

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

V.C., Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Los Angeles, CA, Employer**)

**Docket No. 16-0540
Issued: May 9, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 3, 2016 appellant filed a timely appeal from a November 13, 2015 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 had received appropriate wage-loss compensation during the period February 17, 2014 to May 25, 2015.

FACTUAL HISTORY

On November 15, 2011 appellant, then a 39-year-old psychiatric nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on November 3, 2011 she sustained injuries

¹ 5 U.S.C. § 8101 *et seq.*

when she fell and struck the floor. She indicated that she fell while backing away from a patient trying to hit her. According to the claim form, appellant was a General Services (GS) 5, Step 7 employee. The claim was accepted for a neck sprain, lumbar sprain, left shoulder and upper acromioclavicular sprain, and contusion of left shoulder and upper arm. Appellant returned to a light-duty position and received compensation for intermittent dates. The pay rate for compensation purposes was \$938.98 per week. The pay rate was determined using an annual base salary of \$41,855.00 (\$804.90 per week), plus additional weekly premium pay: \$57.98 in night differential, \$37.53 in Sunday premium pay, \$10.79 in Saturday premium pay, and \$27.78 in holiday pay.

By decision dated October 10, 2012, OWCP issued a schedule award for five percent left arm permanent impairment. The period of the award was August 15 to December 2, 2012.

On March 11, 2013 OWCP offered appellant a modified position as a medical support assistant. The position was full time with an annual pay of \$43,017.00 (a GS 5, Step 8 position). Appellant accepted the position and continued to work in the modified position.

In a report dated June 11, 2015, Dr. Francisco Meza, a Board-certified family practitioner, provided results on examination. He indicated that appellant had made a full recovery and could return to full duty.

On July 6, 2015 appellant filed a claim for compensation (Form CA-7) for “other wage loss” from February 17, 2014 to May 25, 2015. She did not identify the specific type of wage loss on the CA-7 form. By letter dated August 7, 2015, the employing establishment reported that appellant’s February 17, 2014 pay rate was \$43,454.00 annually, and the pay rate on January 11, 2015 was \$43,887.00. It indicated in an August 10, 2015 letter that the current pay rate for a GS-5, Step 7 employee was \$42,700.00. An attachment provided appellant’s premium pay from February 9, 2014 to May 30, 2015. During this period appellant had \$4,531.76 in night differential, and \$2,935.20 in Sunday pay. The attachment also reported four dates of holiday pay totaling \$667.92.

On August 18, 2015 OWCP received an additional document from the employing establishment regarding premium pay in the year prior to February 17, 2014. The employing establishment indicated that appellant earned \$3,217.16 in night differential, \$2,155.71 in Sunday premium pay, and \$1,319.04 in holiday pay.

In a September 14, 2015 memorandum, OWCP calculated appellant’s date-of-injury pay rate, as of 2014, would be \$948.50 per week. It calculated the base pay as \$813.06 for a GS-5, Step 7 employee in 2014, with the following weekly premium pay: \$58.57 in night differential, \$37.91 in Sunday pay, \$10.90 in “Other” pay, and \$28.06 in holiday pay.

The record contains a memorandum of telephone call (Form CA-110) dated October 20, 2015 indicating that appellant had inquired as to the status of the claim for holiday pay wage loss. A CA-110 form dated November 6, 2015 indicates that she had been released to full duty, and was “taken out of the nurse position because she was released to full duty.”² The

² It is not clear what is meant by “taken out of the nurse position.”

memorandum reports “this does not mean [appellant] gets to return to being a nurse. She now has to wait for a position to become available and apply for it and interview like everyone else.”

In a November 9, 2015 memorandum, OWCP calculated that appellant’s actual earnings as of February 2014 were \$944.45 per week. It found that the base pay was \$835.65, with \$59.24 in night differential, \$39.15 in Sunday premium pay, and \$10.41 in holiday pay.

By decision dated November 13, 2015, OWCP denied appellant’s claim for compensation due to loss of holiday pay from February 17, 2014 to May 25, 2015. It found actual earnings met the contemporaneous wages of the job held when injured, and “according to the provisions of 5 U.S.C. [§] 8106 and 5 U.S.C. [§] 8115, you are not entitled to compensation for wage loss for the period you claimed...” OWCP then found that, based on the evidence of record, it had calculated appellant’s wage-earning capacity in accord with its procedure manual. Comparing the actual earnings \$944.45 with the pay rate for the date-of-injury job as of February 2014 of \$948.50, OWCP found the wage-earning capacity percentage was 99.57 percent, rounded to 100 percent. Therefore, appellant had no loss of wage-earning capacity and was not entitled to compensation for the period claimed.

LEGAL PRECEDENT

When an individual sustains an employment-related injury that prevents return to the employment held at the time of injury, but that does not render the employee totally disabled for all gainful employment, the employee is considered partially disabled and is entitled to compensation for her loss of wage-earning capacity as provided for under 5 U.S.C. § 8115.³

ANALYSIS

In the present case, appellant filed a CA-7 form claim for compensation for the period February 17, 2014 to May 25, 2015. She had returned to a light-duty position as a medical support assistant in March 2013. Appellant’s claim for compensation was based on a reduction in holiday pay in the light-duty job that commenced on or around February 17, 2014.

The November 13, 2015, OWCP decision does not make proper findings with respect to the issue presented.⁴ It finds, with respect to February 2014, that actual earnings met the wages of the date-of-injury job, and therefore according to the provisions of 5 U.S.C. § 8106 and 5 U.S.C. § 8115, appellant was not entitled to compensation for the period claimed. The actual provisions of these sections of FECA are not discussed. 5 U.S.C. § 8106 provides that, if there is partial disability, an employee is entitled to 66 2/3 of the difference between monthly pay and monthly wage-earning capacity. 5 U.S.C. § 8115 provides that an employee’s wage-earning “is determined by his [or her] actual earnings if his [or her] actual earnings fairly and reasonably represent his [or her] wage-earning capacity.” If actual earnings do fairly and reasonably

³ 5 U.S.C. § 8115.

⁴ *Id.* at § 8124(a) provides that OWCP shall determine and make a finding of facts and make an award for or against payment of compensation. 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP shall contain findings of fact and a statement of reasons.

represent wage-earning capacity, then OWCP determines loss of wage-earning capacity in accord with the *Shadrick* formula,⁵ which has been codified at 20 C.F.R. § 10.403.⁶

It is unclear whether the November 13, 2015 decision was an attempt to issue a formal wage-earning capacity under 5 U.S.C. § 8115. To the extent that it was, it does not constitute a proper wage-earning capacity determination. OWCP does not make a finding that the medical support assistant position fairly and reasonably represented appellant's wage-earning capacity. A light-duty position may be the basis for a wage-earning capacity determination,⁷ but OWCP must make proper findings. OWCP procedures indicate that a formal decision for wage-earning capacity based on actual earnings should include: a brief case summary regarding return to work, a discussion of the evidence supporting that the position was classified and appropriate for a wage-earning capacity determination, and identification of medical evidence indicating that the medical condition is stable with well-defined work limitations.⁸

OWCP does not make these findings to support a formal wage-earning capacity determination.⁹ The November 13, 2015 decision does not represent a proper formal wage-earning capacity with respect to actual earnings as of February 2014.

Even if the decision is not a formal wage-earning capacity determination, it is well established that, when a claimant has actual earnings, OWCP reduces compensation payable for those periods to reflect the actual earnings.¹⁰ Wage-loss compensation is reduced or offset by the employee's actual earnings pursuant to the *Shadrick* formula,¹¹ but here the November 13, 2015 OWCP decision does not represent a proper decision regarding offset for actual earnings during the period claimed. The application of the *Shadrick* formula in the decision simply indicates that as of February 17, 2014 there would be an offset for actual earnings resulting in no compensation payable. The finding as to actual earnings was based on earnings as of February 17, 2014. Appellant's claim, however, is that after February 17, 2014 there was a reduction in holiday pay that would result in at least a partial loss of wage-earning capacity. To properly address this claim based on an offset of actual earnings, OWCP must consider the actual earnings after February 17, 2014 to determine if there was any loss of wage-earning capacity due to a loss of holiday pay.

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁶ OWCP first calculates an employee's wage-earning capacity in terms of percentage 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, and the resulting dollar amount is subtracted from the pay rate for compensation purposes to obtain the loss of wage-earning capacity.

⁷ 20 C.F.R. § 10.510.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.6(d) (June 2013).

⁹ OWCP does not discuss appellant's current employment. It does not appear that appellant had returned to work as a nurse assistant, although a June 11, 2015 report from Dr. Meza indicated that appellant had no work restrictions.

¹⁰ *Supra* note 8 at Chapter 2.815.5(e)(2) (June 2013).

¹¹ *See W.L.*, Docket No. 12-0320 (issued November 26, 2012).

The case will accordingly be remanded to OWCP to properly resolve the issues presented in the case. After such further development as is deemed necessary, OWCP should issue a proper decision with respect to the claim for compensation.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 13, 2015 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: May 9, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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