United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 16-1217**
	)	**Issued: October 11, 2017**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, El Paso, TX, Employer	)	

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 May 18, 2016 appellant filed a timely appeal from an April 14 and two May 11, 2016 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received a $118,568.17 overpayment of compensation; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly modified its October 21, 2011 loss of wage-earning capacity determination and properly calculated appellant's present loss of wage-earning capacity.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 29, 2009 appellant, then a 26-year-old border patrol agent trainee, filed a traumatic injury claim (Form CA-1) alleging that on January 27, 2009 he sustained a knee injury when he landed on his left knee during a take-down training exercise at work. Under File No. xxxxxx461, OWCP accepted his claim for several left knee conditions, including sprains of the cruciate and medial collateral ligaments, knee contusion, and lateral meniscus tear. It authorized appellant's request for left knee surgery and he stopped work on March 12, 2009 to undergo reconstruction revision surgery on his left anterior cruciate ligament.[2] Appellant received disability compensation on the daily rolls beginning April 25, 2009. Appellant received disability compensation on the daily rolls through May 9, 2009. He then received disability compensation on the periodic rolls from May 10 through June 6, 2009 and again on the daily rolls from July 15 through August 29, 2009.

In a May 1, 2009 letter, OWCP notified appellant of his continuing compensation payments and his responsibility to return to work if he no longer was totally disabled. It also informed him that, if he filed for or received other compensation or disability benefits, *i.e.*, (black lung or veterans' benefits) from any federal employing establishment, he must advise OWCP of the name of the federal employing establishment and the nature of the disability involved.

Appellant returned to light-duty work on May 20, 2009 and was terminated effective August 13, 2009 as his medical restrictions prevented him from completing mandatory training.[3]

Appellant was returned to the periodic rolls effective August 30, 2009.

In a September 10, 2009 letter, OWCP again notified appellant of his continuing compensation payments and his responsibility to return to work if he no longer was totally disabled. It reiterated that if he filed for or received other compensation or disability benefits from any federal employing establishment, he must advise OWCP of the name of the federal employing establishment and nature of the disability involved.

On September 30, 2009 appellant filed a claim for a schedule award (Form CA-7) and responded in the affirmative to a question asking whether he had applied for or received disability benefits from the DVA. On the same form an employing establishment official noted

[2] OWCP previously accepted (under File No. xxxxxx042) that on October 1, 2007 appellant sustained several left knee conditions, including tears of his lateral and medial menisci, and sprain of his cruciate ligament. On November 15, 2007 appellant underwent OWCP-approved left knee surgery in the form of arthroscopic lateral meniscus repair and arthroscopic anterior cruciate ligament reconstruction with allograft. The files for the October 1, 2007 and January 27, 2009 injuries have been combined, with the file for the January 27, 2009 injury being designated as the master file. Prior to sustaining the October 1, 2007 and January 27, 2009 work injuries, appellant was receiving benefits from the Department of Veterans Affairs (DVA) for 20 percent disability related to a left knee condition caused by his military service.

[3] On August 13, 2007 appellant had entered duty under a conditional appointment subject to satisfactory completion of a two-year trial period.

that appellant was receiving a payment of $674.00 each month from the DVA for disability due to his left knee condition.

On October 1, 2010 OWCP requested that the Denver Regional Office of the Veterans Benefits Administration, a subdivision of the DVA, complete and respond to questions regarding appellant's military service awards, nature of disability, monthly benefits rate, and dates of any increase in benefits. On November 2, 2010 it received a completed form indicating that appellant had a DVA claim number, that he received $973.00 each month for left knee disability, and that no increase in monthly benefits had been made as a result of his on-the-job injury.

On September 19, 2011 OWCP received an August 7, 2009 DVA rating decision, finding that appellant's left knee disability rating would be increased from 20 to 100 percent for the period March 12, 2009 to April 30, 2010, due to his March 12, 2009 surgical treatment necessitating convalescence. The decision noted that appellant's left knee disability rating would be 30 percent beginning May 1, 2010.

OWCP requested that appellant complete and return EN1032 forms which posed various questions about his income and employment activities. In EN1032 forms signed on September 14, 2010 and September 10, 2011, appellant indicated that he had not received an increase in the DVA's award for his left knee.[4]

On July 24, 2014 OWCP received a copy of a DVA award letter dated March 15, 2013 in which the DVA indicated that appellant's monthly award amount was $1,024.00 for a service-connected evaluation of 50 percent disability.

In a December 3, 2014 letter, OWCP notified appellant that FECA prohibits dual benefits for a given federal civilian employment-related injury and advised that an increase in a veteran's service-connected disability, brought about by an injury sustained while in federal civilian employment, is considered a dual payment when the veteran is also receiving FECA wage-loss benefits. It noted that appellant was receiving a disability rating from the DVA for his left knee prior to sustaining his January 27, 2009 work-related injury and that his disability with the DVA was increased, effective March 12, 2009 to April 30, 2010, from 20 percent to 100 percent to reflect the additional impairment caused by surgery for the work-related injury. OWCP advised that, during the same time period, appellant was receiving wage-loss benefits from OWCP and that, therefore, he received a dual benefit. It requested that appellant make an election of benefits within 30 days[5] and enclosed an election of benefits form. OWCP advised appellant that, once he had made his election, it was irrevocable.

On December 30, 2014 OWCP received appellant's response in which he elected to receive DVA benefits effective December 30, 2014.

[4] Appellant later indicated that he had not received an increase in the DVA's award for his left knee in the forms he signed on September 25, 2012, September 22, 2013, October 1 and November 9, 2014, and October 7, 2015.

[5] OWCP advised appellant that, because he had received and was receiving increased DVA benefits, he had to make an election between the entire amount received from OWCP since March 12, 2009 and the amount of the increase he had received from the DVA, over the original impairment percentage, since March 12, 2009.

On February 5, 2015 OWCP forwarded another letter regarding the required election of benefits. It noted that the election date of December 30, 2014 could not be accommodated because the election of benefits, whether for FECA or DVA benefits, had to start on the date of the increase of the DVA award, *i.e.*, March 12, 2009. OWCP provided appellant further instructions for making a corrected election.

On March 2, 2015 OWCP received a form, completed on February 23, 2015 in which appellant corrected the effective date of the election of DVA disability benefits to March 12, 2009.[6]

In a February 16, 2016 notice, OWCP advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of $118,568.17 for the period April 25, 2009 to February 6, 2016 because he received prohibited dual DVA and OWCP payments.[7] It also made a preliminary determination that he was at fault in the creation of the overpayment because he was aware or should have reasonably been aware that he was not entitled to receive benefits from the DVA military service award and OWCP disability benefits for the same period of time. OWCP advised appellant that he could submit evidence challenging the fact, amount, or finding of fault, and request waiver of the overpayment. It informed appellant that he could submit additional evidence in writing or at a prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed overpayment recovery questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of the overpayment.

Appellant submitted an undated letter discussing the circumstances of the claimed overpayment and a Form OWCP-20, signed on March 17, 2016, in which he provided figures for monthly income, monthly expenses, and assets. He asserted that he was not at fault in the creation of the claimed overpayment and requested waiver of recovery of the overpayment. Appellant argued that he had always provided the information requested from OWCP, including information about the amount of income he received and the sources of the income. He asserted that his family would face financial hardship if the overpayment had to be repaid.

In an April 14, 2016 decision, OWCP finalized the overpayment of compensation in the amount of $118,568.17. It found that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

While OWCP was developing the overpayment and fault issues, it also began receiving evidence relevant to the third issue of this case, *i.e.*, whether a prior loss of wage-earning capacity determination should be modified.

[6] During this period of time, appellant was also requesting schedule award compensation benefits based on his physician's calculations for permanent partial impairment of 12 percent permanent impairment of the left lower extremity. On April 10, 2015 OWCP advised him that his claim for schedule award benefit entitlement was closed due to his election to receive DVA benefits.

[7] Payment documents in the evidence of record show that appellant first received OWCP disability compensation on April 25, 2009 and last received it on February 6, 2016. Overpayment calculation documents show that he received $118,568.17 in OWCP disability compensation during this period.

By decision dated October 21, 2011, OWCP had adjusted appellant's compensation effective that date based on its determination that he had the capacity to earn wages of $414.00 per week in the constructed position of administrative clerk.[8] It noted that appellant's vocational rehabilitation counselor had indicated that appellant was vocationally capable of performing the position[9] and that it was reasonably available in his commuting area at wages of $414.00 per week. OWCP indicated that the physical duties of the position were within the work duties recommended by Dr. Grant McKeever, the Board-certified orthopedic surgeon, who served as an impartial medical specialist.

Appellant advised OWCP that he had been working on a full-time basis since February 24, 2014 for a private employer, Pride Industries. He submitted pay stubs from Pride Industries which noted that, for each week during the period May 17 to June 27, 2017, he earned $18.33 per hour and $733.20 per week (working 40 hours). In EN1032 forms signed on October 1 and November 9, 2014, appellant indicated that his employment as a general maintenance worker at Pride Industries began on February 24, 2014 and that the job paid $18.38 per hour.

In an undated statement received on March 24, 2016, appellant advised that he was now working at the ADP Corporation as a human resources benefits consultant for $17.25 per hour. He indicated that he initially started working for the ADP Corporation as a contractor (earning between $10.00 and $14.00 per hour) and that the position became permanent on February 1, 2016. Appellant advised that he took a pay cut from his prior job in order to pursue work in his field of study.[10]

In an April 7, 2016 letter, OWCP advised appellant that it proposed to modify the October 21, 2011 loss of wage-earning capacity determination. It noted that this formal loss of wage-earning capacity determination should be modified because the evidence of record substantiated that appellant had been vocationally rehabilitated as he now was employed in a new job, obtained with additional training, education, or qualifications, which paid 25 percent more than the current pay of the job in which his wage-earning capacity was previously determined on October 21, 2011. OWCP advised that the evidence of record substantiated that appellant was previously rated as an administrative clerk and that he was employed as a general maintenance worker with Pride Industries effective February 24, 2014. It noted that he successfully performed the physical demands of this new job for more than 60 days. OWCP indicated that the evidence of record also reflected that appellant had additional training or

[8] The administrative clerk position involved such duties as compiling and maintaining records of business transactions and office activities, tabulating data and copying it into record books, and computing wages, taxes, premiums, commissions, and payments. The position also involved recording orders for merchandise or services, paying out cash, and giving information to customers, claimants, employees, and sales personnel.

[9] In late-2009 appellant began participating in an OWCP-sponsored vocational rehabilitation program and, in connection with that program, he started taking business administration classes at El Paso Community College. He later took classes at the University of Texas at El Paso and, in December 2013, he completed a bachelor's degree in human resources at that institution

[10] Appellant also noted that he had previously advised OWCP that, after graduating from school, he had worked as a general maintenance worker for Pride Industries.

acquired specific education or qualifications prior to starting this new position as demonstrated by vocational rehabilitation reports and by his statement received on March 24, 2016. It noted that this new job paid $737.67 per week.[11] OWCP indicated that the current pay of the job for which appellant's wage-earning capacity was previously determined in the October 21, 2011 loss of wage-earning decision (administrative clerk) was $414.00 a week, and noted that $737.67 per week was at least 25 percent more than $414.00 a week. It provided him 30 days to submit evidence and argument challenging the proposed action. Appellant did not respond to OWCP's April 7, 2016 letter.

In a May 11, 2016 decision, OWCP modified its October 21, 2011 wage-earning capacity determination to reflect appellant's earnings as a general maintenance worker. It noted that, after reviewing all available evidence, it had determined that the evidence substantiated that he was employed in a new job as a general maintenance worker, obtained with additional training, education, or qualifications. OWCP further indicated that appellant earned $737.67 as a general maintenance worker and that this amount was 25 percent more than the current pay of the administrative clerk job which served as the basis for the October 21, 2011 loss of wage-earning capacity determination. It noted that another decision addressing appellant's current wage-earning capacity would be issued under separate cover.

In another decision dated May 11, 2016, OWCP indicated that appellant was reemployed as a general maintenance worker for Pride Industries with wages of $737.67 per week and that the position fairly and reasonably represented his wage-earning capacity. It noted that, since appellant demonstrated the ability to perform the duties of the job for 60 days or more, it was considered suitable to his partially disabling condition. OWCP indicated that it was reducing appellant's monetary compensation effective May 11, 2016 based upon on his earnings in this position and that an enclosed document explained the method of calculating his entitlement to monetary compensation. In the enclosed document, it performed a *Shadrick* calculation to determine appellant's loss of wage-earning capacity.[12] OWCP indicated that appellant was capable of earning $737.67 per week, that the current pay rate for his date-of-injury job (border patrol agent trainee) job was $812.22,[13] and that his loss of wage-earning capacity was nine percent. It noted that appellant's new gross compensation rate was $233.00 every four weeks.[14]

LEGAL PRECEDENT -- ISSUE 1

FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty. While an

[11] OWCP obtained the figure $737.67 by multiplying appellant's pay of $18.38 per hour times 2,087 annual hours and dividing the resulting figure by 52 weeks. It also noted that the current pay for appellant's date-of-injury job, *i.e.*, border patrol agent trainee, was $662.54 per week.

[12] *See infra* note 43.

[13] In providing the $812.22 figure, OWCP noted that it was correcting an error for the current pay of a border patrol agent trainee that it had made in its April 7, 2016 letter.

[14] Appellant last received disability compensation on February 6, 2016 and has not received any additional disability compensation after OWCP issued its May 11, 2016 decision.

employee is receiving such compensation, however, he or she may not receive salary, pay, or remuneration of any type from the United States, except in return for service actually performed or for certain payments related to service in the Armed Forces. The latter includes benefits administered by the DVA, unless such benefits are payable for the same injury being compensated for under FECA.[15] The prohibition against dual payment of FECA and veterans benefits extends to cases in which: (1) the disability or death of an employee resulted from an injury sustained while in federal civilian employment and the DVA held that the same disability or death was caused by military service; or (2) an increase in a veteran's service-connected disability award was brought about by an injury sustained while in federal civilian employment.[16]

An election between these benefits is required under both scenarios.[17] An overpayment of compensation under FECA may occur when a claimant is not entitled to the amount already paid.[18]

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of $118,568.17. Beginning April 25, 2009, appellant received FECA benefits for disability resulting from a January 27, 2009 left knee injury.[19] He also had been receiving DVA disability benefits for his left knee condition.[20] Once OWCP learned that appellant was receiving increased DVA disability benefits, it required him to make an election of benefits. On March 2, 2015 OWCP received a form in which appellant indicated an election of DVA disability benefits effective March 12, 2009.

OWCP determined that, at the time of the overpayment, appellant was on its disability rolls and received compensation every 28-calendar days. However, appellant retroactively elected to receive benefits from his DVA military service award in lieu of OWCP disability benefits effective March 12, 2009. He received FECA benefits through February 6, 2016. Following his election of DVA benefits, appellant was no longer entitled to FECA benefits.[21] Appellant's receipt of increased DVA disability benefits for his left knee condition beginning March 12, 2009 became a prohibited dual benefit under 5 U.S.C. § 8116 when he received FECA

[15] 5 U.S.C. §§ 8102(a), 8116(a). *See also S.G.*, Docket No. 12-0779 (issued September 17, 2012).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8b (December 1997).

[17] *See id.* at Chapter 2.1000.8a(5).

[18] *See id.* at Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2d (May 2004).

[19] Appellant previously received disability compensation for brief periods in 2007 and 2008 due to a work-related October 1, 2007 left knee injury.

[20] OWCP received an August 7, 2009 DVA rating decision finding that appellant's left knee disability rating increased from 20 to 100 percent beginning March 12, 2009 due to his OWCP-approved March 12, 2009 surgical treatment necessitating convalescence.

[21] *See supra* notes 15 through 18.

disability compensation for the same left knee condition beginning effective April 25, 2009 and thereafter through February 6, 2016, the date his FECA compensation stopped.[22] The Board has previously found overpayments of compensation when created retroactively as in the present case.[23] OWCP correctly calculated the amount of the overpayment as $118,568.17 for the period of prohibited dual payment, *i.e.*, April 25, 2009 to February 6, 2016.[24]

The Board therefore affirms the finding that appellant received an overpayment in the amount of $118,568.17.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled.[25] The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."[26] No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.[27]

In determining whether an individual is not "without fault" or alternatively "at fault" in the creation of an overpayment, section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part, that a recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

> "(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
>
> "(2) Failed to provide information which he or she knew or should have known to be material; or
>
> "(3) Accepted a payment which he or she knew or should have known to be incorrect…."[28]

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[22] *See id.*

[23] *See J.R.*, Docket No. 15-0387 (issued September 15, 2016); *B.G.*, Docket No. 14-2002 (issued August 13, 2015) concerning the retroactive creation of overpayments of compensation.

[24] Payment documents and overpayment calculation documents show that appellant received $118,568.17 in OWCP disability compensation during the period April 25, 2009 to February 6, 2016.

[25] 5 U.S.C. § 8129(a).

[26] *Id*. at § 8129(b).

[27] *L.J.*, 59 ECAB 264 (2007).

[28] 20 C.F.R. § 10.433(a).

Section 10.433(b) of OWCP's regulations provides that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.[29]

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in the creation of the $118,568.17 overpayment in that he accepted a payment which he knew or reasonably should have known was incorrect.[30] Appellant knew or should have known that he could not accept benefits from an increased DVA military service award for a period already covered by his FECA disability payments.

In a May 1, 2009 letter, OWCP notified appellant of his continuing compensation payments and his responsibility to return to work if he no longer was totally disabled. It informed appellant that if he filed for or received other compensation or disability benefits (*i.e.*, black lung or veterans' benefits) from any federal employing establishment, he must advise OWCP of the name of the federal employing establishment and the nature of the disability involved.[31] In a December 3, 2014 letter, OWCP again notified appellant that FECA prohibits dual benefits for a given federal civilian employment-related injury and advised that an increase in a veteran's service-connected disability, brought about by an injury sustained while in federal civilian employment, is considered a dual payment when the veteran is also receiving FECA disability benefits.

In an August 7, 2009 rating decision, the DVA found that appellant's left knee disability rating would be increased from 20 to 100 percent commencing as of March 12, 2009 due to his March 12, 2009 surgical treatment necessitating convalescence. As noted, appellant made an election in March 2015 to receive DVA disability benefits retroactive to March 12, 2009. His receipt of increased DVA disability benefits commencing as of March 12, 2009 became a prohibited dual benefit under 5 U.S.C. § 8116 as he was also receiving FECA disability benefits beginning April 25, 2009 and thereafter through February 6, 2016, the date his FECA compensation stopped.[32] At the time he accepted the DVA disability benefits, appellant knew or reasonably should have known, based on past notice provided by OWCP, that he was not permitted to receive both FECA disability benefits and increased DVA disability benefits for the

[29] *Id*. at § 10.433(b).

[30] *See supra* note 26.

[31] In a September 10, 2009 letter, OWCP provided similar information to appellant.

[32] *See* notes 15 through 16.

same period.[33] He is therefore at fault in the creation of the $118,568.17 overpayment based on the fact that he accepted payments which he knew or should have known to be incorrect.[34]

The Board will therefore affirm OWCP's April 14, 2016 decision on the issue of fault. As appellant was not without fault in creating the overpayment, he is not eligible for waiver.[35] OWCP must therefore recover the debt.[36]

LEGAL PRECEDENT -- ISSUE 3

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[37] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[38]

Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[39] A determination regarding whether actual earnings fairly and reasonably represents one's wage-earning capacity should be made only after an employee has worked in a given position for more than 60 days.[40] After a given employee's capacity to earn wages is determined, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[41]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally

[33] *See H.T.*, Docket No. 16-0482 (issued July 14, 2016).

[34] *See supra* note 26. On appeal appellant argues that he was not at fault in the creation of the overpayment because he had disclosed the benefits he received from the DVA. He asserts that he was not advised that he could not receive OWCP compensation and increased DVA benefits related to his left knee condition at the same time, but the Board has explained how he was informed that he could not receive such prohibited dual payments.

[35] *See supra* note 25.

[36] *A.P.*, Docket No. 15-0586 (issued June 6, 2016).

[37] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[38] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[39] *E.W.*, Docket No. 14-0584 (issued July 29, 2014); *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

[40] *See supra* note 16 at *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5 (June 2013).

[41] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Albert C. Shadrick*, 5 ECAB 376 (1953).

rehabilitated or the original determination was, in fact, erroneous.[42] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[43]

With respect to modification of wage-earning capacity, OWCP's procedure manual provides:

> "Vocationally Rehabilitated. It may be appropriate to modify the [loss of wage-earning capacity] rating on the grounds that the claimant has been vocationally rehabilitated if the claimant is employed in a new job (a job different from the job for which he or she was rated) obtained with additional training which pays at least 25 [percent] more than the current pay of the job for which the claimant was rated.
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> "*See W.G.*, Docket No. 06-0367 (issued December 27, 2006). [The Board] held that the psychology technician position was proper for a modification of an existing wage-earning capacity determination, because appellant was vocationally rehabilitated and employed in a new job earning at least 25 [percent] more than the position in which he was rated. However, [the Board] has held that without a showing of additional qualifications obtained by appellant through retraining, it is improper to make a new loss of wage-earning capacity determination based solely on increased earnings. *See Mary Miklosz*, Docket No. 05-1672 (issued June 9, 2006).
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> "(1) If there is evidence of increased earnings as outlined above, and these earnings have continued for at least 60 days, the CE [claims examiner] should:
>
> > (a) Determine the duration, exact pay, duties, and responsibilities of the current job.
> >
> > (b) Determine whether the claimant underwent training or vocational preparation to earn the current salary.
> >
> > (c) Assess whether the actual job differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated.
>
> "(2) If the results of this investigation establish that the claimant is rehabilitated or self-rehabilitated, or if the evidence shows that the claimant was retrained for a different job, compensation may be redetermined using the *Shadrick* formula. Any modification of compensation should be preceded by a 30-day prereduction notice and be made prospectively so that no overpayment results."[44]

[42] *C.R.*, Docket No. 14-0111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

[43] *See T.M.*, Docket No. 08-0975 (issued February 6, 2009).

[44] *Supra* note 16 at *Modification of Loss of Wage Earning Capacity Decisions*, Chapter 2.1501.5c (June 2013).

ANALYSIS -- ISSUE 3

By decision dated October 21, 2011, OWCP had adjusted appellant's compensation, effective that date, based on its determination that he had the capacity to earn wages in the constructed position of administrative clerk.

In December 2013, appellant completed a bachelor's degree in human resources at the University of Texas at El Paso.[45] In March 2016, he advised OWCP that on February 24, 2014 he began working on a full-time basis as a general maintenance worker for a private employer, Pride Industries. In this position, appellant earned wages of $18.38 per hour.

In a May 11, 2016 decision, OWCP modified the October 21, 2011 wage-earning capacity determination to reflect appellant's earnings in the general maintenance worker position. It noted that the evidence substantiated that he was employed in a new job as a general maintenance worker, obtained after additional training, education, or qualifications, which paid 25 percent more than the current pay of the job for which his wage-earning capacity was previously determined in the October 21, 2011 loss of wage-earning capacity determination (*i.e.*, administrative clerk). OWCP indicated that appellant earned $737.67 as a general maintenance worker for more than 60 days and that this amount was 25 percent more than $414.00 per week, the current pay of the administrative clerk job. It thereby modified its October 21, 2011 loss of wage-earning capacity determination based on the second prong of the above-noted test for modifying such formal determinations, *i.e.*, that appellant had been retrained or otherwise vocationally rehabilitated.[46] OWCP noted that another decision addressing appellant's current wage-earning capacity would be issued under separate cover.

In the separate May 11, 2016 decision, OWCP indicated that appellant's job as a general maintenance worker for Pride Industries fairly and reasonably represented his wage-earning capacity. It conducted a *Shadrick* calculation[47] and indicated that appellant was capable of earning $737.67 per week, that the current pay rate for his date of injury job (border patrol agent trainee) job was $812.22, and that his loss of wage-earning capacity was nine percent. OWCP noted that appellant's new gross compensation rate would be $233.00 every four weeks.[48]

The Board finds that OWCP met its burden of proof to modify its October 21, 2011 loss of wage-earning capacity determination.[49] As noted above, OWCP modified its October 21, 2011 loss of wage-earning capacity determination based on the second prong of the test for

[45] *Supra* note 9

[46] *See supra* note 42.

[47] *See supra* note 41.

[48] Although this calculation was made, due to the DVA election, appellant received no compensation. He last received disability compensation on February 6, 2016 and he had not received any additional disability compensation after OWCP issued its May 11, 2016 decision.

[49] *See supra* note 43.

modifying such formal determinations, *i.e.*, that appellant had been retrained or otherwise vocationally rehabilitated.[50]

The evidence of record reflects that appellant was vocationally rehabilitated after OWCP determined his loss of wage-earning capacity in its October 21, 2011 decision. In addition to the fact that appellant received significant additional education after that determination, the Board notes that the position of general maintenance worker clearly represented a new job from the administrative clerk position that was the basis for the October 21, 2011 wage-earning capacity determination. The general maintenance job differed in its duties and responsibilities from the administrative clerk job. Moreover, appellant worked more than 60 days in the position.[51] The general maintenance worker job also paid at least 25 percent more than the administrative clerk job. The current wages for the administrative clerk job were $414.00 per week and the general maintenance worker job paid $737.67 per week.[52]

The Board accordingly finds that OWCP properly determined that appellant was vocationally rehabilitated. Appellant was employed in a different job from that job on which the October 21, 2011 wage-earning capacity was originally determined, with different duties and responsibilities, and had greater than 25 percent increased earnings for more than 60 days.[53]

For these reasons, OWCP met its burden of proof to modify its October 21, 2011 loss of wage-earning capacity determination and; therefore, the Board will affirm its first May 11, 2016 decision.[54]

In its second May 11, 2016 decision, OWCP calculated appellant's present loss of wage-earning capacity under the principles of the *Shadrick* case.[55] The Board finds that OWCP properly conducted this calculation, which incorporated figures derived from the new loss of wage-earning capacity determination. Therefore, the Board will also affirm OWCP's second May 11, 2016 decision concerning appellant's present loss of wage-earning capacity.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of $118,568.17 and that he was at fault in the creation of the

[50] *See supra* note 42.

[51] *See supra* notes 36 and 40 and the *W.G.* and *Mary Miklosz* cases OWCP cited in Chapter 2.1501.5c of its procedures. *See also C.S.*, Docket No. 12-1221 (issued February 11, 2013).

[52] *See G.S.*, Docket No. 07-0021 (issued April 10, 2007).

[53] *See S.J.*, Docket No. 16-0445 (issued May 20, 2016).

[54] *See supra* note 52.

[55] *See supra* note 53.

overpayment of compensation, thereby precluding waiver of recovery of the overpayment. The Board further finds that OWCP properly modified its October 21, 2011 loss of wage-earning capacity determination and properly calculated appellant's present loss of wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the two May 11, 2016 decisions and the April 14, 2016 decision of the Office of Workers' Compensation Programs are affirmed.

Issued: October 11, 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