

of proof to reduce appellant's wage-loss compensation, effective December 8, 2022, based on his actual earnings as a regional lead insurance adjuster.

FACTUAL HISTORY

On October 8, 1996 appellant, then a 26-year-old sheet examiner, filed an occupational disease claim (Form CA-2) alleging that he developed an aggravation of allergic rhinitis as a result of exposure to dust ink and sheets of money being cut in the course of his federal employment. OWCP accepted the claim for aggravation of allergic rhinitis. Appellant performed limited-duty work from October 10, 1996 through March 7, 1997. The employing establishment terminated his employment on March 8, 1997 because it no longer had an appropriate limited-duty position available.

By decision dated August 18, 1997, OWCP reduced appellant's compensation benefits based on his actual earnings of \$16,000.00 a year as police officer in Florida. It found that this position fairly and reasonably represented his wage-earning capacity because he had demonstrated the ability to perform the duties of this position for 60 days or more.

On May 9, 2000 OWCP proposed to modify the August 18, 1997 LWEC determination and further reduce appellant's compensation benefits as he had self-rehabilitated himself by acquiring additional skills and experience in the area of law enforcement, as he was earning 25 percent more than the current wages of \$17,000.00 a year in the position of police officer. It found that he was employed as a chief of police in Texas, since February 1, 1999 earning \$23,432.76 a year.

By decision dated June 15, 2000, OWCP reduced appellant's compensation benefits based on his actual earnings of \$23,432.76 a year as a chief of police. It found that he had self-rehabilitated, that his current position fairly and reasonably represented his wage-earning capacity, and that he had demonstrated the ability to perform the duties of this position for 60 days or more, and, therefore, modified the August 18, 1997 LWEC determination.

Appellant provided a series of EN-1032 forms indicating that he was employed as an insurance adjuster beginning in January 2016. In a January 6, 2021 Form EN-1032, he indicated that he was an insurance manager earning \$82,000.00 per year.

In a June 10, 2021 development letter, OWCP recounted that it had received information that appellant had been vocationally rehabilitated, and accepted a different position. It requested a signed statement including the details of his current position and afforded 30 days for a response.

On December 30, 2021 appellant completed a Form EN-1032 and reported his employment as an adjuster supervisor/claims analyst since 2016.

In a February 3, 2022 development letter, OWCP again recounted that it had received information that appellant had been vocationally rehabilitated and accepted a different position. It requested a signed statement including the details of his current position and afforded 30 days for a response.

In a March 8, 2022 statement, appellant reported that he had worked in the insurance industry since 2002, and trained himself as an insurance adjuster obtaining enough experience to be employed full time. He related that he had worked for the same company since 2016 and that his current employment was as regional lead insurance adjuster for six states with a salary of \$80,000.00 a year. Appellant requested formal medical retirement based on his disability.

On August 17, 2022 OWCP proposed to modify the June 15, 2000 LWEC determination as the evidence of record substantiated that appellant had been vocationally rehabilitated in a new job as a regional lead insurance adjuster. It found that he had obtained the position through additional self-training, education, or qualifications. OWCP further determined that appellant earned 25 percent more than in the chief of police job that had formed the basis of its June 15, 2000 LWEC determination. It noted that he successfully performed the physical demands of this new job for more than 60 days. OWCP afforded appellant 30 days to submit additional evidence. Appellant did not respond.

By decision dated September 20, 2022, OWCP modified the June 15, 2020 LWEC determination to reflect appellant's earnings as a regional lead insurance adjuster. It noted that the evidence substantiated that he was employed in a new job as regional lead insurance adjuster, obtained with additional training, education, or qualifications. OWCP further indicated that appellant earned \$82,000.00 as a regional lead insurance adjuster. It determined that this amount was 25 percent more than the pay of a chief of police position \$23,432.76 which served as the basis for the June 15, 2000 LWEC determination.

On November 30, 2022 the employing establishment reported that the current rate of pay of a sheet examiner was \$29.20 per hour.

By decision dated December 8, 2022, OWCP found that appellant's actual earnings as regional lead insurance adjuster beginning January 2021 fairly and reasonably represented his wage-earning capacity. It found that he had no LWEC as his pay in that position exceeded the pay rate for the position held at the time of his injury.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proof to establish that disability has ceased or lessened before it may terminate or modify compensation benefits.³ In general, the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury.⁴

A wage-earning capacity determination is a finding that, a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn

³ *S.B.*, Docket No. 19-0781 (issued February 2, 2022); *S.C.*, Docket No. 19-1680 (issued May 27, 2020); *Betty F. Wade*, 37 ECAB 556 (1986).

⁴ *See* 20 C.F.R. § 10.5(f).

wages.⁵ 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.⁶ A determination regarding whether actual earnings fairly and reasonably represent one's wage-earning capacity should be made only after an employee has worked in a given position for at least 60 days.⁷

Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.⁸

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 rehabilitated, or the original determination was, in fact, erroneous.⁹ The burden of proof is on the party attempting to show modification.¹⁰

With respect to modification of wage-earning capacity, OWCP's procedures provide:

“Vocationally Rehabilitated. It may be appropriate to modify the LWEC 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.”¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to modify the June 15, 2000 LWEC determination.

By decision dated June 15, 2000, OWCP reduced appellant's compensation benefits based on his actual earnings of \$23,432.76 a year as chief of police. It found that this position fairly and

⁵ 5 U.S.C. § 8115(a); *see W.R.*, Docket No. 21-0235 (issued January 18, 2022); *M.J.*, Docket No. 21-0036 (issued August 23, 2021); *O.S.*, Docket No. 19-1149 (issued February 21, 2020); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁶ *See W.R.*, *id.*; *M.G.*, Docket No. 19-1659 (issued August 18, 2020); *J.A.*, Docket No. 18-1586 (issued April 9, 2019).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

⁸ *See W.R.*, *supra* note 5; *M.G.*, *supra* note 6; *M.F.*, Docket No. 18-0323 (issued June 25, 2019).

⁹ *W.R. id.*; *M.G. id.*; *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹⁰ *J.C.*, Docket No. 23-0182 (issued August 29, 2023); *D.T.*, Docket No. 18-0174 (issued August 23, 2019); *J.B.*, Docket No. 17-0817 (issued April 26, 2018); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

¹¹ *Supra* note 7 at Chapter 2.1501.5c (June 2013); *J.C.*, Docket No. 16-1217 (issued October 11, 2017).

reasonably represented his wage-earning capacity as he had demonstrated the ability to perform the duties of this position for 60 days or more.

In a January 6, 2021 Form EN-1032 appellant indicated that he was an insurance manager earning \$82,000.00 per year. In response to a February 3, 2022 OWCP development letter, on March 8, 2022 he reported that he had worked in the insurance industry since 2002 and trained himself as an insurance adjuster obtaining enough experience to be employed full time. Appellant related that his current employment was as regional lead insurance adjuster for six states with a salary of \$80,000.00 a year.

In its September 20, 2022 decision, OWCP found that appellant earned \$82,000.00 as a regional lead insurance adjuster and that this amount was 25 percent more than \$23,432.76, the pay of a chief of police which served as the basis for the June 15, 2000 LWEC determination. There is no indication in the record that OWCP sought to obtain the current pay of the job for which he was rated on June 15, 2000 as a chief of police. Instead, OWCP compared appellant's current earnings as a regional lead insurance adjuster beginning in 2021 to the pay of the job of chief of police in 2000.¹² As it has not established that the position of regional lead insurance adjuster pays at least 25 percent more than the current pay of chief of police, it has failed to follow its own procedures and, thus, failed to meet its burden of proof to modify the June 15, 2000 LWEC determination.¹³

CONCLUSION

The Board finds that OWCP has not met its burden of proof to modify the June 15, 2000 LWEC determination.¹⁴

¹² *Compare S.J.*, Docket No. 19-0186 (issued August 2, 2019) (in which OWCP conducted a labor market survey to determine the current pay for the job on which the claimant's wage-earning capacity was previously determined).

¹³ *See Mary E. Delong*; Docket No. 03-1169 (issued November 18, 2003) (OWCP compared earnings for date-of-injury position, not the current rate of pay of position held at the time of LWEC); *see also Mildred Alder-Johnson*, 50 ECAB 474 (1999) (OWCP did not properly calculate actual earnings); *compare Marie A. Gonzales*, 55 ECAB 395 (2004); *Penny L. Baggett*, 50 ECAB 559 (1999); *Odessa C. Moore*, 46 ECAB 681 (1995); *Billy R. Beasley*, 45 ECAB 244 (1993) (finding that an increase in pay alone is insufficient to establish that an employee is vocationally rehabilitated).

¹⁴ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the December 8 and September 20, 2022 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: December 22, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board