

² Appellant submitted additional evidence after OWCP's May 16, 2013 decision, but the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

ISSUES

The issues are: (1) whether appellant met her burden of proof to modify her wage-earning capacity; and (2) whether OWCP properly modified the pay rate at her wage-earning capacity, determination.

FACTUAL HISTORY

OWCP initially accepted that on November 4, 2009 appellant, then a 42-year-old nurse, sustained a neck sprain and peripheral autonomic neuropathy due to pushing a mail cart and performing other repetitive work duties on that date. It later accepted the condition of degeneration of cervical intervertebral disc. Appellant stopped work on November 4, 2009.

Appellant received continuation of pay for the period November 4 to December 19, 2009. On June 1, 2010 she completed a claim for compensation (Form CA-7) alleging that she was entitled to receive compensation for the period December 20, 2009 to July 3, 2010. On the portion of the CA-7 form to be completed by the employing establishment, Ruby Williams, a workers' compensation program coordinator, noted that appellant had a base salary of \$16.84 per hour and combined Saturday and Sunday premium pay of \$39.52 per week. The record contains two additional versions of the employing establishment portion of the CA-7 form, which were completed by James Rutherford, a payroll supervisor.

In one version, Mr. Rutherford stated that appellant had a base salary of \$19.76 per hour and received Saturday premium pay of \$39.52 every two weeks, Sunday premium pay of \$39.52 every two weeks, retention pay of \$142.27 every two weeks, and holiday pay totaling \$316.16 (for working December 25, 2009 and January 1, 2010).

In the other version, Mr. Rutherford noted that appellant had a base salary of \$20.10 per hour and received Saturday premium pay of \$40.16 every two weeks, Sunday premium pay of \$40.16 every two weeks, retention pay of \$142.27 every two weeks, and holiday pay totaling \$482.40 (for working January 18, February 15, and May 30, 2010).

In a June 15, 2010 letter, appellant asserted that the employing establishment provided improper pay information on the CA-7 form she completed on June 1, 2010. She claimed that the employing establishment provided incorrect figures for her base hourly pay and for Saturday and Sunday premium pay. Appellant also alleged that her retention pay had been omitted. She claimed that, on the date of her November 14, 2009 work injury, she had base pay of \$19.76 per hour, Saturday premium pay of \$39.68 every two weeks, Sunday premium pay of \$39.68 every two weeks, and retention pay of \$142.27 every two weeks. Appellant also indicated that she received holiday premium pay of \$316.16 (for pay period 26 of pay year 2008).

Appellant began receiving disability compensation on the daily rolls, effective December 20, 2009. She later received compensation on the periodic rolls. The record reflects that appellant's wage-loss compensation was based on a weekly pay rate of \$715.52 for the period December 20, 2009 to July 3, 2010. The record further reflects that her wage-loss compensation was based on pay rate of \$832.74 for the period July 4 to August 28, 2010 and a pay rate of \$908.68 for the period August 29 to October 23, 2010.

In August 20 and September 24, 2010 letters, OWCP requested that the employing establishment provide additional information about appellant's pay including any pay for premium pay categories.

By letter dated October 4, 2010, the employing establishment provided information regarding "computation of pay" for appellant with respect to the period November 4, 2008 to November 4, 2009. It attached pay sheets which detailed her pay in various pay categories for each of the 26 two-week pay periods that ran from November 4, 2008 to November 4, 2009. OWCP indicated that pay sheets of record showed that, on November 4, 2009, appellant's base salary was \$793.06 per week.³ The records and worksheets indicated that, in the year prior to November 4, 2009, she had, on the average, \$4.56 in weekly night differential pay, \$15.26 in weekly Saturday premium pay, \$15.17 in weekly Sunday premium pay, \$12.10 in weekly holiday pay, and \$51.93 in weekly retention pay.

On October 20, 2010 OWCP calculated appellant's weekly pay rate to be \$892.08 based on the following weekly figures: base pay of \$793.06, Saturday premium pay of \$15.26, Sunday premium pay of \$15.17, night differential of \$4.56, holiday pay of \$12.10, and retention pay of \$51.93. Based on this information, appellant received wage-loss compensation based on a pay rate of \$892.08 for the period October 24, 2010 and continuing.

On October 29, 2010 appellant received a check in the amount of \$3,488.10, which was to compensate her for wage-loss compensation she failed to receive due to its previous use of improper pay rates for the period December 20, 2009 to October 23, 2010. The record contains documents, including a Manual Adjustment Form, regarding the calculation of her compensation for the period December 20, 2009 to October 23, 2010.

In January 2011, appellant began participating in an OWCP-sponsored vocational rehabilitation program, but her participation in the program did not result in her being retrained for a new position. On May 23, 2011 she underwent nonwork-related surgery for a thyroid condition. In a June 10, 2011 note, Dr. Deon Faillace, an attending general surgeon, allowed appellant to return to work in mid to late July 2011.

On June 15, 2011 appellant accepted a modified position with the employing establishment as a medical technician and she began working in this position on August 29, 2011.⁴ The medical technician job, which involved drawing blood for laboratory testing, was sedentary in nature and required lifting of up to 10 pounds. In a September 2, 2011 letter, OWCP advised appellant that her compensation would be reduced to reflect her actual earnings as a medical technician.

In a November 4, 2011 decision, OWCP reduced appellant's wage-loss compensation effective August 29, 2011 based on its finding that her actual wages as a medical technician fairly and reasonably represented her wage-earning capacity. It noted that, because she had

³ The Board notes that the documents of record, including earnings and leave statements, actually showed that appellant earned a slightly higher amount of \$793.10 per week (\$41,241.00 per year divided by 52 weeks).

⁴ Appellant received pay of \$41,947.00 per year or \$806.67 per week as a medical technician.

shown the ability to perform the duties of the job for 60 days or more, the position was considered suitable to her partially disabled condition. OWCP then applied the *Shadrick* formula to calculate appellant's loss of wage-earning capacity.⁵ This calculation showed that, effective August 29, 2011, appellant had a loss of wage-earning capacity of 10 percent. The payment of wage-loss compensation, though reduced due to a change in her loss of wage-earning capacity, continued to be based on a pay rate of \$892.08 per week.⁶

On November 23, 2011 appellant filed a claim alleging a recurrence of disability on November 14, 2011. She asserted that she recently had a significant worsening of symptoms related to her November 4, 2009 work injury.

In a November 17, December 2 and 5, 2011 reports, Dr. Carolyn Sampson, an attending Board-certified family practitioner, reported that on November 14, 2011 appellant experienced an increase in neck and right arm pain due to sustaining a new traumatic injury at work. On November 30, 2011 Dr. Gabriel Pantol, an attending Board-certified neurosurgeon, examined appellant who complained of pain and paresthesias in her right arm. Appellant attributed the pain to a work-related injury.

By decision dated December 27, 2011, OWCP denied appellant's recurrence of disability claim as she had not submitted sufficient medical evidence.

In a March 21, 2012 decision, an OWCP hearing representative set aside the December 27, 2011 decision finding that OWCP had not considered appellant's request for modification of its November 4, 2011 wage-earning capacity decision. As the claim should have been construed as a request for modification of the wage-earning capacity decision, the case was remanded to OWCP. On that same date OWCP issued a formal decision denying modification of the wage-earning capacity decision.

In a March 8, 2012 report, received on March 23, 2012, Dr. Sampson indicated that appellant was disabled from all work. She did not indicate what specific medical condition or conditions caused appellant's disability from work.⁷

By later dated March 28, 2012, appellant, through counsel, requested a telephone hearing of the March 21, 2012 decision. This request was later withdrawn on July 9, 2012 by counsel.

⁵ 5 ECAB 376 (1953). See *infra* notes 18 through 20.

⁶ On November 14, 2011 appellant stopped work and, under a separate OWCP claim, she filed a claim alleging that she had a new right shoulder injury on November 14, 2011 due to moving patients and engaging in other work duties that required bending, twisting, and lifting. Her claim was approved for rotator cuff syndrome and allied disorders of her right shoulder and she began to receive compensation for total wage loss on the periodic rolls. Appellant's receipt of wage-loss compensation beginning November 14, 2011 under this separate OWCP file is not the subject of the present appeal.

⁷ In a November 17, 2011 form report, Dr. Sampson indicated that appellant was totally disabled from November 15 to December 5, 2011 and partially disabled thereafter. She generally indicated that appellant's symptoms were "triggered" by the repetitive use of her right arm after the August 2011 return to work.

In a September 13, 2012 letter, appellant claimed that OWCP had underpaid her compensation for the period December 20, 2009 to August 28, 2011. She provided calculations of claimed compensation underpayment for various sub-periods within this period which were based on a pay rate for compensation purposes of \$927.50 per week. Appellant filed a request for reconsideration, dated September 13, 2012, of the November 4, 2011 wage-earning capacity decision.

Several forms completed by Mr. Rutherford were added to the record. In a December 5, 2012 document, he provided a detailed chart showing appellant's various premium pay categories for the year (comprised of 26 pay periods) prior to her November 4, 2009 injury. The document shows that, on the average for this period, appellant earned \$4.56 in night differential pay, \$15.26 in Saturday premium pay, \$15.17 in Sunday premium pay, \$9.15 in holiday pay and \$51.98 in retention pay.⁸ Other documents showed that her base pay on the date of injury was \$41,241.00 per year or \$793.10 per week. In a December 12, 2012 document, Mr. Rutherford indicated that appellant did not work at all during the holiday of pay period 26 in 2008 and noted that the previous calculation of \$12.10 per week, which represented her holiday pay for the year prior to November 4, 2009 divided by 52, was incorrect as the figure for holiday pay for the year prior to November 4, 2009 improperly included \$153.36 for pay period 26 in pay year 2008. The correct figure for holiday pay was \$9.15 per week.

OWCP then calculated appellant's weekly pay rate using the corrected amounts provided by the employing establishment to include base pay in effect at the time of injury (\$793.10 per week) and additional amounts based on the weekly average of each of the premium pay categories earned for one year prior to the injury, including night differential pay of \$4.56, Saturday premium pay of \$15.26, Sunday premium pay of \$15.17, holiday pay of \$9.15, and retention pay of \$51.98. These figures added together equaled pay of \$889.22 per week.

In a December 12, 2012 decision, OWCP affirmed the November 4, 2011 wage-earning capacity determination. It noted that, because appellant had demonstrated the ability to perform the duties of the job for 60 days or more, the position of medical technician was considered suitable to her partially disabled condition.⁹ However, it was determined that there was an error in her pay rate for compensation purposes as the evidence of record showed that her actual pay rate for compensation purposes was \$889.22 rather than \$892.08. OWCP noted that it calculated an improper pay rate at the time of its November 4, 2011 wage-earning capacity determination because it used an incorrect figure for holiday pay for the year prior to November 4, 2009. The November 4, 2011 wage-earning capacity determination was modified to reflect the correct pay rate for compensation purposes.

Appellant's counsel on December 18, 2012 requested a telephone hearing.¹⁰

⁸ It should be noted that Mr. Rutherford reported retention pay of \$51.98 per week, a figure which is slightly higher than the previously reported retention pay of \$51.93 per week. The \$51.98 figure is supported by the new documentation submitted by Mr. Rutherford.

⁹ OWCP also found that appellant had not submitted medical evidence showing a change in her condition, related to the accepted work injuries, prevented her from working as a medical technician.

¹⁰ On January 11, 2013 counsel withdraw the earlier request for hearing.

In a January 3, 2013 decision, OWCP formerly modified the pay rate for compensation purposes for the wage-earning capacity decision of \$889.22 per week. It applied the *Shadrick* formula to calculate appellant's loss of wage-earning capacity,¹¹ and beginning January 13, 2013, she received wage-loss compensation based on the new pay rate of \$889.22.

Appellant requested on February 2, 2013 a review of the written record by an OWCP hearing representative and continued to claim that she had been paid improper amounts of compensation by OWCP. In a February 1, 2013 letter, she provided calculations of claimed compensation underpayment for the period December 20, 2009 to August 28, 2011, which were similar to those contained in her September 13, 2012 letter.

Appellant advised OWCP on March 12, 2013 that Alan Shapiro was no longer the representative.

In a May 16, 2013 decision, the hearing representative affirmed OWCP's January 3, 2013 decision noting that OWCP's wage-earning capacity determination was properly modified to reflect an error in the pay rate for compensation purposes.

LEGAL PRECEDENT

Under 5 U.S.C. § 8115(a), 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. Generally, wages actually earned are the best measure of 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.¹² A determination as to whether actual earnings fairly and reasonably represents one's wage-earning capacity should be made only after an employee has worked in a given position for more than 60 days.¹³

Once the wage-earning capacity of an injured employee 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.¹⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁵

OWCP's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings. A job that is part time (when the claimant was a full-time employee at the time of injury), seasonal in an area where year-round employment is available, or temporary (when the date-of-injury position was a permanent position) is generally not appropriate for a

¹¹ See *infra* notes 18 through 20.

¹² *E.W.*, Docket No. 14-584 (issued July 29, 2014); *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

¹⁴ *C.R.*, Docket No. 14-111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

¹⁵ See *T.M.*, Docket No. 08-975 (issued February 6, 2009).

wage-earning capacity determination.¹⁶ In addition, it is well established that a position that is considered an odd-lot or makeshift position designed for a claimant's particular needs is not appropriate for a wage-earning capacity determination.¹⁷

Section 8105(a) of FECA provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."¹⁸ Section 8101(4) of FECA defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."¹⁹

The formula for determining loss of wage-earning capacity has been codified at section 10.403(c)-(e) of OWCP's regulations.²⁰ Under the *Shadrick* formula, OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's actual earnings (or constructed earnings) by the current or updated pay rate for the position held at the time of injury.²¹ The employee's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes, defined in 20 C.F.R. § 10.5(a) as the pay rate at the time of injury, the time disability begins or the time disability recurs, whichever is greater, by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity.²² It has been administratively determined that certain pay elements will be included in computing an employee's pay rate, including night or shift differential, Saturday premium, Sunday premium, holiday and retention pay.²³

¹⁶ Federal (FECA) Procedure Manual, *supra* note 13 at, Chapter 2.814.7a (July 1997).

¹⁷ See A.J., Docket No. 10-619 (issued June 29, 2010).

¹⁸ 5 U.S.C. § 8105(a). Section 8110(b) of FECA provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

¹⁹ *Id.* at § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002). The Board has held that if an employee has one recurrence of disability which meets the requirements of 8101(4), any subsequent recurrence would also meet such requirements and would entitle the employee to a new recurrence pay rate. *Carolyn E. Sellers*, 50 ECAB 393 (1999).

²⁰ 20 C.F.R. § 10.403(c)-(e).

²¹ *Id.* at § 10.403(c)-(d).

²² *Id.* at § 10.403(e).

²³ See Federal (FECA) Procedure Manual, *supra* note 13 at, *Determining Pay Rates*, Chapter 2.900.6b (March 2011).

ANALYSIS

OWCP initially accepted that on November 4, 2009 appellant sustained a neck sprain and peripheral autonomic neuropathy due to performing her work duties on that date. It later accepted the condition of degeneration of cervical intervertebral disc. Appellant stopped work but later returned to work for the employing establishment in the modified position of medical technician. In a November 4, 2011 decision, OWCP made a formal wage-earning capacity determination. It found that appellant's actual earnings as a medical technician fairly and reasonably represented her wage-earning capacity. OWCP noted that she had been performing the job for more than 60 days as she began the job on August 29, 2011.

Appellant later requested modification of OWCP's November 4, 2011 wage-earning capacity determination. In December 12, 2012 and January 3, 2013 decisions, OWCP considered her request for modification of its prior wage-earning capacity determination. The Board finds that OWCP properly modified its November 4, 2011 wage-earning capacity determination to correct a minor error in the pay rate for compensation purposes and that it properly found that appellant had failed to establish that the November 4, 2011 wage-earning capacity determination should be modified on any other basis.

OWCP conducted an evaluation of the November 4, 2011 wage-earning capacity determination under the first basis for modifying a wage-earning capacity determination, *i.e.*, whether the original wage-earning capacity determination was erroneous. It properly determined that appellant's actual wages in the position of medical technician fairly and reasonably represented her wage-earning capacity. OWCP noted that, because she had demonstrated the ability to perform the duties of the job for 60 days or more, the position was considered suitable to her partially disabled condition. Appellant had been working in the position since August 29, 2011 when OWCP issued its November 4, 2011 wage-earning capacity decision.²⁴ She failed to establish that the medical technician position constituted part-time, sporadic, seasonal, or temporary work or that the position was a makeshift position designed for her particular needs.²⁵

OWCP, on its own properly determined that there was an error in appellant's pay rate as the evidence of record showed that her actual pay rate for compensation purposes was \$889.22 rather than the \$892.08 figure used at the time of the November 4, 2011 determination. In December 2012, Mr. Rutherford, a payroll supervisor for the employing establishment, submitted new documentation regarding her pay rate for compensation purposes at the time of her November 4, 2009 work injury. This information included base pay in effect at the time of November 4, 2009 injury and the additional amounts based on the total amount of extra premium pay earned for one year prior to the injury. It was appropriate to base appellant's pay rate on the date-of-injury pay (November 4, 2009) because she did not qualify for a recurrent pay rate under the strictures of FECA.²⁶

²⁴ See *supra* notes 12 and 13.

²⁵ See *supra* notes 16 and 17.

²⁶ See *supra* notes 18 and 19.

With respect to the various categories of premium pay, it was appropriate to calculate, as dictated by OWCP procedure, the weekly averages of the amounts appellant received in the year prior to November 4, 2009.²⁷ Appellant's pay rate included base pay per week of \$793.10, night differential of \$4.56, Saturday premium pay of \$15.26, Sunday premium pay of \$15.17, holiday pay of \$9.15, and retention pay of \$51.98. OWCP properly determined that these figures added together equaled her pay of \$889.22 per week. It noted that it had calculated an improper pay rate at the time of its November 4, 2011 wage-earning capacity determination because it had used an incorrect figure for holiday pay for the year prior to November 4, 2009. Mr. Rutherford had indicated that appellant had holiday pay of \$9.15 per week, rather than the previously calculated \$12.10 per week.

Before OWCP and on appeal, appellant argued that OWCP did not use a proper pay rate for compensation purposes either in its November 4, 2011 wage-earning capacity determination or after it modified that determination in its December 12, 2012 and January 3, 2013 decisions. She suggested that the proper pay for compensation purposes should have been \$927.50 per week. However, appellant did not provide a clear explanation of what pay components (*i.e.*, weekly base pay and premium pay categories) comprised this pay rate figure and the evidence of record does not substantiate the use of this figure. The Board further notes that, after modifying its November 4, 2011 wage-earning capacity determination, OWCP properly carried out a calculation under the *Shadrick* formula to determine her loss of wage-earning capacity and entitlement to compensation. Appellant has not provided any evidence or argument showing that OWCP's calculation under the *Shadrick* formula was improper and the evidence of record supports the figures used by OWCP in this calculation.²⁸

The Board also finds that appellant failed to establish that OWCP's original wage-earning capacity determination should be modified on any other basis. For example, appellant did not show that there was a material change in the nature and extent of her injury-related condition (*i.e.*, the November 4, 2009 work injury) such that she could not work as a medical technician.²⁹ In a March 8, 2012 report, Dr. Sampson, an attending Board-certified family practitioner, found that appellant was disabled from all work, but she failed to state what specific medical condition or conditions caused her disability from work. The record contains other reports in which attending physicians noted that appellant reported an increase in neck and right arm symptoms in November 2011, but none of these reports establish a worsening of the November 4, 2009 work conditions which prevented her from working as a medical technician.³⁰ In addition, there is no

²⁷ See *supra* note 23.

²⁸ See *supra* notes 20 through 22.

²⁹ See *supra* notes 14 and 15.

³⁰ Under a separate claim file, OWCP accepted that on November 14, 2011 appellant sustained a new traumatic injury due to moving patients and engaging in other work duties that required bending, twisting, and lifting. Appellant's claim was approved for rotator cuff syndrome and allied disorders of her right shoulder and she began to receive compensation for total wage loss on the periodic rolls. The effects of the November 14, 2011 injury are not relevant to the issue of the present case, as OWCP's wage-earning capacity determinations in the present case evaluated appellant's wage-earning capacity relative to her November 4, 2009 work injury.

evidence that further modification of the wage-earning capacity determination is warranted on the basis that appellant had been retrained or otherwise vocationally rehabilitated.³¹

With respect to the denial of her request for modification of OWCP's wage-earning capacity determination, appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

The Board notes that, in several communications, including in September 13, 2012 and February 1, 2013 letters, appellant claimed that OWCP underpaid her compensation for the period December 20, 2009 to August 28, 2011. Appellant provided detailed calculations of claimed underpayment of compensation for various sub-periods within this period.

OWCP has not addressed appellant's claim in this regard. The question of whether appellant received the correct amount of compensation for the period December 20, 2009 to August 28, 2011 is separate and distinct from issues presently before the Board. Upon return of the case record, OWCP should issue an appropriate decision on this matter.

CONCLUSION

The Board finds that OWCP made a proper determination regarding appellant's wage-earning capacity, including its determination regarding her request for modification of its wage-earning capacity determination.

³¹ See *supra* notes 14 and 15.

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 5, 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