

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

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N.C., Appellant )

and )

DEPARTMENT OF HOMELAND SECURITY, )  
TRANSPORTATION SECURITY )  
ADMINISTRATION, Los Angeles, CA, Employer )

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**Docket No. 18-0172  
Issued: August 7, 2018**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 30, 2017 appellant filed a timely appeal from a May 9, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 OWCP properly determined appellant's pay rate for compensation purposes in its reduction of his compensation for failing to participate in vocational rehabilitation.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances as set forth in the prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 9, 2004 appellant, then a 50-year-old screener, filed a traumatic injury claim (Form CA-1) alleging that on August 3, 2004 he strained a muscle in his shoulder and arm lifting a bag. OWCP accepted the claim for right shoulder strain, cervical strain, acromioclavicular joint arthritis and tendinitis of the right shoulder, cervical discogenic disc disease at C5-6, reflex sympathetic dystrophy of the right upper extremity, causalgia, and psychogenic pain. Appellant stopped work on August 7, 2004.

Appellant filed a claim for compensation (Form CA-7) requesting wage-loss compensation beginning September 21, 2004. On the claim form the employing establishment advised that he earned \$14.44 per hour with an extra \$1.44 per hour for two and a half hours per week of night differential.

OWCP paid appellant wage-loss compensation beginning September 21, 2004 using a date-of-injury pay rate of \$583.14 per week. It calculated his weekly pay rate by multiplying his hourly rate of \$14.44 by 2087 hours per year and dividing by 52 weeks to find a weekly base pay rate of \$579.54. OWCP added \$3.60 per week in night differential, (\$1.44 multiplied by 2.5 hours per week), to find a total weekly pay rate of \$583.14.

Appellant was promoted on October 3, 2004 from the “D” band pay rate to the “F” band pay rate, and his base salary increased from \$30,146.00 to \$37,336.00, including locality pay. He returned to modified employment on December 13, 2004, but experienced a recurrence of disability on March 26, 2005.

The employing establishment offered appellant a position on April 13, 2005 as a modified lead transportation security screener with an annual salary of \$39,158.00 in the “F” band. The duties required no lifting over 20 pounds or reaching above the right shoulder level. Appellant returned to work in the position on May 7, 2005.<sup>3</sup>

On September 4, 2005 appellant stopped work as the employing establishment no longer had work available within his restrictions. OWCP paid him compensation beginning October 30, 2005. It used a pay rate date of September 4, 2005 to find a weekly base pay rate of \$753.04 and night differential of \$4.71, for a total weekly pay rate of \$757.75.

OWCP referred appellant back to the rehabilitation counselor on June 5, 2008 for vocational rehabilitation. By decision dated December 18, 2008, it reduced his compensation under 5 U.S.C. § 8113(b) as he failed without good cause to participate in vocational

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<sup>2</sup> Docket No. 16-1152 (issued October 19, 2016); Docket No. 16-0441 (issued October 21, 2016).

<sup>3</sup> By decision dated May 9, 2005, OWCP found that appellant received an overpayment of compensation in the amount of \$471.74 because he returned to work on December 17, 2004, but received compensation through December 25, 2004. It found that he was at fault in the creation of the overpayment.

rehabilitation.<sup>4</sup> OWCP determined that if appellant had undergone vocational rehabilitation he would have had the capacity to perform the duties of a surveillance system monitor. In applying the formula set forth in *Albert C. Shadrick*,<sup>5</sup> it used a pay rate date of September 4, 2005. OWCP calculated that appellant was entitled to net compensation of \$786.78 each four weeks.

By decision dated February 1, 2010, an OWCP hearing representative affirmed the December 18, 2008 decision. She found that OWCP properly reduced appellant's compensation under section 8113(b) as he failed to participate in vocational rehabilitation without good cause. In decisions dated April 25, 2011 and August 13, 2012, OWCP denied modification of its reduction of his compensation for failure to participate with vocational rehabilitation.

The employing establishment, in a letter dated April 16, 2013, advised that appellant sustained an injury on August 3, 2004 at which time he earned \$14.44 per hour and had 2.5 hours per week of night differential. It noted that he was not entitled to a recurrent pay rate and that calculation of the loss of wage-earning capacity should be based on pay banding. The employing establishment advised that, effective October 31, 2005, appellant earned a salary including locality pay of \$14.44 per week with night differential of 25 hours per week and 8 hours of Sunday premium pay per week.

On August 13, 2013 appellant again requested reconsideration. He argued that he should be paid at an "F" band rate as he was promoted on October 2, 2004. Appellant further maintained that he experienced a recurrence of disability on March 26, 2004.

The employing establishment, by letter dated May 16, 2014, provided that the applicable "D" band pay ranged on appellant's date of injury (DOI) from \$23,600.00 to \$35,400.00 and that he earned an annual salary of \$30,146.00, effective January 11, 2004. Appellant was subsequently promoted to "F" band.

By decision dated June 20, 2014, OWCP modified its December 18, 2008 loss of wage-earning capacity determination as it incorrectly calculated appellant's pay rate. It found that it failed to include eight hours of Sunday premium pay and 25 hours of night differential in his recurrent pay rate and failed to properly calculate his weekly compensation rate using the formula applicable for performance-based pay systems. OWCP determined that appellant had not shown good cause for his failure to undergo vocational rehabilitation. In another decision dated June 20, 2014, it vacated in part and affirmed in part the August 13, 2012 decision as it used an inaccurate pay rate in its loss of wage-earning capacity determination.

Appellant requested reconsideration on June 19, 2015. He challenged the finding that he refused to cooperate with vocational rehabilitation and argued that his pay rate should be the higher rate he received when he returned to work in December 2004.

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<sup>4</sup> By decision dated January 16, 2009, OWCP granted appellant a schedule award for 17 percent permanent impairment of the right upper extremity.

<sup>5</sup> 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403 (c)-(e).

By decision dated September 10, 2015, OWCP denied modification of its June 20, 2014 decision. It found that appellant had not demonstrated cooperation with vocational rehabilitation such that it would remove the sanction of section 8113(b).

Appellant appealed to the Board. By decision dated October 19, 2016, the Board affirmed in part and set aside in part the September 10, 2015 decision.<sup>6</sup> The Board found that OWCP properly reduced appellant's compensation under section 8113(b) as he failed to participate in vocational rehabilitation. The Board further found, however, that OWCP erred in determining his pay rate for compensation purposes in reducing his compensation benefits. The Board noted that OWCP used a recurrent pay rate date of September 4, 2005 in reducing appellant's benefits effective December 18, 2008 and in its subsequent modification of the December 18, 2007 decision to include Sunday premium pay and night differential in his pay rate. The Board found that he had not returned to his usual full-time employment with the federal government following his August 3, 2004 work injury, but instead returned to modified employment on December 13, 2004 and May 7, 2005 before stopping work on September 4, 2005. The Board determined that OWCP should have used the greater of either August 3, 2004, the DOI, or August 7, 2004, the date disability began, as the applicable pay rate date. The Board instructed OWCP to utilize the appropriate pay band and to include any applicable Sunday premium pay and night differential in calculating appellant's pay rate for partial disability based on its reduction of his compensation for failing to participate in vocational rehabilitation.<sup>7</sup>

OWCP telephoned the employing establishment on January 13, 2017 to obtain pay rate information. It noted that on the DOI appellant earned \$14.44 per hour with one-half hour of night differential a day at an additional 10 percent. OWCP asked that the employing establishment indicate whether the DOI pay rate was the same as the date disability began, August 7, 2004.

On January 31, 2017 OWCP calculated appellant's pay rate as of the DOI and current pay rate for the DOI position. It found that his DOI pay ranged from \$23,600.00 to \$35,400.00 without locality pay and from \$28,331.80 to \$42,497.70 with locality pay. OWCP determined that appellant earned \$30,146.00 on the DOI, which yielded a weekly pay rate of \$579.72. It added an additional 10 percent for 2.5 hours per week of night differential, or \$3.61, to find a total weekly pay rate of \$583.34.

OWCP further determined that the annual salary for appellant's DOI position in 2008, the date it reduced his compensation, ranged from \$24,432.00 to \$36,648.00 without locality pay and \$30,603.52 to \$45,905.28 with the 20.05 percent locality pay indicated by Office of Personnel Management (OPM) locality tables for his geographical area. It applied the pay banding formula

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<sup>6</sup> Docket No. 16-1152 (issued October 19, 2016).

<sup>7</sup> In a decision dated July 6, 2015, an OWCP hearing representative found that appellant received an overpayment of compensation in the amount of \$16,955.80 for the period October 30, 2005 to June 28, 2014 because he received compensation at an incorrect rate. He further found that appellant was not at fault in the creation of the overpayment, but denied waiver of recovery of the overpayment as he failed to provide the required financial information. By decision dated October 21, 2016, the Board set aside the July 6, 2015 OWCP decision after finding that the case was not in posture for decision regarding whether appellant received an overpayment of compensation and the amount of any overpayment. Docket No. 16-0441 (issued October 21, 2016). The Board found that OWCP used an incorrect pay rate date in determining his pay rate for compensation purposes from October 30, 2005 to July 28, 2014.

set forth in its procedures to find a weekly pay rate of \$626.78. OWCP added \$3.90 in night differential to find a weekly pay rate of \$630.69.

By letter dated February 8, 2017, OWCP advised appellant that it had contacted the employing establishment to obtain his pay rate on August 7, 2004, the date disability began, but it did not respond to the request. It informed him that it would use his pay rate as of the DOI, August 3, 2004, of \$583.34 per week. OWCP noted that the employing establishment's pay band did not change yearly based on cost-of-living adjustments, but did include locality pay. It indicated that it had to calculate appellant's pay rate as a percentage of the appropriate pay band. OWCP found that he was in "D" band in 2004, which provided a yearly pay range of \$23,600.00 to \$35,400.00. It found that in 2008 "D" band had a base pay of \$24,432.00 to \$36,648.00 with an additional 25.26 percent locality pay. OWCP added 2.5 hours per week of night differential to find a weekly pay rate of \$630.69. It applied the formula set forth in *Shadrick* to find net compensation every four weeks of \$413.00, or \$63.72 after it subtracted health and life insurance premiums.

By decision dated May 9, 2017, OWCP modified its December 18, 2008 reduction of appellant's compensation for failure to undergo vocational rehabilitation. It noted that the Board had affirmed its finding that he failed to participate in vocational rehabilitation without good cause and specified that its decision addressed only the calculation of his pay rate. OWCP noted that the Board determined that appellant was not entitled to a recurrent pay rate. It used the date disability began, August 7, 2004, as the pay rate date, noting that there was no evidence that the pay rate on that date differed from that the pay rate on the DOI. OWCP found that appellant's weekly pay rate on the date disability began was \$583.34 including night differential. It noted that his locality pay, according to OPM pay tables, was 20.5 percent in 2004 and 25.26 in 2008, and that the base pay rate was \$23,600.00 to \$35,400.00 in 2004 and \$24,432.00 to \$36,648.00 in 2008. OWCP found that the updated DOI pay rate was \$630.69 including night differential of a half hour per day for five days per week. It applied the *Shadrick* formula in computing the loss of wage-earning capacity.

On appeal appellant contends that he did not refuse to participate in vocational rehabilitation, but was instead sent home from class due to his injury. He went to another school which did not teach him to be a surveillance system monitor. Appellant notes that it took OWCP nine years to include night differential in his pay rate calculation.

### **LEGAL PRECEDENT**

Section 8105(a) of FECA provides: If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.<sup>8</sup> Section 8101(4) of FECA defines monthly pay for purposes of computing compensation benefits as follows: "[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after

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<sup>8</sup> 5 U.S.C. § 8105(a). Section 8110(b) of FECA provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

the injured employee resumes regular full-time employment with the United States, whichever is greater....”<sup>9</sup>

The formula for determining loss of wage-earning capacity has been codified at section 10.403(c)-(e) of OWCP’s regulations.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> It has been administratively determined that certain pay elements will be included in computing an employee’s pay rate, including night or shift differential, Saturday premium, Sunday premium, holiday, and retention pay.<sup>13</sup>

OWCP’s procedures note that some agencies have performance-based pay systems, which generally do not include automatic pay increases.<sup>14</sup> To determine loss of wage-earning capacity under such a system, its procedures provide:

“If the employing agency pay scale was banded on the DOI, and remains banded ‘currently’ the CE [claims examiner] will first need to determine the injured employee’s DOI pay rate as a percentage of the appropriate band. Once that percentage has been established, the current pay rate for the DOI job (as entered in Item (2) of the *Shadrick* formula) will be the same percentage of the current pay range for the band in which the employee was being paid on the DOI.

“For example, if the employee was hired in the second band (with a range of \$28,085.00 through \$60,049.00) at a salary of \$50,000.00, then he earns 69 percent of the total range. If the current range of the band in which he was being paid on the DOI is \$35,000.00 through \$72,000.00, then \$60,530.00 will be the current salary since it is 69 percent of the new range. When calculating the percentage of the pay band range, normal rounding rules apply.”

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<sup>9</sup> *Id.* at § 8101(4).

<sup>10</sup> 20 C.F.R. § 10.403(c)-(e).

<sup>11</sup> *Id.* at § 10.403(c)-(d).

<sup>12</sup> *Id.* at § 10.403(e).

<sup>13</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.6b (March 2011).

<sup>14</sup> *Id.* at Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.4(e)(3) (June 2013).

OWCP's procedures provide the steps required to determine the percentage on a pay as follows:

"Determine the range of the DOI pay band by deducting the lowest salary from the highest salary within that band. (In the example above,  $\$60,049.00 - \$28,085.00 = \$31,964.00$ ).

"Deduct the salary at the low end of the band from the actual salary paid to the employee. ( $\$50,000.00 - \$28,085.00 = \$21,915.00$ ).

"Take the amount from step 2 and divide it by the amount from step 1. This will give the percentage of the salary range that the employee earned on the DOI ( $\$21,915.00$  divided by  $\$31,964.00 = 69$  percent). The CE must document the case record with this calculation."<sup>15</sup>

The next step, according to OWCP's procedures, is to determine the current salary for the DOI job as follows:

"Determine the range of the current salaries for the DOI pay band by deducting the lowest salary from the highest salary within that band. (In the example given,  $\$72,000.00 - \$35,000.00 = \$37,000.00$ ).

"Multiply the amount from step 1 by the percentage of the band that the employee was earning on the DOI. ( $\$37,000.00 \times 69$  percent =  $\$25,530.00$ ).

"Add the number obtained in the second step to the lowest salary in the current range for the appropriate band. This will give you the current pay rate for the job held when injured. ( $\$25,530.00 + \$35,000.00 = \$60,530.00$ ).

"Once the current pay rate for the job held when injured is calculated according to the above instructions, it can be entered into Item (2) of the *Shadrick* formula so that compensation for [loss of wage-earning capacity] can be paid to the injured employee. The CE must document the case record with the Form CA-816 or equivalent."<sup>16</sup>

### ANALYSIS

On prior appeal the Board found that OWCP erred in using a recurrent pay rate date of September 4, 2005 in its December 18, 2008 reduction of appellant's compensation to reflect the amount that he could have earned as a surveillance system monitor if he had continued to participate in vocational rehabilitation and in its June 20, 2014 modification of the reduction of his compensation. The Board determined that he had not resumed regular full-time employment with the Federal Government after his August 3, 2004 work injury, and that his pay rate was either the August 3, 2004, the DOI, or August 7, 2004, the date disability began. The Board instructed

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

OWCP to use the formula for pay banding and include any applicable premium pay in calculating appellant's compensation for partial disability due to his failure to participate in vocational rehabilitation.

OWCP, on remand, noted that it was unable to obtain information from the employing establishment regarding the pay rate on the date disability began, but found that the evidence supported that it was the same rate as on the DOI. It indicated that it was using the date disability began as the pay rate, August 7, 2004.

The Board finds that OWCP properly calculated appellant's pay rate in reducing his compensation based on the amount that he would have earned as a surveillance system monitor had he continued to participate in vocational rehabilitation. The employing establishment paid him under a performance-based alternative pay system, or pay banding. OWCP's procedures set forth a formula for determining pay rate as a percentage of the appropriate pay band.<sup>17</sup> Once the percentage of the band has been determined, OWCP's procedures provide a second formula to calculate the current pay rate for the job held when injured.<sup>18</sup> Its procedures specify that it must include its calculation finding appellant's pay rate as a percentage of the band in the case record.<sup>19</sup>

On January 31, 2017 OWCP noted that appellant earned \$30,146.00 on the date of injury, for a weekly pay rate of \$579.73. It added an additional 10 percent to his hourly rate of \$14.44 for 2.5 hours per week to find an additional \$3.61 weekly, for a total weekly pay rate of \$583.34.

OWCP next utilized the pay banding formula to determine appellant's pay rate as a percentage of the applicable "D" pay band. It found that in 2004 the pay band ranged from \$28,331.80 to \$42,497.70 with locality pay. OWCP deduced the lowest salary from the highest salary in the band (\$42,497.70 - \$28,331.80) to find \$14,165.90. It then deducted the salary at the low end of the band from the actual salary paid (\$30,146.00 - \$28,331.80) to find \$1,814.20, which it divided by \$14,165.90 to find that appellant earned 13 percent of the salary range of the band. OWCP noted that in 2008 the range of salary for his DOI pay band ranged from \$30,603.52 to \$45,905.28 with locality pay. In accordance with its procedures, it deducted the lowest salary from the highest salary within in the band (\$45,905.28 - \$30,603.52) to find a range of \$15,301.76, which it multiplied by the percentage of the band that appellant earned on the DOI to find \$1,989.23. OWCP added the \$1,989.23 to the low end of the salary band, \$30,603.52, to find an annual base salary of \$32,592.75, or a weekly pay rate of \$626.76. It added \$3.90 for 2.5 hours of night differential to find a weekly pay rate of \$630.69.

The Board also finds that OWCP properly applied the formula in *Shadrick* to determine appellant's wage-earning capacity had he participated with vocational rehabilitation.<sup>20</sup> It divided his employment capacity to earn wages of \$513.00 a week by his current pay rate of the position held when injured of \$630.69 per week effective August 7, 2004 to find an 81 percent wage-

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *See M.K.*, Docket No. 17-0208 (issued April 17, 2018).

earning capacity. OWCP multiplied the pay rate at the time of injury of \$583.34 by the 81 percent wage-earning capacity percentage. The resulting amount of \$472.51 was subtracted from appellant's DOI pay rate of \$583.34 which provided a loss of wage-earning capacity of \$110.83 per week. OWCP then multiplied this amount by the appropriate compensation rate of three-fourths which yielded \$83.12 or \$105.25 weekly after adjustments. It subtracted benefit premiums to find a net compensation every four weeks of \$71.72 every four weeks.

On appeal appellant contends that he did not refuse to participate in vocational rehabilitation and did not receive adequate training for the rated position. In its October 19, 2016 decision, however, the Board affirmed OWCP's reduction of his compensation under section 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation. Absent further merit review by OWCP, this matter is *res judicata*.<sup>21</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined appellant's pay rate for compensation purposes in its reduction of his compensation for failing to participate in vocational rehabilitation.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the May 9, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 7, 2018  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

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<sup>21</sup> See *S.M.*, Docket No. 18-0075 (issued April 11, 2018).