

FACTUAL HISTORY

On September 24, 2014 appellant, then a 54-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on August 12, 2014 he sprained his lower back when he moved a patient in bed. It was originally considered a minor injury and medical benefits were paid.

Appellant did not report to work from August 13 to September 26, 2014. On September 22, 2014 he was offered a limited-duty assignment within the employing establishment as a United Service Organization (USO) Day Room Greeter. The duties included providing assistance to veterans, visitors, families, and employees, answering the telephone and directing telephone calls to personnel, setting up games and equipment for patients, and keeping the Information Desk clean and organized. Appellant accepted the light-duty position.

On December 18, 2014 appellant filed a claim for wage-loss compensation (Form CA-7) for "other wage loss" and indicated that it was for loss of night differential and Saturday/Sunday premium pay for the period September 22 to December 31, 2014. On the back of the form, the employing establishment indicated that he had worked light duty from September 22 to December 31, 2014. It also noted that appellant lost his night differential and Saturday/Sunday premium pay effective September 22, 2014. As the claim had not previously been evaluated, OWCP opened his claim and sent a development letter to him on December 23, 2014. Appellant continued to file various claims for "other wage-loss" compensation until March 7, 2015.

In two decisions dated February 20, 2015, OWCP converted appellant's claim to an occupational disease claim as the condition developed over the course of employment and accepted his claim for back sprain. It also denied his request for continuation of pay for the period August 13 to September 26, 2014 because it was no longer considered a traumatic injury claim.

On a March 6, 2015 duty status report, Dr. Susan Vizcay, Board-certified in family medicine, took appellant off work for four weeks and appellant filed various claims for wage-loss compensation for leave without pay beginning March 8, 2015 (Form CA-7), and for loss of night differential and Saturday/Sunday premium pay.

By decisions dated May 7, 2015, OWCP expanded the accepted conditions to include herniated lumbar disc with myelopathy and aggravation of lumbar degenerative disc disease and placed appellant on the periodic rolls effective May 3, 2015.³

Appellant provided an earnings and leave statement for the pay period ending July 26, 2014 when he worked as a nursing assistant, GS-5/Step 8. The earnings and leave statement indicated that his total annual pay was \$39,012.00. Appellant's biweekly gross pay was \$1,495.20, plus \$112.20 in night differential (for 60 hours), \$37.52 in Saturday premium pay for (8 hours), and \$37.52 in Sunday premium pay (for 8 hours) for a total biweekly gross pay of \$1,682.44 or \$841.22 weekly. He also provided an earnings and leave statement for the pay period ending October 18, 2014, after he began work as a USO Day Room Greeter, GS-5/Step 9.

³ Appellant was paid for sick leave from March 6 to May 2, 2015.

The earnings and leave statement noted that his total annual pay was \$40,067.00. Appellant's biweekly gross pay was \$1,536.00 plus \$38.40 in night differential (for 20 hours), \$38.56 in Saturday premium pay (for 8 hours), and \$38.56 in Sunday premium pay (for 8 hours) for a total biweekly gross pay of \$1,651.52 or \$825.76 weekly.

In a decision dated June 29, 2015, OWCP denied appellant's claim for wage-loss compensation and loss of night differential and premium pay for the period September 22, 2014 to March 5, 2015. It found that his actual earnings during that period were equal to or exceeded his current wages of the position for the date of injury. OWCP, therefore, denied appellant's wage-loss compensation claim in accordance with 20 C.F.R. § 10.501 because it found that there was no loss of wage-earning capacity during the claimed period.

On July 16, 2015 OWCP received appellant's request for an oral hearing before an OWCP hearing representative. The hearing was held on February 17, 2016. Appellant alleged that he lost four hours of night differential pay every day when he began his modified duty effective September 22, 2014. He explained that when he looked at his paystubs he noticed that he used to be getting 60 hours in night differential per pay period and now he was only getting 20 hours in night differential pay. The hearing representative found, however, that appellant's current pay rate was higher than his pay rate at the time of injury according to the *Shadrick* formula. She requested that he provide evidence, such as copies of pay stubs, to establish that he had a loss of wages during that period.

Appellant submitted copies of earnings and leave statements for periods ending September 20, 2014, October 4, 2014, October 18, 2014, November 1, 2014, January 10, 2015, February 7, 2015, and March 7, 2015.

By decision dated April 8, 2016, an OWCP hearing representative affirmed the June 29, 2015 decision with modification. She found that OWCP should have calculated appropriate earnings based on the number of calendar days from September 22, 2014 to March 5, 2015, not number of weeks, but explained that that this change did not alter the final disposition because appellant's actual earnings during the claimed period still exceeded his date-of-injury pay rate. The hearing representative explained that on the date of injury the base rate for appellant's prior year earnings was \$39,012.00. Appellant's total premium pay for the year prior to injury was holiday pay of \$1,338.08, Sunday pay of \$989.68, night differential of \$2,636.49, and other totaled \$971.12. This equaled \$5,935.37 a year or an average of \$114.14 a week for premium pay ($\$5,935.37 \div 52 = \114.14). Appellant's average weekly base pay of \$750.23 ($\$39,012.00$ divided by 52 weeks = \$750.23) on the date of injury, added to his average weekly premium pay of \$114.14 equaled \$864.37. The hearing representative then noted that the current pay rate for the date-of-injury job was \$757.69. This updated base pay was then increased by the percentage of premium pay earned as of the date of injury, and the total current weekly pay for the date-of-injury job, plus premium pay, was determined to be \$872.97.

The hearing representative also noted that average actual earnings for the period September 22, 2014 to March 5, 2015 appellant had earned a total of \$20,004.31 of the base pay

and a total of \$1,622.64 in premium pay,⁴ totaling \$21,626.95.⁵ As the average weekly earnings of appellant's light-duty job was \$917.61 or more than the current actual weekly salary for the date-of-injury position, and using the *Shadrick* formula appellant has no loss of wage-earning capacity.

LEGAL PRECEDENT

Section 8115 of FECA provides that 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 his loss of wage-earning capacity.⁶ If a claimant is entitled to compensation for partial wage loss after return to work, OWCP offsets actual earnings by comparing the wages of the position he or she was currently able to perform with the current wages of the position he or she held when injured pursuant to the *Shadrick*⁷ formula.⁸

The formula for determining loss of wage-earning capacity has been codified at section 10.403(c)-(e) of OWCP's regulations.⁹ 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.¹⁰ 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.¹¹ It has been administratively determined that certain pay elements will be included in

⁴ Night differential of \$389.28, Saturday premium pay of \$424.08, Sunday premium pay of \$346.96, and holiday premium pay of \$462.32 for a total of \$1,622.64.

⁵ The hearing representative explained that the appropriate calculation should be determined using calendar days. Total earnings of \$21,626.95 divided by 165 days (the number of days in the claimed period) equals \$131.07 a day times 7 days a week equals a total approximate weekly pay rate of \$917.61.

⁶ 5 U.S.C. § 8115. *See also* 20 C.F.R. § 10.402.

⁷ *Supra* note 5. The formula developed in the *Shadrick* decision has been codified at 20 C.F.R. § 10.403(d), which provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by OWCP, by the current pay rate for the job held at the time of the injury..

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.815.2(e) (June 2013).

⁹ 20 C.F.R. § 10.403(c)-(e).

¹⁰ *Id.* at § 10.403(c)-(d).

¹¹ *Id.* at § 10.403(e).

computing an employee's pay rate, including night or shift differential, Saturday premium, Sunday premium, and holiday and retention pay.¹²

ANALYSIS

OWCP accepted that appellant sustained a lumbar injury as a result of an August 12, 2014 employment incident. Appellant began a light-duty position as an USO Room Greeter beginning September 22, 2014. He filed a claim for wage-loss compensation for partial disability for the period September 22, 2014 to March 5, 2015. OWCP found that appellant was not entitled to wage-loss compensation because his actual earnings during the period September 22, 2014 to March 5, 2015 exceeded his date-of-injury pay rate. The Board finds that OWCP properly determined that he was not entitled to partial wage-loss compensation during the relevant time period.

In the instant case, appellant does not contest that the earnings in his modified position fairly and reasonably represented his wage-earning capacity. Instead, he contends that he did not earn as much premium pay in the modified position due to his new schedule. Specifically, appellant has claimed that he previously earned more hours of night differential than he currently earned in his modified position beginning September 22, 2014. The Board notes, however, that OWCP properly took into account his receipt of premium pay, including night differential and weekend premium pay, in computing his pay rate. OWCP properly looked at the entire previous year to determine the average for the year of the premium pay.

The Board finds that OWCP properly applied the *Shadrick* formula to determine that appellant had zero percent loss of wage-earning capacity. In the April 8, 2016 decision, OWCP's hearing representative properly used appellant's weekly pay rate of \$750.23 from the date of injury in line (1) of the *Shadrick* formula. Use of this figure was proper because it represented the highest figure of appellant's pay at the time of injury, the monthly pay at the time disability began, or the monthly pay at the time compensable disability recurred, if the recurrence began more than six months after the injury.¹³

¹² See *supra* 9 at Chapter 2.900.6b (March 2011). *Administrative Inclusions*. It has been determined administratively that the following elements will be included in computing an employee's pay rate:

“(1) *Night differential* is paid for regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m....

“(4) *Premium pay for work on Sundays and/or Saturdays* under 5 U.S.C. § 5546(a), which provides for extra pay when an employee's regular work schedule includes an eight-hour period, any part of which falls on a Sunday or described as being within the period commencing at 12:00 a.m. Saturday and ending at 12:00 a.m. Sunday. Saturday pay is usually payable to health professionals working for the Department of Veterans Affairs.

“(5) *Premium pay for work on holidays* under 5 U.S.C. § 5546(b), which provides for extra pay when an employee's regular schedule includes work on a holiday. This increment may not be paid for work which exceeds eight hours or which represents overtime.”

¹³ 5 U.S.C. § 8101(4).

In line (2) of the *Shadrick* formula, OWCP used appellant's current annual salary for the date-of-injury position (\$757.69) and then increased this updated base pay by the percentage of premium pay earned as of the date of injury, to determine that the total current weekly pay for the date-of-injury job plus premium pay would be \$872.97. The Board notes that OWCP's calculation in this regard was proper.

In line (3) of the *Shadrick* formula, OWCP used appellant's actual weekly earnings effective September 22, 2014 of \$917.61.

OWCP then divided his actual weekly earnings during the relevant time period (\$917.61) by the current pay rate for the job he held when injured (\$872.97) for a total wage-earning capacity percentage of 105 percent. Because appellant's actual wages for the period September 22, 2014 to March 5, 2015 exceeded the current wages of the position he held on the date of injury, OWCP correctly found that he was not entitled to wage-loss compensation for loss of night differential pay during the claimed period. Therefore, the Board finds that appellant has failed to establish wage-loss compensation for partial disability during the period September 22, 2014 to March 5, 2015.

The Board notes that even though appellant believes he received less premium pay during the period September 22, 2014 to March 5, 2015 than in his prior position, his actual average weekly earnings during that period of \$917.61 exceeded his actual average date-of-injury weekly pay rate, including his night differential and weekend premium pay, of \$872.97. Appellant therefore had no loss of wage-earning capacity. Therefore, OWCP properly found that he was not entitled to wage-loss compensation benefits under FECA.¹⁴

On appeal appellant contends that he did not understand how he made more money from September 22, 2014 to March 5, 2015 when he earned four hours less per day in night differential. He points out that he used to earn 60 hours in night differential pay, but only earned 20 hours in night differential pay in his new modified position as shown in his earnings statement. Appellant has not provided evidence to substantiate his claim of 60 hours of night differential each pay period in the prior position. For the period in his prior position, he provided only one earnings and leave statement. OWCP, however, reviewed the total night differential for the year which reflected less than 60 hours each pay period. Accordingly, appellant has not established wage-loss compensation during the claimed period.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish wage-loss compensation for partial disability during the period September 22, 2014 to March 5, 2015 due to his August 12, 2014 employment injury.

¹⁴ See *R.P.*, Docket No. 09-1250 (issued February 3, 2010) (the Board found that the claimant had no loss of wage-earning capacity even though she was not earning as much premium shift differential pay in her new position because her actual earnings exceeded those she received at the time of injury when she was working night shift).

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 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