United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, CENTRAL ILLINOIS REGIONAL AIRPORT, Bloomington, IL, Employer	)	**Docket No. 18-0535** **Issued: December 31, 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 January 18, 2018 appellant filed a timely appeal from a December 20, 2017 merit decision 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.

ISSUE

The issue is whether appellant has met his burden of proof to modify an August 12, 2016 loss of wage-earning capacity (LWEC) determination.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 4, 2012 appellant, then a 35-year-old part-time transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that he injured his lower back when assisting a customer with baggage on that date. He initially missed intermittent periods from work, and then stopped work completely on January 30, 2013. On February 12, 2013 OWCP accepted the claim for lumbar back strain. It subsequently expanded acceptance of the claim to include thoracic or lumbosacral neuritis or radiculitis and displacement of lumbar intervertebral disc without myelopathy.

On March 7, 2013 appellant accepted a modified part-time position. He was terminated by the employing establishment on March 8, 2013.[2] OWCP initially paid appellant wage-loss compensation and medical benefits on the daily rolls and then paid appellant compensation on the periodic compensation roll, based on his part-time employment, as of April 8, 2013.

On an EN1032 form, signed by appellant on September 3, 2013, appellant indicated that he had worked for AFNI, a private employer, performing office work, from September 2010 to present. On an EN1032 form, signed by appellant on September 9, 2014, he indicated that he began work with AFNI on September 27, 2010 and continued, and that on June 16, 2014 he began a second office job with the City of Bloomington, Illinois.[3]

Following an October 1, 2014 inquiry by OWCP, on October 30, 2014 the City of Bloomington indicated that appellant had commenced work as a cash collection manager for 40 hours a week on June 16, 2014, and earned $2,423.08 biweekly. A position description was attached.[4]

In an EN1032, signed by appellant on October 1, 2015, he indicated that he had continued to work with AFNI until March 2015 and also worked for the City of Bloomington. Appellant continued to receive FECA compensation on the periodic roll.

OWCP obtained pay rate information from the employing establishment and prepared a pay rate memorandum on August 12, 2016. This indicated that, based on a 20-hour workweek with Sunday premium and night differential, appellant's weekly pay rate was $843.44.

By decision dated August 12, 2016, OWCP determined that appellant's actual earnings with the City of Bloomington, Illinois, where he had worked since June 16, 2014, fairly and

[2] The termination notice indicated that appellant, who was hired on June 19, 2011, was terminated during his two-year trial period due to misconduct.

[3] In February 2014, OWCP referred appellant to Dr. Eric Orenstein, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a March 24, 2014 report, he advised that appellant could not return to a transportation security officer position, but could return to work in a sedentary light-duty job.

[4] The position description indicated that the manager managed, safeguarded, and reconciled most of the city's water utility revenues and collection activity, supervised support staff employees, and was responsible for ensuring excellent customer service to the public. The work also involved developing customer service standards, enforcing internal controls, and supervising within a collective bargaining agreement and under city policies to ensure that work processes and rules were followed. The work was performed in an office environment.

reasonably represented his wage-earning capacity. It further found that he had no loss of wage-earning capacity because his actual earnings of $1,211.54 per week met or exceeded the current wages for the job he held when injured on November 4, 2012.

On August 20, 2016 appellant requested a hearing with OWCP's Branch of Hearings and Review. During the hearing, held before an OWCP hearing representative on March 6, 2017, appellant testified that at the time of the November 4, 2012 employment injury, he worked full time at AFNI as a performance improvement specialist, and worked part time for the employing establishment. He indicated that at present he worked for the City of Bloomington, in a job just like the position he had at AFNI, but that now he supervised more employees. Appellant maintained that the LWEC determination should have been based on his full-time work at AFNI as well as his part-time work at the employing establishment. The hearing representative explained the criteria needed to modify an LWEC determination and asked that appellant furnish a job description and earnings information from AFNI.

Appellant forwarded a job description of the performance improvement specialist position at AFNI.[5] He also forwarded income tax information for the years 2014, 2015, and 2016. This included W2 forms reporting income from the City of Bloomington.[6]

By decision dated May 16, 2017, OWCP's hearing representative affirmed the August 12, 2016 LWEC determination, finding that appellant had not met his burden of proof to establish that the August 12, 2016 LWEC determination was erroneous.

On June 2, 2017 appellant requested reconsideration and provided a summary of his employment.

By decision dated August 23, 2017, OWCP found appellant had submitted insufficient evidence to support modification of the August 12, 2016 LWEC determination.

Appellant next requested reconsideration on September 5, 2017. He submitted federal and state tracking information for the years 2011, 2012, and 2013.[7]

[5] The position summary indicated that the performance improvement specialist provided support and direction to coaches and collectors by answering questions, providing training, modeling behaviors, identifying performance deficiency trends, input into curriculum development, and ensuring strategy is in affect and validating results. The incumbent was to create trend reports and performance data to be provided to senior management as requested.

[6] Appellant also forwarded treatment notes dated January 30 and March 28, 2017 in which Dr. Gustavo Galue, a Board-certified family physician, described physical examination findings and diagnosed displacement of lumbar intervertebral disc without myelopathy and low back pain radiating to the left leg. The record also includes treatment notes dated September 26 and November 29, 2016 completed by Andrew Tharp, a nurse practitioner, who works with Dr. Galue.

[7] Appellant also submitted additional progress notes from Dr. Galue dated May 8 to November 27, 2017 in which he described appellant's low back pain, which was currently unchanged.

The employing establishment submitted appellant's pay rate information for the date of injury. It also provided the maximum salary of a full-time employee in August 2016 the date the LWEC was issued when including night differential and Sunday and holiday premium pay.

By decision dated December 20, 2017, OWCP found that the evidence of record was insufficient to warrant modification of the August 12, 2016 LWEC determination. It noted that, as the position appellant held with AFNI in 2012 was dissimilar from his employing establishment position, it obtained earnings of a full-time employee at the employing establishment performing the same duties as appellant, who was a part-time employee. OWCP concluded that appellant's current pay rate in private employment was equal to or greater than the current pay of the job held when injured and, therefore, there was no loss of wage-earning capacity.

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 for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[8] An LWEC determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected/constructed position, represents a claimant's ability to earn wages.[9] Generally, an employee's actual earnings best reflect his wage-earning capacity.[10] Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.[11]

OWCP procedures provide that, if an injured employee has returned to alternative employment in the private sector, the claims examiner should consider the number of hours actually being worked in relation to the number the claimant is medically capable of working and review both the nature of the occupation and the actual wages earned in the new position to determine whether the earnings fairly and reasonably represent the wage-earning capacity.[12]

Compensation payments are based on these determinations, and OWCP's finding remains undisturbed until properly modified.[13] Modification of a wage-earning capacity determination is unwarranted unless there is a material change in the nature and extent of the injury-related

[8] 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see T.H.*, Docket No. 18-0704 (issued September 6, 2018).

[9] *See W.G.*, Docket No. 18-0374 (issued August 28, 2018).

[10] *T.H., supra* note 8.

[11] *Id*.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determination of Whether Earnings Are Representative of the Wage-Earning Capacity*, Chapter 2.815.5d (June 2013).

[13] *See W.G., supra* note 9; *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.[14] The burden of proof is on the party seeking modification.[15]

ANALYSIS

The Board finds that appellant has not met his burden of proof to modify the August 12, 2016 LWEC determination.[16]

Appellant asserts on appeal that the August 12, 2016 LWEC determination was erroneous because it was not based on the two jobs that he held when injured on November 4, 2012. He does not assert that he had established a material change in his employment-related condition or indicate that he had been retrained or otherwise vocationally rehabilitated.

As the Board explained in the case *Michael A. Wittman*,[17] OWCP is not restricted from considering earnings from employment which commenced subsequent to the employment injury in determining whether the actual earnings of the subsequent employment fairly and reasonably represent an employee's wage-earning capacity.[18] If an employee's earning capacity actually increases after the injury by the commencement of a job or earnings in a position which he did not have on the date of injury, whether or not similar to the federal employment at the time of injury, OWCP may consider such earnings as a factor in evaluating his or her wage-earning capacity.[19] At the time of the employee's employment injury on November 4, 2012, he did not have concurrent employment with the City of Bloomington, which he began on June 16, 2014, 19 months after the employment injury.

Thus, in the case at hand, the Board finds that OWCP properly applied the principles of section 8114(d) of FECA[20] and determined that appellant had no loss of wage-earning capacity on August 12, 2016 because his weekly earnings in private employment with the City of Bloomington exceeded those of his federal employment. There is, therefore, no evidence to support that the August 12, 2016 LWEC determination was erroneous.

Appellant argues that in determining appellant's loss of wage-earning capacity, his full-time earnings at AFNI should have been added to his earnings from his part-time employment at the employing establishment, to determine his date-of-injury pay rate. The Board also notes that the case *Irwin E. Goldman*, 23 ECAB 6 (1971), established the principle that earnings from

[14] 20 C.F.R. § 10.511; *see Tamra McCauley*, 51 ECAB 375, 377 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

[15] *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[16] 5 U.S.C. § 8114(d).

[17] 43 ECAB 800 (1992).

[18] *Id*.

[19] *Id*.

[20] 5 U.S.C. § 8114(d). This provision provides the methodology for determining average annual earnings. *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4 (March 2011).

concurrent, dissimilar employment shall be excluded by OWCP when determining an injured federal employee's pay rate. Thus, when appellant was injured on November 4, 2012 performing transportation security duties, his dissimilar employment at AFNI doing office work shall not be considered in his pay rate for compensation purposes.

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

CONCLUSION

The Board finds that appellant has not met his burden of proof to modify the August 12, 2016 LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 31, 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