitation counselor indicated that appellant had been actively pursuing employment as a paralegal assistant in Green Bay, Wisconsin. A March 6, 2013 e-mail from appellant indicated that he was relocating to California from Wisconsin, with the hope that there might be better opportunity for a job in California. The counselor noted that recent labor market surveys showed available employment both in his new location in California and his former location in Green Bay, Wisconsin. As of March 21, 2013 appellant had moved to California. On March 26, 2013 an OWCP rehabilitation specialist completed a Form 66 job classification for the position of paralegal. The position was described as a "light" position with 20 pounds occasional lifting. As to specific vocational preparation (SVP), the specialist stated that appellant "will be trained to meet the SVP requirement." With respect to availability, she stated that the job was available, noting appellant's willingness to relocate. The report stated that labor market survey calls and web search showed job listings in Michigan, Green Bay, Wisconsin and California. The hourly rate was \$12.00 to \$20.00 and the weekly wage was reported as \$480.00 to \$800.00.

By letter dated May 13, 2013, OWCP advised appellant that it proposed to reduce his compensation as he had the capacity to earn wages as a paralegal, Department of Labor's *Dictionary of Occupational Titles*, DOT No. 119.267.026 with wages of \$480.00 per week.

Appellant was advised to submit evidence within 30 days if he disagreed with the proposal. With respect to the pay rate calculations, OWCP stated that the date of recurrence was July 28, 2009. It found that appellant had not worked for the employing establishment since 2004, when he worked in the temporary position of information receptionist. According to OWCP, although the effective date was July 28, 2009, appellant's pay rate would be determined based on temporary position beginning November 1, 2004. Based on an hourly wage of \$12.79, it determined that a full-time employee at this rate would earn \$513.32 per week. Appellant testified that in addition to his date-of-injury temporary firefighter position for the employing establishment, he was also working as a part-time paid firefighter and a heavy automatic mechanic and tow truck driver in Iron River, Michigan.

By decision dated June 24, 2013, OWCP reduced appellant's compensation based on capacity to earn weekly wages of \$480.00 as a paralegal. Appellant's pay rate was found to be \$513.32 per week, his current date-of-injury pay rate \$627.71 and his continuing compensation would be based on a loss of wage-earning capacity of \$123.30 per week.

Appellant requested a hearing before an OWCP hearing representative, which was held on November 25, 2013. At the time of the hearing, he had moved back to Iron River, Michigan. Appellant argued that the selected position was not reasonably available in his area, that he did have the vocational qualifications for the position, and that OWCP had incorrectly calculated his pay rate.

By decision dated January 13, 2014, OWCP hearing representative affirmed the June 24, 2013 decision. She found the evidence was sufficient to meet OWCP's burden of proof to reduce appellant's compensation based on wage-earning capacity.

LEGAL PRECEDENT

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.³

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 or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of his or her injury, his or her degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.⁴

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

³ *Carla Letcher*, 46 ECAB 452 (1995).

⁴ *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her 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.⁵ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁶

ANALYSIS

In the present case, based upon appellant's vocational rehabilitation, OWCP selected the position of paralegal and determined that earnings of \$480.00 per week represented his wage-earning capacity. The Board finds that OWCP properly reduced appellant's compensation in this case.

Appellant did not raise an argument with respect to the medical suitability of the selected position. The attending physician, Dr. Mologne, indicated that appellant could lift 40 pounds, with no squatting or kneeling with the left knee or leg. The selected position was limited to 20 pounds lifting and there was no indication the position was outside any work restrictions.

The selected position must also be vocationally suitable and reasonably available in appellant's commuting area. In this regard, the evidence indicated that appellant had completed a certification course for a position as a paralegal assistant. The rehabilitation counselor confirmed that appellant had sufficient vocational preparation for the paralegal position.

As to reasonable availability of the position in appellant's commuting area, the record indicated that appellant initially lived in Iron River, Michigan then in late 2012 had taken an apartment in Green Bay, Wisconsin while looking for a job. Prior to the completion of the CA-66 by the rehabilitation specialist on March 27, 2013, appellant had moved to California. The rehabilitation counselor looked at job availability in all three locations and found the selected position was reasonably available in all of these commuting areas.

With respect to wages, the rehabilitation counselor found that entry-level wages began at \$480.00, and no contrary evidence was presented. She indicated that the wage rate was based on review of job listings and Department of Labor wage statistics. As noted above, OWCP then determines the loss of wage-earning capacity by applying the established formula set forth at 20 C.F.R. § 10.403. OWCP found the pay rate for compensation purposes as of the July 2009 surgery was \$515.13 per week based on full-time work, and the current pay rate for the date-of-injury job was \$627.71. Applying the formula, OWCP found appellant had 78 percent wage-

⁵ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁶ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.403 (employee's wage-earning capacity in terms of percentage is determined by dividing the employee's earnings by the current pay rate for the date-of-injury job. The wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity).

earning capacity and was entitled to a 28-day compensation rate of \$351.00. No contrary evidence was presented.

On appeal, appellant argues that his education was insufficient and did not qualify him for employment. For the reasons noted above, the Board finds that OWCP properly found the selected position represented appellant's wage-earning capacity. The Board notes that OWCP is not obligated to actually secure employment for appellant.⁷ Even if the employee is unsuccessful in obtaining work, this does not in itself establish that the selected position was not reasonably available.⁸ Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation based on wage-earning capacity in the selected position.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 13, 2014 is affirmed.

Issued: July 9, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

⁷ *Dennis D. Owen*, 44 ECAB 475 (1993).

⁸ *See Karen L. Lonon-Jones*, 50 ECAB 293 (1999); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).