

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

B.G., Appellant)
and) Docket No. 17-1763
DEPARTMENT OF VETERANS AFFAIRS,)
MINNEAPOLIS VETERANS) Issued: April 9, 2018
ADMINISTRATION HEALTH CARE SYSTEM,)
Minneapolis, MN, 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

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 14, 2017 appellant filed a timely appeal from an April 25, 2017 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 the case.

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's compensation benefits based on her actual earnings in a part-time, modified position.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 9, 2010 appellant, then a 43-year-old nursing assistant filed a traumatic injury claim (Form CA-1) alleging that she injured her back on November 2, 2010 while she was transferring a patient. OWCP accepted the claim for sprain of back, lumbar region. Appellant received continuation of pay from November 3 to December 8, 2010, and missed time from work for intermittent periods thereafter. She stopped work on June 11, 2011. Appellant initially received wage-loss compensation benefits on the supplemental rolls and on the periodic compensation rolls as of July 3, 2011. She returned to modified duty for four hours a day on December 12, 2011. Appellant increased her work hours to six hours daily by January 15, 2012 and continued to receive disability compensation for partial wage loss. She stopped work on December 26, 2012 and was returned to the periodic compensation rolls.

On March 18, 2013 Dr. Stefano Sinicropi, a Board-certified orthopedic surgeon, performed spinal fusion at L5-S1. She returned to modified part-time employment on September 3, 2013.

A Notification of Personnel Action (Standard Form 50) effective February 23, 2014 indicated that appellant received a promotion to GS-6 advance medical support assistant. On April 7, 2014 OWCP additionally accepted lumbosacral spondylosis.

Appellant stopped work on January 6, 2015 and on February 4, 2015 Dr. Sinicropi performed hardware removal at L5-S1. She received wage-loss compensation, and returned to work, four hours daily, on March 16, 2015. Appellant began working six hours daily on April 15, 2015, which she continued.

In a November 19, 2015 attending physician's report (Form CA-20), Dr. Sinicropi noted that appellant was status post fusion at L5-S1 and advised that she had a permanent restriction of six hours of limited-duty daily. Appellant continued to receive compensation for partial wage loss.²

On August 25, 2016 the employing establishment offered appellant a permanent position as advanced medical support assistant in the primary care service, effective September 18, 2016. Appellant accepted the position on August 30, 2016. The job offer indicated that the salary was \$44,583.00 annually.

An April 25, 2017 OWCP memorandum to file indicated that appellant was entitled to a recurrent pay rate, effective January 6, 2015. It obtained pay rate information from the employing establishment which indicated that her January 6, 2015 recurrent pay rate was \$43,579.00 annually, which yielded a weekly pay rate of \$838.06. The current weekly pay rate for the job and step when injured, effective September 18, 2016, was found to be \$747.15. Appellant's actual weekly earnings were reported as \$643.00. Her wage-earning capacity percentage was therefore 86 percent and her weekly loss was \$117.33. This weekly earnings loss multiplied by the 2/3

² In decisions dated April 24, 2013 and November 2, 2015, OWCP denied appellant's schedule award claim. By decision dated August 16, 2016, an OWCP hearing representative affirmed the November 2, 2015 decision.

compensation rate yielded a weekly compensation pay rate of \$78.22, which was adjusted by cost of living to a four-week loss of wage-earning capacity (LWEC) of \$320.00.³

By decision dated April 25, 2017, OWCP determined that the advanced medical support assistant position fairly and reasonably represented appellant's wage-earning capacity. It reduced her wage-loss compensation and provided its calculations based on the *Shadrick* formula and concluded that her new compensation rate was \$320.00 each four weeks.

LEGAL PRECEDENT

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled from all gainful employment, is considered partially disabled.⁴ Compensation for partial disability is determined 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 wage-earning capacity.⁵ Generally, wages actually earned are the best measure of a 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.⁶ Compensation payments are based on the wage-earning capacity determination, and OWCP's finding remains undisturbed until properly modified.⁷

A light-duty position that fairly and reasonably represents an employee's ability to earn wages may form the basis of an LWEC determination if that light-duty position is a classified position to which the injured employee has been formally reassigned.⁸ The position must conform to the established physical limitations of the injured employee; the employing establishment must have a written position description outlining the duties and physical requirements; and the position must correlate to the type of appointment held by the injured employee at the time of injury.⁹ If these circumstances are present, a determination may be made that the position constitutes regular federal employment.¹⁰ In the absence of a light-duty position as described above, OWCP will assume that the employee was engaged in noncompetitive, makeshift, or odd-lot employment.¹¹

With respect to part-time employment, Federal (FECA) Procedure Manual provides that: (1) a part-time position may form the basis of an LWEC determination if the employee was a part-

³ These calculations were recorded in the April 25, 2017 wage-earning capacity form (Form CA816).

⁴ 20 C.F.R. § 10.402.

⁵ 5 U.S.C. § 8115(a).

⁶ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁷ See *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁸ 20 C.F.R. § 10.510.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

time worker at the time of injury; and (2) for an employee who was a full-time employee on the date of injury, a part-time position may form the basis of an LWEC determination if the employee's stable, established work restrictions limit him or her to part-time work.¹²

As long as there is no work stoppage due to the accepted condition(s), a formal LWEC determination should be issued following 60 calendar days from the date of return to work.¹³ The formula for determining LWEC based on actual earnings, developed in the *Albert C. Shadrick* decision,¹⁴ has been codified at 20 C.F.R. § 10.403. 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 position.¹⁵

ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits based on her actual earnings in a part-time, modified position.

In this case it was appropriate for OWCP to base the April 25, 2017 LWEC decision on appellant's part-time earnings. A part-time position may form the basis of an LWEC determination if an employee has established work restrictions that limit the employee to part-time work.¹⁶ On November 19, 2015 appellant's attending orthopedic surgeon, Dr. Sinicropi provided permanent restrictions that appellant could only work 30 hours limited-duty weekly. In September 2016 she began working in a position as an advanced medical support assistant within these restrictions. She continued in this position, and on April 25, 2017, OWCP issued its LWEC decision.

The Board also finds that OWCP properly applied the *Shadrick* formula in determining the LWEC. The calculations provided by OWCP in its April 25, 2017 decision comport with the *Shadrick* formula, as provided in section 10.403(d) of OWCP's regulations.¹⁷ Under the *Shadrick* formula, it firsts calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's actual earnings by the current or updated pay rate for the position held at the time of injury.¹⁸ OWCP properly determined that the weekly pay rate when disability recurred was \$838.06, based on an annual salary of \$43,579.00, and found that the current pay rate for job and step when injured was \$747.15. It then found that appellant was capable of earning \$643.00

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5c(1)(b) (June 2013).

¹³ *Id.* at Chapter 2.815.6a.

¹⁴ 5 ECAB 376 (1953).

¹⁵ 20 C.F.R. § 10.403(d).

¹⁶ *Supra* note 11.

¹⁷ 20 C.F.R. § 10.403.

¹⁸ *Supra* note 13; *see also* 20 C.F.R. § 10.403; D.M., Docket No. 16-1527 (issued July 25, 2017).

weekly, which yielded a wage-earning capacity of 86 percent.¹⁹ OWCP adjusted appellant's wage-earning capacity by multiplying the weekly pay when disability recurred (\$838.06) by 86 percent, finding a weekly loss of \$117.33, for an unaugmented compensation rate of \$78.22 which was increased by an applicable cost-of-living adjustment to \$80.00 per week or \$320.00 each compensation period.

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

CONCLUSION

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits based on her actual earnings in a part-time, modified position.

ORDER

IT IS HEREBY ORDERED THAT the April 25, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 9, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ Appellant was working a 30-hour workweek, based on a \$44,583.00 annual salary for a 40-hour workweek or \$21.43 per hour (which, times 30 hours, yields a \$642.96 weekly salary).