

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

S.J., Appellant)

and)

**U.S. POSTAL SERVICE, POST OFFICE,
Honolulu, HI, Employer**)

**Docket No. 19-0186
Issued: August 2, 2019**

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 November 5, 2018 appellant filed a timely appeal from an October 4, 2018 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 this case.

ISSUE

The issue is whether OWCP met its burden of proof to modify a July 15, 2014 loss of wage-earning capacity (LWEC) determination, effective October 7, 2018.

FACTUAL HISTORY

On November 27, 2011 appellant, then a 55-year-old data collection technician, filed a traumatic injury claim (Form CA-1) alleging that on November 26, 2011 he sustained a low back injury when attempting to lift flat tubs from the back of a web cage while in the performance of

¹ 5 U.S.C. § 8101 *et seq.*

duty. On January 20, 2012 OWCP accepted the claim for lumbago. Appellant stopped work on November 26, 2011 and received continuation of pay for the 45-day period commencing November 27, 2011. It began paying him compensation benefits on the supplemental rolls effective February 4, 2012, and on the periodic rolls effective March 9, 2014. Appellant resigned from employment due to medical reasons effective August 11, 2014.

On July 19, 2013 OWCP referred appellant for, and he participated in, vocational rehabilitation services. Based on labor market analysis prepared by the vocational rehabilitation specialist, by letter dated June 3, 2014, OWCP proposed to reduce appellant's wage-loss compensation due to his ability to earn wages as a general clerk.

By decision dated July 15, 2014, OWCP reduced appellant's compensation, effective July 8, 2014, based on his ability to earn wages in the constructed position of general clerk (clerical), Department of Labor's *Dictionary of Occupational Titles* (DOT) # 209.562-010, at the rate of \$360.00 a week. Following a March 6, 2015 telephonic hearing regarding the LWEC determination, by decision dated May 21, 2015, an OWCP hearing representative affirmed the July 15, 2014 LWEC determination.

Appellant was treated by Dr. Bernard M. Portner, a Board-certified physiatrist, from November 18, 2016 to May 26, 2017, for low back pain from a work-related injury on December 7, 2015. He reported currently working a desk job. Dr. Portner diagnosed displacement of lumbar intervertebral disc without myelopathy, lumbar spine instability, work-related injury caused by lifting, lumbago, and somatic dysfunction of sacral region. He noted that appellant continued his full-time desk job and recommended chiropractic treatment and a weight loss regimen.

In a Form EN1032, signed May 14, 2017, appellant reported working for the VA in an administrative support position with actual earnings of \$41,768.90. He noted dates of employment as December 31, 2014 to the present. Appellant submitted a notification of personnel action (Form SF50) approved on January 7, 2017, from the Department of Veterans Affairs (VA), who advised that appellant was employed as a program support assistant with pay of \$41,768.90 a year effective January 8, 2017.

In a letter dated May 16, 2018, OWCP informed the employing establishment that appellant returned to work for the VA as a program support assistant. It noted that he was currently receiving compensation for his LWEC pursuant to the July 15, 2014 LWEC determination. OWCP advised that on the date of injury appellant was a data collection technician, level seven, step zero and requested the current salary for this position.

In a separate letter dated May 16, 2018, OWCP requested that the VA provide pay rate information for the position of program support assistant effective May 16, 2018 including premium pay.

On May 24, 2018 the employing establishment indicated that the current salary of a data collection technician, level seven, step zero was \$61,335.00.

On June 5, 2018 OWCP acknowledged receipt of the CA-1032 in which appellant reported that he was employed by the VA in a position processing disability claims. It noted that on July 15, 2014 appellant's compensation was reduced to reflect his ability to earn wages as a general clerk. OWCP requested that appellant submit additional information regarding his employment, specifically his grade and step, job title, job duties, whether he underwent additional training or schooling for the position, and his latest earnings statement.

The VA responded to OWCP's May 16, 2018 request for information and indicated that the salary for a program support assistant, full-time GS-7, Step 1, effective May 16, 2018, was \$42,462.00 with no night differential or Sunday pay.

In a letter dated May 28, 2018, received on June 8, 2018, appellant indicated that he assumed a new position at the VA on August 22, 2017. Appellant submitted a notification of personnel action, Standard Form (SF50), dated August 20, 2017 which noted that he changed positions from a program support assistant to a veteran service representative effective August 20, 2017. It noted the initial probationary period was completed. The VA indicated that the position has known promotion potential and the determination on promotion to the next higher grade would be made by August 19, 2018. In a notification of personnel action (SF50) approved January 7, 2018, the salary for the position of veteran service representative was \$47,129.00.

On June 14, 2018 OWCP referred appellant's file to vocational rehabilitation for updated labor market information for a general clerk, DOT #209.562-010. In a July 3, 2018 report, the vocational rehabilitation counselor conducted a labor market survey for general clerk, DOT #209.562-010 and provided an updated Form CA66. The current salary for DOT#209.562-010 general clerk in the claimant's labor market was \$476.00 a week.

Effective August 19, 2018, appellant was promoted to a GS-9, step 1 with earnings of \$51,940.00 a year plus a cost-of-living increase of 10.99 percent. In a *Shadrick*² documentation memorandum dated August 20, 2018, OWCP determined that for a data collection technician the total weekly pay for the grade and step for the date of injury November 26, 2011 was \$1,396.28. It further noted that the total current weekly pay, effective August 19, 2018, for the grade and step for a data collection technician was \$1,578.13. OWCP calculated that the actual earnings on which the wage-earning capacity was based for a veteran service representative \$1,108.62.

On August 27, 2018 OWCP proposed to modify the formal LWEC determination issued on July 15, 2014 because the evidence of record substantiated that appellant was vocationally rehabilitated, had obtained additional training, education, and qualification, and was employed in a new job "which pays 25 percent more than the current pay of the job in which [the] wage-earning capacity was previously determined on July 15, 2014." It indicated that appellant was previously rated as a general clerk and was now employed as a veteran service representative. The job as a veteran service representative paid \$1,108.62 a week and the current pay for the job for which the wage-earning capacity was previously determined was \$476.00 a week. OWCP determined that \$1,108.62 was "at least" 25 percent more than \$476.00. In an accompanying "computation of compensation," it determined that appellant had 70 percent wage-earning capacity when dividing

² *Albert C. Shadrick*, 5 ECAB 376 (1953).

the amount that he was capable of earning as a veteran service representative, \$1,108.62, by the pay rate for the position of general clerk (clerical), \$1,578.13.

On September 4, 2018 appellant explained his disagreement with the proposed modification of his July 15, 2014 LWEC determination and submitted additional medical evidence.

Appellant submitted a report from Dr. Spencer Lau, an osteopath, dated July 30, 2018 who treated him for bilateral low back pain, stable, from a workers' compensation lifting injury on November 26, 2011. Dr. Lau noted findings on examination of the lumbar spine of restriction with range of motion, facet loading was painful, and intact reflexes, motor strength, and sensation. He diagnosed displacement of the lumbar intervertebral disc without myelopathy, sacral region somatic dysfunction, low back pain, and work-related injury. Dr. Lau noted that appellant currently had a "desk job" at the VA.

By decision dated October 4, 2018, OWCP modified the July 15, 2014 LWEC determination. It found that appellant had obtained additional training and was employed at the VA in a position which paid 25 percent more than the current pay for the job for which his wage-earning capacity was previously determined on July 15, 2014, *i.e.*, general clerk (clerical) position. OWCP concluded: "The LWEC determination issued on July 15, 2014 has been modified. A decision that addresses your current wage-earning capacity will be issued under separate cover." In a separate decision of even date, OWCP advised appellant that, effective October 7, 2018, it would reduce his compensation benefits based on his actual earnings as a veteran service representative, which commenced on August 22, 2017. It found that as he had performed the duties of this position for two or more months, OWCP concluded that it fairly and reasonably represented appellant's wage-earning capacity and "is considered suitable to [his] partially disabled condition." OWCP provided a computation of compensation which revealed that appellant had 70 percent wage-earning capacity when comparing his actual earnings of \$1,108.62 to the current pay rate for his date-of-injury position of \$1,578.13, *i.e.*, (\$1,108.62 divided by \$1,578.13).

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.³ A loss of wage-earning capacity 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.⁴ Generally, an employee's actual earnings best reflect his wage-earning capacity.⁵ Absent evidence

³ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁴ *See Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁵ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

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.⁶

Compensation payments are based on these determinations, and OWCP's finding remains undisturbed until properly modified.⁷ Modification of a wage-earning capacity determination is unwarranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.⁸ The burden of proof is on the party seeking modification.⁹

ANALYSIS

The Board finds that OWCP has met its burden of proof to establish that the July 15, 2014 LWEC determination should be modified, effective October 8, 2018.

Following vocational rehabilitation services, on July 15, 2014 a formal decision was issued reducing appellant's compensation as he had the capacity to earn wages as a general clerk. As noted, modification of such determination is only warranted where the party seeking modification establishes either that there was a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.¹⁰

The evidence substantiates that appellant is employed in a new position as a veteran service representative. On a Form EN1032 signed May 14, 2017, appellant advised that he returned to work on December 31, 2014 for the VA in an administrative support position with actual earnings of \$41,768.90. In a notification of personnel action (Form SF-50) approved January 7, 2017, the VA advised that appellant was employed as a program support assistant. Appellant was appointed to the position of a veteran service representative on August 20, 2017 and effective August 19, 2018 he was promoted to a GS-9, step 1 with earnings of \$51,940.00 a year plus a cost-of-living increase of 10.99 percent.

On July 3, 2018 the vocational rehabilitation counselor conducted an updated labor market survey for general clerk, DOT #209.562-010. The current salary for DOT# 209.562-010 general clerk in the claimant's labor market was \$476.00 a week. The evidence reveals that actual earnings on which the wage-earning capacity was based for a veteran service representative was \$1,108.62 a week which is greater than 25 percent more than the current pay for the job for which his wage-

⁶ *Id.*

⁷ See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

⁸ 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).

⁹ *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

earning capacity was previously determined on July 15, 2014. The Board finds that OWCP established the criteria for modifying the loss of wage-earning capacity determination, specifically that appellant has been retrained or otherwise vocationally rehabilitated.¹¹

Appellant asserted that he would experience financial hardship if his compensation was modified. However, his assertion does not address the issue in this case -- whether OWCP properly modified the July 15, 2014 wage-earning capacity determination. There is no evidence that the physical requirements of the position were outside his physical ability as Dr. Lau acknowledged on July 30, 2018 that appellant was currently working at a desk job with the VA.

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 modify the July 15, 2014 LWEC determination, effective October 7, 2018.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 and Chapter 2.1501.8(c) (June 2013).

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 2, 2019
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