United States Department of Labor
Employees' Compensation Appeals Board

L.L., Appellant	)	
	)	**Docket No. 21-1234**
and	)	**Issued: July 14, 2023**
U.S. POSTAL SERVICE, CLEVELAND-WEST PARK POST OFFICE, Cleveland, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On August 12, 2021 appellant, through counsel, filed a timely appeal from a June 30, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id*. An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id*.; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq*.

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's wage-loss compensation, effective December 17, 2020, based on his actual earnings as a technology associate.

FACTUAL HISTORY

On February 17, 2016 appellant, then a 39-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left foot and ankle when he stepped on a decorative strip hidden by snow on a walkway while in the performance of duty. He stopped work on February 17, 2016. OWCP accepted the claim for sprain of left ankle ligament, and nondisplaced fracture of the left cuboid bone. It paid appellant wage-loss compensation on the supplemental rolls as of April 16, 2016, and on the periodic rolls as of October 1, 2016. OWCP found that the appropriate pay rate was the date of injury, February 17, 2016.

The employing establishment indicated that appellant's position was classified as level 01, Step J, and that his annual salary was $57,873.00 as of February 17, 2016.

In treatment notes dated August 30, 2016, January 3, 2017, and March 8, 2017, appellant's attending physician, Dr. Mark J. Berkowitz, a Board-certified orthopedic surgeon, opined that appellant's accepted left ankle and foot conditions had modestly improved, but that he was still unable to return to work as a letter carrier. He recommended additional work conditioning followed by a functional capacity evaluation (FCE) to determine appellant's work capacity.

On November 22, 2019 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions for an additional second opinion examination with Dr. William R. Bohl, a Board-certified orthopedic surgeon.[3]

In his December 17, 2019 second opinion examination report, Dr. Bohl reviewed the SOAF, the medical records, and performed a physical examination. He diagnosed chronic ankle sprain on the left side, osteoarthritis of the calcaneocuboid and subtalar joints, and a Morton's neuroma between the second and third metatarsals. Dr. Bohl also found that appellant may have an impinging anterior ankle spur with synovitis and/or an osteochondral fracture of the talar dome. He opined that appellant's February 17, 2016 employment injury caused both the accepted conditions of left ankle sprain and left foot cuboid fracture. Dr. Bohl determined that he continued to experience left ankle pain, laxity of the lateral ankle ligaments, and post-traumatic arthritis of his left foot as a result of the February 17, 2016 employment injury. He found that appellant could not return to his date-of-injury position as a letter carrier. Dr. Bohl completed a work capacity evaluation (Form OWCP-5c) on February 10, 2020 and found that appellant could perform sedentary or light-strength level work for eight hours a day. He advised that appellant could walk and stand for brief increments and could not reach above the shoulder on the left, bend, stoop,

[3] OWCP had previously obtained a second opinion examination from Dr. Robert B. Leh, a Board-certified orthopedic surgeon, on April 25, 2017 and from Dr. David K. Halley, a Board-certified orthopedic surgeon, on April 25 and July 19, 2018. Both physicians opined that appellant could not return to his date-of-injury position and provided work restrictions.

squat, kneel, or climb. Dr. Bohl determined that he could push, pull, and lift up to 30 pounds for eight 8 hours a day.

In a letter dated January 28, 2019, the employing establishment, OWCP requested, if possible, that a position be offered to appellant in writing, within the restrictions provided by Dr. Bohl.

On February 25, 2020 OWCP referred appellant for vocational rehabilitation to find a suitable position within the restrictions provided by Dr. Bohl on February 10, 2020.

On March 13, 2020 the employing establishment offered appellant a modified city carrier position with varying work hours. This position required walking and lifting for one to four hours a day. On March 23, 2020 the employing establishment offered appellant a modified city carrier position working four hours a day. This position required him to stand and walk for 15 minutes per hour for 2 hours a day, and lift for 4 hours a day.

In a May 20, 2020 proposal for a training plan, the vocational rehabilitation counselor proposed that appellant undergo six months of computer training to secure a position as either a computer system applications developer or a computer system software developer. The proposed training plan would begin on July 2, 2020 and continue through January 22, 2021.

On August 3, 2020 appellant accepted a full-time job in the private sector working as a technology associate. His salary was $47,000.00 per year based on an hourly rate of $22.60. Appellant was also entitled to overtime.

In a vocational rehabilitation report dated October 5, 2020, the vocational rehabilitation counselor noted that appellant had worked for over 60 days in a new permanent full-time position in the private sector. The vocational rehabilitation file was closed as of October 7, 2020.

On December 11, 2020 OWCP requested that the employing establishment provide the pay rate of appellant's date-of-injury position as of August 3, 2020.

By decision dated December 17, 2020, OWCP found that appellant was able to perform the duties of the position of technology associate and reduced his compensation effective December 17, 2020. It found that the position of technology associate fairly and reasonably represented appellant's wage-earning capacity based upon actual earnings. OWCP determined that appellant was entitled to compensation from August 3, 2020 based upon his actual earnings with the private sector employer beginning on that date. Applying the *Shadrick* formula, it demonstrated that appellant's salary as of February 17, 2016, the date of his injury, was $1,112.94 per week; his current adjusted pay rate for his job on the date of injury was $1,208.31;[4] and he was currently capable of earning $971.80 per week as a technology associate. OWCP, therefore, determined that appellant had an 80 percent wage-earning capacity, which when multiplied by 75 percent, the augmented compensation rate, amounted to a weekly compensation rate with cost-of-living adjustments of $181.25 per week, and a new compensation rate every four weeks of $725.00.

[4] The employing establishment indicated that the current salary for appellant's date-of-injury position was $62,832.00.

Appellant's loss of wage-earning capacity (LWEC) per week was calculated as $222.59. OWCP found that his current adjusted net compensation rate each four weeks was $725.00.

On January 6, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

At the telephonic hearing on April 21, 2021, appellant testified that his annual salary at the time of his injury on February 17, 2016 was $58,271.00. He further contended that the grade for the position was 1 and the Step O. Appellant asserted that the pay rate for the date-of-injury position as of August 3, 2020 was $67,237.00. Counsel did not dispute the calculation of his wage-earning capacity, but disagreed with the salary amounts of his date-of-injury position. The hearing representative noted that the employing establishment indicated that his level was 01, Step J with a base salary of $57,873.00. She left the record open for 30 days for appellant to submit supporting evidence.

Following the telephonic hearing, appellant provided a series of notification of personal actions (PS Form 50) which listed his position title as carrier (city) and provided his grade, step, annual salary, and indicated that the salary was increased based either on a step increase or on a cost-of-living adjustment (COLA). On November 28, 2015, due to a step increase, appellant's grade/Step were 01/J and his annual salary was $57,873.00. On July 23, 2016 he received a step increase to grade/Step 01/K and a salary increase to $58,271.00. On September 1, 2018 appellant received a step increase to grade/Step 01/O and his salary was increased to $63,144.00. On August 31, 2019 his grade/Step 01/O and his base salary was increased to $65,037.00 due to a craft COLA increase. On April 10, 2021 appellant's grade/step remained 01/O and his annual salary was increased to $67,237.00 due to a craft COLA. He also provided an employee earnings statement from 2020 which indicated that his position was classified as level 01, step O with an annual salary of $65,037.00.

By decision dated June 30, 2021, OWCP's hearing representative found that the position of technology associate fairly and reasonably represented appellant's wage-earning capacity. She further found that OWCP properly determined that appellant's date-of-injury pay rate was $57,873.00 per year, that he had not provided information that the salary for the date-of-injury position as of August 3, 2020 was incorrect, and that OWCP, therefore, correctly calculated his LWEC.

LEGAL PRECEDENT

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity.[5] Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of

[5] 5 U.S.C. § 8115(a); *V.H.*, Docket No. 20-1012 (issued August 10, 2021); *Loni J. Cleveland*, 52 ECAB 171 (2000).

showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[6]

OWCP's procedures state that, after a claimant has been working for 60 days, it will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.[7] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[8] has been codified at section 10.403 of OWCP regulations. 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.[9]

ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective December 17, 2020, based on his actual earnings as a technology associate.

OWCP's second opinion physician, Dr. Bohl, opined that appellant was unable to return to his date-of-injury position with the employing establishment. He advised that appellant was not totally disabled and could return to full-time employment with specified permanent restrictions. There is no medical evidence of record which establishes that appellant remains totally disabled due to the residuals of his accepted left ankle and foot injuries.[10]

The Board finds that appellant's actual earnings fairly and reasonable reflect that he had 80 percent wage-earning capacity. At the time OWCP issued its wage-earning capacity determination, he had worked as a technology associate over 60 days. Therefore, the evidence of record is sufficient to establish that appellant's actual earnings as a technology associate fairly and reasonably represent his wage-earning capacity.[11]

[6] *D.A.*, Docket No. 21-0267 (issued November 19, 2021); *K.B.*, Docket No. 20-0358 (issued December 10, 2020); *Lottie M. Williams*, 56 ECAB 302 (2005).

[7] *See K.B., id.; L.J.*, Docket No. 14-0970 (issued August 21, 2014); Federal (FECA) Procedure Manual, Part 2 – Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.2(b) (June 2013).

[8] 5 ECAB 376 (1953); 20 C.F.R. §§ 10.403(d)-(e).

[9] *See* 20 C.F.R. § 10.403(d). The pay rate for compensation purposes is then multiplied by the wage-earning capacity percentage. This amount is subtracted from the pay rate for compensation purposes to determine the LWEC. *Id.* at § 10.403(e). The Board notes that under FECA, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in an LWEC. *See generally, Y.O.*, Docket No. 16-1886 (issued February 24, 2017); *Prince W. Wallace*, 52 ECAB 357 (2001).

[10] *C.M.*, Docket No. 18-0688 (issued November 15, 2018).

[11] *Id.*

The Board finds that OWCP properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,[12] in determining appellant's LWEC. OWCP calculated that his gross compensation rate should be adjusted to $725.00 every four weeks using the *Shadrick* formula. It indicated that appellant's salary on February 17, 2016, the date of his injury, was $1,112.94 per week; his current adjusted pay rate for his job on the date of injury was $1,208.31; and that he was currently capable of earning $971.80 per week, the rate of a technician associate. OWCP, therefore, determined that appellant had 80 percent wage-earning capacity, which when multiplied by 75 percent, amounted to a weekly compensation rate, with cost-of-living adjustments, of $181.25. Appellant's LWEC per week was calculated as $222.59. OWCP found that his current adjusted net compensation rate every four weeks was $725.00.

Appellant, through counsel, contended that OWCP did not utilize his actual salary on his date of injury and did not utilize the correct current salary for his date-of-injury position. The comparison under *Shadrick* is between the current actual earnings in the technology associate position and the current date-of-injury earnings. As explained in *Shadrick*, the comparison is always to the wages at the time of the injury, and the earnings at time of injury must be updated to the date of current earnings, because it would be inappropriate to compare actual dollars earned at a later date with actual dollars earned at the time of injury.[13] The Board noted in *Fabian W. Fraser*,[14] the comparison is made to the pay in same step of the grade appellant held on the date of the injury, not the wages appellant subsequently earned or would have earned had he continued in the same job, as "this includes subsequent within-grade increases or may even include changes in classification factors which may not be considered." The Board has consistently held that grade and step increases, promotions, or other increases in earnings after the employment injury are not used to determine wage-earning capacity.[15]

The evidence that appellant provided following the telephonic hearing corresponds with the salary for the date of injury on February 17, 2016 as determined by OWCP, on November 28, 2015 due to a step increase, appellant's grade/Step were 01/J and his annual salary was 57,873.00. Appellant then contended that the salary for his date-of-injury position on August 3, 2020 should have been $67,237.00. However, this would have been his salary only if he had remained in the date-of-injury position and secured the step increases from a grade/Step 01/J to a grade/Step 01/O. As previously noted, the Board has consistently held that grade and step increases, promotions, or other increases in earnings after the employment injury are not used to determine wage-earning capacity.[16]

[12] *Supra* note 8 and 9.

[13] *D.M.*, Docket No. 16-1527 (issued July 25, 2017); *Alfred C. Shadrick, supra* note 8; *see also* 20 C.F.R. § 10.403.

[14] 9 ECAB 865 (1958).

[15] *See D.M., supra* note 13 (claimant contended that OWCP should use an increased salary due to grade increases issued after the date of injury); *Caroline H. Siemers*, Docket No. 02-0352 (issued August 1, 2002) (claimant argued OWCP should not use date-of-injury earnings, but earnings from a higher grade position she received after the injury due to a promotion; the Board found that the date-of-injury earnings must be used).

[16] *Id*.

OWCP properly found that appellant was no longer totally disabled from work as a result of his accepted condition, and it followed established procedures for determining his employment-related loss of wage-earning capacity. The Board, therefore, finds that OWCP met its burden of proof to reduce appellant's compensation in its December 17, 2020 LWEC determination.

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 has met its burden of proof to reduce appellant's wage-loss compensation, effective December 17, 2020, based on his actual earnings as a technology associate.

ORDER

IT IS HEREBY ORDERED THAT the June 30, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 14, 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