

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

J.F., Appellant)	
)	
and)	Docket No. 14-0574
)	Issued: June 7, 2016
DEPARTMENT OF STATE, U.S. EMBASSY)	
SENEGAL, Washington, DC, Employer)	

Appearances: *Case Submitted on the Record*
Steven E. Brown, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 10, 2014 appellant, through counsel, filed a timely appeal from a December 26, 2013 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 appellant has met his burden of proof to establish wage-loss compensation for disability for the period November 25, 2002 to February 29, 2004 due to his accepted employment injury.

FACTUAL HISTORY

OWCP accepted that on December 18, 1992 appellant, then a 39-year-old cultural affairs assistant, sustained an injury to his left leg when he fell into a manhole while working for the employing establishment in Senegal, Africa. Several protruding rods in the manhole punctured

¹ 5 U.S.C. § 8101 *et seq.*

his skin and the wounds ultimately became infected. OWCP accepted the conditions of puncture wound and osteomyelitis of the left leg. Appellant returned to his work duties, but after approximately one year of unsuccessful treatment in Senegal, he was transported to the United States on December 14, 1993 for medical treatment in an attempt to save his leg from amputation. His leg was successfully treated. Appellant returned to Senegal in May 1994 and returned to part-time work until June 1996 when he returned to full-time work. He worked full time until July 2000 when he became constantly sick, suffering from severe migraines, and physical pain related to the accepted injury.

Appellant filed a claim for wage-loss compensation (Form CA-7) commencing July 5, 2000.² In October 2000 he was placed on permanent sick leave. Appellant returned to the United States and became a permanent resident on July 4, 2002.

OWCP initially denied appellant's wage-loss claim by decision dated January 30, 2001. On October 3, 2003 it vacated that decision and accepted a recurrence of disability as of July 5, 2000. OWCP also expanded the claim to include the additional conditions of major depression and tranquilizer addiction.

In its October 3, 2003 decision, and again in a letter dated March 25, 2004, OWCP requested that appellant provide the following information to determine the extent of any disability compensation due to his accepted injury: all of the dates and periods he was not paid wages and was in leave without pay status, all of his earnings/wages/salaries, and benefits/pension/annuities from all of his employers and from all government sources (including Senegal and the United States of America) for every date/time period claimed. It also requested the conversion rate of Senegalese currency to U.S. currency as of July 5, 2000, the date of recurrence.

In an April 27, 2004 letter, counsel provided the following information derived from appellant's April 3, 2004 narrative statement: appellant did not work at all from July 5, 2000 through November 24, 2002. During the period November 25, 2002 to June 15, 2003, he worked part time as a cashier at Starbucks with an hourly wage of \$7.00; for the period June 17, 2003 through February 27, 2004, he worked part time as a cashier at Giant Food with an hourly wage of \$9.10; for the period October 1 to November 12, 2003, he worked part time as an office administrator at Elite Chauffer Transportation Services, Inc. with an hourly wage of \$9.00; for the period January 31 to February 29, 2004 he worked part time as a school bus driver for Loudon County Public Schools with a net wage of \$218.78 every two weeks; and from March 1, 2004 to the time of his statement, he worked full time as a patient services representative with an hourly wage of \$12.57 for 40 hours a week.

In a September 24, 2004 letter, OWCP advised appellant that evidence of his earnings, such as earning statements from his employers or pay stubs, employment forms, and income tax filing records, were necessary for every date and time period of wage loss claimed. Appellant was provided 30 days to submit such evidence.

Appellant submitted copies of his 2002, 2003 and 2004 Wage and Tax Statements, (IRS Forms W-2) and a copy of his tax returns for 2003. For 2002, he earned \$885.05 from Starbucks

² At the time of his injury and when he filed the claim for recurrence, appellant was a citizen of Senegal.

and \$92.43 from Pizza Outlet, for a total \$977.48. For 2003, appellant earned \$7,495.65 from Giant Foods, \$1,026.00 from Elite Chauffeur Transportation, Inc., and \$5,195.29 from Starbucks, for a total of \$13,716.94. For 2004, he earned \$473.80 from Loudon County Public Schools, \$2,818.02 from Giant Foods, and \$27,885.38 from Loudon Hospital, for a total \$31,177.20.

On March 14, 2005 the employing establishment provided appellant's pay rate and leave analysis information. It provided appellant's annual basic pay effective March 28, 1999, March 27, 2000, and October 19, 2001. The employing establishment also provided exchange rates for Senegalese currency in 1999 and 2000. It converted appellant's pay rate amounts to American dollars.³ OWCP was also provided a copy of Senegalese workers' compensation law.

The employing establishment noted, in an August 10, 2005 letter to OWCP, that as a federal direct-hire employee, appellant fell under FECA instead of the local labor law applicable to workers' compensation. It, however, provided a copy of the local labor law for OWCP's reference.

By letter to appellant dated August 23, 2005, OWCP explained that for the period July 5, 2000 through October 19, 2001 appellant had already been compensated through sick, annual, and casual leave from the employing establishment.⁴ It further advised that he would be compensated for the period October 20, 2001 through November 24, 2002 for total disability. As for the period November 25, 2002 through February 29, 2004, OWCP noted that any compensation would have to be weighed against appellant's actual earnings during that period.

On August 24, 2006 OWCP further expanded appellant's claim to include left metatarsalgia/osteoarthritis of the fourth joint and authorized a metatarsal head resection, which was performed on March 20, 2006. Custom shoes were also authorized in relation to appellant's accepted conditions on December 21, 2006. By decision dated March 3, 2010, OWCP issued appellant a schedule award under FECA for 64 percent permanent impairment of the left lower extremity. The date of maximum medical improvement was noted as March 8, 2008 and the period of the award ran from April 13, 2007 to October 24, 2010.

In a May 22, 2013 letter to the employing establishment, OWCP requested additional pay rate information with regard to whether appellant had any loss of wage-earning capacity. On June 17, 2013 the employing establishment advised OWCP that the annual pay rate for the same grade and step appellant held on the date of injury was \$11,152.46. On August 8, 2013 OWCP requested clarification from the employing establishment, noting that the salary information previously provided indicated a significant decrease in appellant's salary over the years, from \$18,373.00 per year in 1992 to \$11,152.46 in 2002. It requested that the employing establishment confirm these amounts or explain whether the date-of-injury position had changed or whether premium benefits had previously been included. By e-mail dated August 27, 2013 the employing establishment responded that records could not be traced, except for earnings and leave statements. The attached earnings and leave statements for 2001 noted appellant's annual rate of pay in 2001 as 10,156,172 CFA francs.

³ During his employment with the employing establishment in Senegal, appellant was paid in West African CFA francs, the official currency of Senegal.

⁴ OWCP stated that sick and annual leave time could not be repurchased, as appellant's contract was terminated with the employing establishment on October 19, 2001.

By decision dated September 10, 2013, OWCP denied appellant's claim for wage-loss compensation for the period November 25, 2002 through February 29, 2004, finding that appellant's actual earnings during that period were equal to or exceeded appellant's date-of-injury/date of disability pay rate, or the date of recurrence pay rate. It calculated appellant's actual earnings for 2002, 2003, and 2004 (\$977.48 + \$13,716.94 + \$4,796.48) equaled a total of \$19,490.90. OWCP divided \$19,490.90 by the 66 total weeks for the period November 25, 2002 to February 29, 2004 and found that appellant's actual earnings averaged \$295.31 per week.

OWCP determined that the weekly pay rate on the date of recurrence (July 5, 2000) was \$287.23 per week. It also determined that the current value (as of November 25, 2002) of the grade and step of the date-of-injury position was \$214.47 per week, effective November 25, 2002.

OWCP found that, as appellant had actual earnings of \$295.31 per week during the period November 25, 2002 to February 29, 2004, there was no loss of wage-earning capacity. Thus, although the claim for recurrence was accepted, appellant was not eligible for wage-loss compensation for that period.

On October 10, 2013 counsel requested reconsideration. He argued that OWCP should have used the highest pay rate between the date of appellant's injury, the date disability began, or the date of recurrence. Counsel referred to FECA Procedure Manual 4-0801-9(n), which states: "exchange rates in effect as of the date of injury, date disability began, or date of recurrence should be used to convert local currencies to United States dollars." He argued that appellant was a foreign national and, when factoring in the exchange rate, the date-of-injury pay rate was significantly higher than the date of recurrence pay rate. Counsel disagreed with the use of the exchange rate in effect on the date of recurrence in 2000.

The employing establishment submitted to OWCP a copy of appellant's payroll information previously of record, dated October 30, 2001. Counsel argued that as of appellant's last day of employment, October 19, 2001, he earned 11,758,172 CFA francs. He argued that if that salary was converted to U.S. dollars using the 1992 exchange rate, his annual salary of 11,758,172 divided by 270 CFA francs would convert to an annual salary of \$43,548.78. This salary divided by 52 weeks would amount to \$837.47 per week. As this would clearly be more than the actual wages earned, counsel argued that appellant would continue to be entitled to partial compensation.

By decision dated December 26, 2013, OWCP denied modification of its prior decision. It found that accurate and appropriate pay information was used in calculating the amount of disability compensation and there was no evidence to substantiate counsel's contention that the date-of-injury pay rate was higher than the date of recurrence.

LEGAL PRECEDENT

When an employee has earnings from employment, he is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁵ Under these

⁵ L.S., 59 ECAB 350 (2008).

circumstances, OWCP offsets actual earnings pursuant to the *Shadrick* formula.⁶ If a reduction of benefits based upon actual earnings is not accompanied by a determination that the earnings fairly and reasonably represent the employee's wage-earning capacity, an informal reduction of benefits utilizing the *Shadrick* formula is proper rather than a formal loss of wage-earning capacity determination.⁷

FECA provides that where OWCP learns of actual earnings that span a lengthy period of time, several months or more, the compensation entitlement should be determined by averaging the earnings for the entire period, determining the average pay rate and applying the *Shadrick* formula (comparing the average pay rate for the entire period to the pay rate of the date-of-injury job in effect at the end of the period of actual earnings).⁸

For all claims under FECA, compensation is to be based on the pay rate as determined under section 8101(4) which defines monthly pay as:

“The 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....”⁹

In applying section 8101(4), the statute requires OWCP to use the greater of the pay rate on the date of injury, date of disability, or the date of recurrence. Exchange rates in effect as of the date of injury, date disability began or date of recurrence should be used to convert local currencies to United States dollars.¹⁰ Consumer Price Index increases apply only if the claimant is being paid under FECA benefit structure.¹¹ FECA contains no provision which, either in specific terms or by way of implication, would authorize the payment of interest when awards of compensation are made retroactively.¹²

ANALYSIS

Section 8137 of FECA and 20 C.F.R. Part 25 provides guidance regarding workers' compensation benefits to an employee or a dependent who is neither a citizen, nor a resident of the United States or Canada.¹³ Although the record does not include a formal finding by OWCP as to whether FECA or local law was appropriate, it is within the discretion of the Director of

⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(b)(2) (December 1993).

⁸ *Id.* at Chapter 2.814.7(d)(4) (October 2009).

⁹ 5 U.S.C. § 8101(4); *see also Charles P. Mulholland*, 48 ECAB 604, 605-06 (1997).

¹⁰ Federal (FECA) Procedure Manual, Part 4 -- Special Case Procedures, *Foreign National Claims*, Chapter 4.801.9.n (September 1994).

¹¹ *Id.* at Chapter 4.801.9.d.

¹² *Ralph W. Moody*, 42 ECAB 364, 370 (1991).

¹³ *Supra* note 1 at § 8137; *supra* note 10 at Chapter 4.801.3 (September 1994).

OWCP to determine the appropriate pay structure and it is clear that the case has been handled under FECA law. The Board notes that a decision to use either a local or FECA benefit structure in a case should remain consistent throughout the case.¹⁴

Appellant does not dispute the actual wages found by OWCP based on appellant's part-time work. OWCP found that his actual earnings in the private sector for the period November 25, 2002 to February 29, 2004 equaled \$295.31 per week. It found that this amount met or exceeded the current wages of the job held when injured or at the date of recurrence and, thus, appellant was not eligible for disability compensation for the period at issue. Appellant argues on appeal, as he did before OWCP, that in calculating his wage-earning capacity it should have used the date-of-injury pay rate, factored with the currency exchange rate in effect on the date of injury. Counsel contends that as the exchange rate on the date of injury was significantly higher than the exchange rate on the date of recurrence, it should have been used as the comparable pay rate.

OWCP's procedures state that the "exchange rates in effect as of the date of injury, date disability began or date of recurrence should be used to convert local currencies to United States dollars."¹⁵ Since the intent of the statute is to base compensation on the greater of the possible three pay rates, it follows that the currency exchange rate is determined for each of these three dates and compared to determine the greatest of the three possible pay rates.

The record reflects that the pay rate for appellant at the date of recurrence, July 5, 2000, was \$287.23. This amount was derived from his annual salary of 10,156,172 CFA francs, as provided by the employing establishment. On July 5, 2000 the currency exchange rate was 680 CFA francs = \$1.00. Accordingly, the recurrence pay rate, converted to U.S. dollars, was 10,156,172 divided by 680 CFA francs = \$14,935.55. This annual salary divided by 52 weeks equals a weekly salary of \$287.23.

The record, however, is missing the same calculations for the date-of-injury salary, as well as the salary at the date of disability, if it were different than the date-of-injury salary. The September 10, 2013 OWCP decision in fact does not establish the date of disability. In its September 10, 2013 decision, OWCP calculated the current value of the date-of-injury pay rate to be \$11,152.46 or \$214.47 per week; but the record does not substantiate this figure. In this regard the record suggests from OWCP's letter to the employing establishment on August 8, 2013 that appellant's salary decreased over the years and may have been greater on the date of injury.

The Board finds that this case is not in posture for decision as OWCP has not made appropriate findings regarding appellant's pay rate. After OWCP determines whether the date of injury, date of recurrence of disability or date of disability yields the greater pay rate, with currency conversion for each applicable date, OWCP shall apply the *Shadrick* formula to the greatest of these pay rates. The Board finds that OWCP properly determined the average actual

¹⁴ *Supra* note 10 at Chapter 4.801(9) (September 1994).

¹⁵ *Supra* note 10.

earnings for the period November 25, 2002 to February 29, 2004. That rate should then be compared to the proper pay rate to determine the proper amount of wage-loss compensation.¹⁶

As relevant information is currently not of record regarding all three possible pay rates, the Board cannot render a reasoned decision as to whether the December 26, 2013 OWCP decision was proper. The case will be remanded for OWCP to obtain this information and to issue a *de novo* decision on appellant's proper wage-loss compensation, if any, during the period November 25, 2002 to February 29, 2004.

Counsel proffers that OWCP should use the annual salary from appellant's termination date of October 19, 2001 and convert it to U.S. dollars using the conversion rate from 1992. He offers, however, no authority in Board precedent, statute, regulations, or procedures to justify adopting an exchange rate of one date to determine the U.S. dollar equivalent for an annual salary of a different date.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the December 26, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development.¹⁷

Issued: June 7, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁶ The *Shadrick* formula has been codified by regulation at 20 C.F.R. § 10.403(c) through (e). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Fiscal Actions*, Chapter 2.815.3(b)(4) (June 2013).

¹⁷ James A. Haynes, Alternate Judge participated in the original decision but was no longer a member of the Board effective November 16, 2015.