

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

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C.S., Appellant )

and )

**FEDERAL AVIATION ADMINISTRATION,  
CHARLOTTE/DOUGLAS INTERNATIONAL  
AIRPORT, Charlotte, NC, Employer** )

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**Docket No. 16-0881  
Issued: July 27, 2016**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 23, 2016 appellant filed a timely appeal from a March 10, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 determined appellant's pay rate for compensation purposes.

**FACTUAL HISTORY**

On May 22, 2013 appellant, then a 31-year-old air traffic controller, filed a traumatic injury claim (Form CA-1) alleging that on March 15, 2013 he sustained an injury in the

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

performance of duty. He reported that he received a loud tone on the line and suffered a right ear injury. The reverse of the claim form indicated that appellant stopped work on the date of injury and received continuation of pay (COP) from May 16 through 22, 2013. He did briefly return to light-duty work from May 23 to June 9, 2013, received COP from June 10 to July 17, 2013 and then claimed wage-loss compensation for total disability thereafter. OWCP accepted the claim for right ear tinnitus, sudden hearing loss in the right ear, vertigo, and headache and began paying compensation for wage loss on the periodic rolls.

With respect to the pay rate on which compensation was based, the employing establishment submitted an August 2, 2013 memorandum, certified by Dennis Rowland, that appellant's base salary on March 15, 2013 was \$105,736.00. The memorandum reported the following premium pay for the year prior to March 15, 2013: \$4,080.00 in holiday pay, \$3,468.00 in overtime, \$2,970.75 in Sunday premium pay, and \$2,932.50 in night differential pay.

OWCP accepted the information provided by the employing establishment and determined that appellant's pay rate on March 15, 2013, the date of injury, was \$119,187.25, or \$2,292.06 per week. The wage-loss compensation appellant received was based on a pay rate of \$2,292.06 per week.

Appellant submitted a letter dated June 5, 2015, arguing that he felt that OWCP should adjust his pay rate. According to appellant, under employing establishment guidelines, he was considered a Certified Professional Controller-In-Training (CPC-IT) when he transferred to the Charlotte worksite. Appellant had completed one half of his required training at the time of injury, and he contended that he would have completed training if not for the work injury. He believed that his pay was to have increased upon completion of training. Appellant argued that he should be considered as in a "learner's capacity" under 5 U.S.C. § 8113, and should be entitled to a pay rate corresponding to an increased wage-earning capacity.

The record contains a February 8, 2012 memorandum from the employing establishment noting that appellant's transfer to the Charlotte facility would be effective April 8, 2012. The memorandum indicated that the transfer was to a "higher level facility" and, if appellant failed to fully certify at the new facility, he could be subject to adverse action. In a memorandum dated July 6, 2015, an employing establishment manager reported that at the time of injury appellant would have been designated as a CPC-IT, and would need to complete training and become fully certified before he would be eligible for a pay increase.

OWCP requested that the employing establishment complete a questionnaire with respect to appellant's employment at the time of injury. The employing establishment was asked whether appellant was in a formal training program with a specific date of completion, and if he would have automatically received a pay raise on completion of any training, to provide the pay rate. In a response dated November 2, 2015, an employing establishment acting air traffic manager responded "no" with respect to whether there was a formal training program with a specific date of completion. The manager reported that completion of training was dependent on performance and there was no specified date of completion. He indicated that each controller's performance determined certification. No pay information was provided.

By decision dated November 17, 2015, OWCP found that appellant was not entitled to an increased pay rate for compensation purposes as his pay rate was the date of injury “until you become eligible for a recurrent pay rate.” It noted the November 2, 2015 response from the employing establishment and found appellant was not in a learner’s capacity.

Appellant requested reconsideration on December 15, 2015. He submitted a December 10, 2015 letter from Prostell Thomas, who indicated that he was an air traffic manager. Mr. Thomas asserted that appellant was in a formal training program. He indicated there was no set time, “just hours allocated for the position he was training on.” Mr. Thomas wrote that “[a]lthough when I arrived at Charlotte Airport there was no reason to think [appellant] would not be successful in training. [Appellant] was allocated 120 hours on each of the two Departure positions and 100 hours for three satellite positions.” He reported this was not an indefinite program and upon completion appellant would have been promoted. The manager contended that previous experience had nothing to do with advancement, as it was based on completion of training. Mr. Thomas reported that appellant’s base pay in 2013, with locality pay, would have been \$118,349.00 (base \$103,669.00 and locality \$14,680.00). In addition, he indicated that he had discussed the prior answer given by an air traffic manager as to formal training, and the manager had misunderstood what was being interpreted as formal.

By letter dated January 5, 2016, OWCP requested that the employing establishment provide comments. On March 9, 2016 appellant received updated pay rate information with respect to appellant’s earnings in the year prior to May 15, 2013. Mr. Rowland now indicated that appellant had earned \$1,963.08 in holiday pay, \$1,834.88 in night differential, and \$1,216.32 in Sunday premium pay. No overtime pay was reported for the period. A memorandum of telephone call dated March 9, 2016 indicated that the prior figures reported were mistakenly based on another employee.

In a decision dated March 10, 2016, OWCP found that appellant’s pay rate was \$110,750.28, or \$2,129.81 per week, based on the updated information provided by the employing establishment. It found that he had not established that he was in a learner’s capacity. OWCP determined that the employing establishment “has clearly stated that an air traffic controller in training must merit the training completion. The change in designation as a CPC, upon completion of training, would not be automatic.” In addition, OWCP found the evidence of record indicated that appellant’s status was not any different from any employee that had an opportunity for advancement depending on ability and merit.

### **LEGAL PRECEDENT**

An employee’s pay rate for compensation purposes is determined under 5 U.S.C. § 8114, at the time of injury, the time disability begins or the time disability recurs if the recurrence begins more than six months after the injured employee returns to regular full-time employment with the United States, whichever is greater, except as otherwise determined under 5 U.S.C. § 8113.<sup>2</sup>

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<sup>2</sup> 20 C.F.R. § 10.5(s).

5 U.S.C. § 8113(a) provides:

“If an individual: (1) was a minor or employed in a learner’s capacity at the time of injury; and (2) was not physically or mentally handicapped before the injury; the Secretary of Labor, on review under section 8128 of this title after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity.”

In interpreting this section of FECA, the Board has held that “[FECA] contemplates but one increase in wage-earning capacity upon the learner’s completion of training or the minor’s reaching the age of majority; but it does not contemplate such factors as future promotions, increases in salary or advancements, as these rest upon a number of indefinite and uncertain contingencies which place the happening of an event in the realm of possibility, not probability.”<sup>3</sup> The Board has long held that 5 U.S.C. § 8113 provides that a claimant is only entitled to compensation at the pay rate he or she would have received upon completion of training.<sup>4</sup> OWCP issued FECA Program Memorandum No. 122 (issued May 19, 1970) which states: “In effect, the compensation rate of a learner should be adjusted if the pay rate increased as a result of a change in his learner’s status which would have brought him either: (1) to a new level within; or (2) to completion of his learner’s program.”

The Board has delineated the circumstances under which an employee will be considered to be employed in a learner’s capacity at the time of his or her injury. These include whether the job classification described an “in-training” or learning position, whether the position held was one in which the employee could have remained for the rest of his or her life and whether any advancement would have been contingent upon ability, past experience or other qualifications.<sup>5</sup>

### ANALYSIS

The initial question presented in this case with respect to pay rate is whether appellant was in a “learner’s capacity” at the time of injury such that OWCP should recompute his pay rate for compensation purposes. Appellant argues that but for his injury he would have completed training and received a higher pay rate.

The issue of whether a claimant was in a learner’s capacity under 5 U.S.C. § 8113(a) involves an assessment of several factors regarding employment at the time of injury. The above legal precedent indicates there are essentially three requirements that must be satisfied: (1) the claimant was in a training program at the time of injury, (2) upon completion of training would

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<sup>3</sup> *Hayden C. Ross*, 55 ECAB 455 (2004); *Mary K. Rietz*, 49 ECAB 613 (1998); *Robert H. Merritt*, 11 ECAB 64 (1959).

<sup>4</sup> *Hayden C. Ross, id.*

<sup>5</sup> *Henry M. Van Sant*, 49 ECAB 593 (1998); *Deborah D. Jones*, 37 ECAB 609 (1986); *Raymond W. Goodale*, 25 ECAB 350 (1974); *James L. Parkes*, 13 ECAB 515 (1962).

have received a pay increase, and (3) the occurrence of (2) must be within the realm of probability, not possibility.

With respect to the initial requirement, in this case appellant's job title was a CPC-IT. Mr. Thomas of the employing establishment indicated that appellant was considered to be in training at the time of injury.

As to the second factor, OWCP made a finding in the March 10, 2016 decision that upon completion of training appellant would not automatically become a CPC-IT. It is not clear what specific evidence on which OWCP based this finding. Mr. Thomas had indicated in his December 10, 2015 letter that appellant would have been promoted upon completion of training and indicated that he would receive a pay raise. OWCP does not refer to the December 5, 2015 letter from Mr. Thomas or the information provided. The November 2, 2015 response from another manager indicated that appellant would not automatically have been promoted, although little detail was provided. To the extent that OWCP finds appellant would not have received a pay increase upon completion of training, it did not make adequate findings based on the evidence.

Moreover, OWCP did not make adequate findings with respect to the likelihood of completing training. To properly adjudicate the question, the employing establishment should have been asked to clarify the issue. Relevant information would include the number of hours appellant still needed to complete training, whether his training position would continue indefinitely or whether at some point he must complete training, and how much the completion of training depended on his future performance and demonstrated ability. Mr. Thomas made a brief reference to seeing no reason why appellant would not be successful in training, without providing further explanation. He referred to completing a number of hours of training, while the November 2, 2015 manager response indicated that certification was dependent on performance. The evidence of record is simply not sufficient for the Board to make a proper determination as to whether an increase in pay was simply a possibility or a likely probability.

The case will accordingly be remanded to OWCP for further development. The employing establishment should provide appropriate responses to the relevant issues discussed above. Once the determination as to learner's capacity is made, OWCP can properly determine appellant's pay rate for compensation purposes. After such further development as OWCP deems necessary, it should issue a *de novo* decision.

### **CONCLUSION**

The Board finds the case is not in posture for decision and is remanded to OWCP for further development.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 10, 2016 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 27, 2016  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board