

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

C.S., Appellant)

and)

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

**Docket No. 17-0257
Issued: July 27, 2017**

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 November 7, 2016 appellant filed a timely appeal from a November 3, 2016 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 met his burden of proof to establish a greater pay rate based on 5 U.S.C. § 8113(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The case has previously been before the Board.² The facts of the case as provided in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

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 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 working on the date of injury. He did briefly return to work from May 23 to June 9, 2013, and then claimed wage-loss compensation for total disability from June 10, 2013. OWCP accepted the claim for right ear tinnitus 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 reported, in an August 2, 2013 memorandum that showed appellant's base salary on March 15, 2013 was \$105,736.00. Its memorandum reported premium pay for the year prior to March 15, 2013 as: \$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 was \$119,187.25, or \$2,292.08 per week. The wage-loss compensation appellant received was based on a pay rate of \$2,292.08 per week.

Appellant submitted a letter dated June 5, 2015, arguing that he felt OWCP should adjust his pay rate. He argued, under employing guidelines, he was considered a certified professional controller in training when he transferred to the Charlotte worksite. Appellant had completed one half of his required training at the time of injury, and would have completed training if not for the work injury. He indicated that his pay would 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 therefore 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 indicating 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 Certified Professional Controller-In Training and would have 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 automatically receive a pay raise on completion of any training, to provide the pay rate.

² Docket No. 16-1437 (issued November 2, 2016); Docket No. 16-0881 (issued July 27, 2016).

In a response dated November 2, 2015, an employing establishment manager responded “no” to the question of 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 each controller’s performance determined certification. No pay information was provided.

By decision dated November 17, 2015, OWCP denied appellant’s request for an increased pay rate for compensation purposes. 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 an employing establishment air traffic manager. The manager asserted that appellant was in a formal training program. He indicated that there was no set time, “just hours allocated for the position he was training on.” The manager related that “[a]lthough when I arrived at Charlotte Airport there was no reason to think [appellant] would not be successful in training. He was allocated 120 hours on each of the 2 departure positions and 100 hours for 3 satellite positions.” The manager reported this was not an indefinite program and upon completion appellant would have been promoted. He contended that previous experience had nothing to do with advancement, as it was based on completion of training. The manager reported that appellant’s base pay in 2013 would have been \$118,349.00. In addition, he indicated that he had discussed the prior answer given by another 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 it received updated pay rate information with respect to appellant’s earnings in the year prior to May 15, 2013. The employing establishment manager 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 based on another employee.

In a decision dated March 10, 2016, OWCP found appellant’s pay rate was \$110,750.28, or \$2,129.81 per week, based on the information provided by the employing establishment. It found he was not 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 Certified Professional Controller, upon completion of training, would not be automatic.” In addition, OWCP found the evidence indicated appellant’s status was not any different from any employee who had an opportunity for advancement depending on ability and merit.

In a letter dated March 16, 2016, OWCP issued a preliminary determination of an overpayment of compensation in the amount of \$16,740.25. It found that for the period July 18, 2013 to March 5, 2016, appellant had received compensation based on a pay rate for compensation purposes of \$2,292.06 per week. According to OWCP, the proper pay rate was \$2,129.81 per week. In addition, it found appellant was not at fault in creating the overpayment.

By decision dated June 29, 2016, OWCP finalized its determination of an overpayment in the amount of \$16,740.25. It denied waiver of the overpayment, finding appellant had submitted insufficient evidence to justify waiver.

The Board set aside the March 10, 2016 OWCP decision on July 27, 2016.³ The Board found that OWCP had failed to properly make findings as to whether appellant was in a learner's capacity under 5 U.S.C. § 8113(a). The Board noted that, as to the likelihood of completing training and receiving additional pay, the employing establishment should provide additional clarification.

By letter dated August 31, 2016, OWCP requested additional information from the employing establishment regarding appellant's training program. On September 28, 2016 the employing establishment acting air traffic manager responded. He wrote that appellant was in a formal qualification training program to become a Certified Professional Controller. This required certification on two departure radar positions with an allotment of 120 training hours each, and certification on 3 satellite radar positions with allotments of 100 training hours each. Appellant's qualification training would not continue indefinitely, but according to demonstrated abilities in the hours allocated. He concluded, "Positive progress generally leads to position certification; however, negative progress could lead to suspension or termination of training."

Appellant filed an appeal of the June 29, 2016 overpayment decision. By order dated November 2, 2016, the Board remanded the case to OWCP.⁴ The Board found the overpayment issues were not in posture for decision as OWCP had not yet determined the correct pay rate. The case was remanded to OWCP to properly resolve the pay rate issue.

By decision dated November 3, 2016, OWCP found appellant was not entitled to an increase in pay as a certified professional controller. It found the evidence from the employing establishment established that appellant was not in a learner's capacity at the time of injury.

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. § 8113.⁵

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

³ Docket No. 16-0881 (issued July 27, 2016).

⁴ Docket No. 16-1437 (issued November 2, 2016).

⁵ 20 C.F.R. § 10.5(s).

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.”⁶ 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.⁷ 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.⁸

ANALYSIS

Appellant contends that he was in a learner’s capacity at the time of his injury on March 15, 2013. He argues that he should therefore be entitled to the pay rate that he would have had as a certified professional controller upon completion of training.

The evidence of record is insufficient to establish that appellant’s pay rate should be based on completion of the training program and certification as a controller. As the Board noted in the prior decision, appellant had only completed approximately one half of the program. The happening of an event that is possible is not a sufficient basis for an assumed increase in wage-earning capacity.⁹ 5 U.S.C. § 8113(a) specifically refers to a “probable” increase in wage-earning capacity. Based on the evidence of record, the Board finds that the completion of the training program was more in the realm of possibility, not probability.

⁶ *Hayden C. Ross*, 55 ECAB 455 (2004); *Mary K. Rietz*, 49 ECAB 613 (1998); *Robert H. Merritt*, 11 ECAB 64 (1959)

⁷ *Hayden C. Ross*, *id.*

⁸ *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).

⁹ *Supra* note 6.

The evidence from the employing establishment manager indicated that the training program involved extensive hours of training for certification on two departure radar positions and three satellite radar positions. The completion of the program depended on appellant's performance and demonstrated abilities with respect to a difficult training program. Given the extensive number of hours and the nature of the training, the Board finds the evidence does not establish that, as of March 15, 2013, it was probable he would complete the training program.

It is well established that the possibility of future promotions or greater earnings is not sufficient to establish a higher pay rate.¹⁰ As the Board has explained, when completion of a training program is based on quality of performance and demonstrated ability, it is not sufficient to establish a higher pay rate under 5 U.S.C. § 8113(a).¹¹ In the present case, the completion of the training program was dependent on appellant's performance with respect to the certification program. Appellant would not complete the program until he had demonstrated the necessary ability and completed the training hours, and there was no set time for completion. The Board finds that appellant has not met his burden of proof to establish a higher pay rate for compensation purposes under 5 U.S.C. § 8113(a).

On appeal, appellant argues that he was in a learner's capacity when injured. He asserts that he has been successful in all training he had done for the employing establishment. For the reasons discussed, the Board finds that appellant's pay rate for the March 15, 2013 injury should not be determined based on a probable increase in pay on completion of training.

Appellant notes that OWCP did not reissue a decision with respect to an overpayment of compensation in the November 3, 2016 decision. In this regard, the Board notes that the overpayment in this case is based on the issue of the pay rate for compensation purposes. The Board found in its November 2, 2016 order that the overpayment issues were not in posture as the learner's capacity issue had not been resolved. On return of the case record, OWCP should issue a merit decision on the overpayment issues to protect appellant's appeal rights.

CONCLUSION

The Board finds appellant has not met his burden of proof to establish a higher pay rate for compensation purposes based on 5 U.S.C. § 8113(a).

¹⁰ See *John Olejarski*, 39 ECAB 1138 (1988).

¹¹ See *Henry M. Van Sant*, 49 ECAB 593 (1998) (appellant was in a training program, but was not entitled to a higher pay rate as he would have to demonstrate knowledge of operating techniques and pass an oral review before a promotion); see also *Francis L. Alexander, Jr.*, 56 ECAB 511 (2005) (ship fitter apprentice would not be promoted without demonstrated achievement in training); *Hayden C. Ross*, *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 3, 2016 is affirmed.

Issued: July 27, 2017
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