United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 16-1527**
	)	**Issued: July 25, 2017**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PATROL, San Diego, CA, Employer	)	

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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 22, 2016 appellant filed a timely appeal from a July 7, 2016 merit decision and an April 22, 2016 nonmerit 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.

ISSUES

The issues are: (1) whether OWCP properly reduced appellant's compensation to reflect his wage-earning capacity in a modified position; and (2) whether OWCP properly denied appellant's request for a hearing.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 6, 2011 appellant, then a 39-year-old border patrol officer, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury in the performance of duty on March 30, 2011. He reported that he was tackling an absconder and fell on his left shoulder. OWCP accepted the claim for left shoulder contusion, neck sprain, left shoulder and upper arm sprain, and left superior glenoid labrum lesion. Appellant's pay rate was reported as a General Services (GS) 9, Step 1. He worked in a light-duty position and received intermittent wage-loss compensation as of August 17, 2011.

The record indicates that appellant underwent left shoulder arthroscopic surgery on September 2, 2011. He returned to a full-time, light-duty position on December 1, 2011, and received intermittent wage-loss compensation. A second left shoulder arthroscopic surgery was performed on June 8, 2012. Appellant returned to a full-time, light-duty position on October 3, 2012. In a report dated February 14, 2013, the attending orthopedic surgeon, Dr. Amarpal Arora, reported that appellant should remain on modified duty. By report dated April 29, 2013, he again restricted appellant to modified duty, with five pounds lifting, and limited pushing, pulling, and grasping with the left arm. Dr. Arora continued work with restrictions in a June 13, 2013 report and indicated that appellant should remain on modified duty.

Appellant again underwent left shoulder arthroscopic surgery on July 26, 2013. Dr. Arora diagnosed left shoulder labral tear. OWCP paid wage-loss compensation, using a pay rate as of July 26, 2013, representing the date-of-recurrence of disability. The record indicates that appellant returned to a full-time, light-duty position on November 4, 2013. In a report dated March 25, 2014, Dr. Tiffany Shay Alexander, Board-certified in occupational medicine, provided permanent work restrictions that included a 40-pound lifting restriction, with no overhead work and no reaching with his left arm. She opined that appellant was not able to perform the date-of-injury position.

By letter dated June 24, 2014, the employing establishment offered appellant a permanent modified position as a technician. The pay rate was described as a GS-7, Step 10 position, with an annual salary of $55,407.00. The employing establishment reviewed appellant's work history, noting that he had been on light duty since his injury having undergone three left shoulder surgeries. In addition, appellant now had permanent work restrictions. According to the employing establishment, he was currently in the position of officer, at GS-12, but was unable to perform the required duties. On July 3, 2014 appellant accepted the position of technician.

On April 3, 2015 OWCP received information from the employing establishment regarding appellant's pay as of July 26, 2013. The employing establishment reported that he earned $74,854.00 in annual salary, with $286.95 in holiday pay. In a wage-earning capacity form (Form CA-816) dated August 18, 2015, OWCP provided the following calculations for the current GS-9, Step 1 pay rate: base salary $52,668.00, Sunday premium $4,203.07, holiday pay $1,541.32, and night differential $464.39. The weekly pay rate was therefore $1,132.25 per week. The current GS-7, Step 10 for the technician position was $55,956.00, or $1,076.08 per week.

In a memo dated June 10, 2015, OWCP determined that the July 26, 2013 date of recurrence pay rate for compensation purposes was based on an annual salary of $74,854.00, with $286.96 in holiday pay annually.

By decision dated August 20, 2015, OWCP determined that the technician position fairly and reasonably represented appellant's wage-earning capacity. It reduced his compensation benefits and provided its calculations. OWCP found that the current date-of-injury pay rate was $1,132.25, current earnings of $1,076.08, for a wage-earning capacity of 95 percent. The adjusted wage-earning capacity was $1,372.77, based on 95 percent of the pay rate for compensation purposes on July 26, 2013 of $1,145.02. The loss of wage-earning capacity (LWEC) was $72.25 ($1,445.02 - $1,372.77).

On March 22, 2016 appellant submitted a letter postmarked March 19, 2016, requesting an oral hearing with an OWCP hearing representative. He argued that his wage-earning capacity had been improperly determined. Appellant indicated that he had been working in a GS-12, Step 2 position, and OWCP should compare his current earnings with a GS-12 position, not a GS-9, Step 1 date-of-injury pay rate. He argued that he was being penalized for returning to a lower paying job, contrary to OWCP procedures.

By decision dated April 22, 2016, OWCP denied the request for a hearing, as it found that the request was untimely. In addition, it indicated that it had considered the issue and found that it could be equally well addressed by requesting reconsideration.

On May 6, 2016 appellant requested reconsideration. He again argued his LWEC was incorrectly calculated.

By decision dated July 7, 2016, OWCP reviewed the merits and denied modification. It found that its calculations were correct with respect to the wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 1

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 from all gainful employment, is considered partially disabled.[2] Compensation for partial disability is determined under 5 U.S.C. § 8115(a). Wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[3] Generally, wages actually earned are the best measure of a 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.[4] Compensation payments

[2] 20 C.F.R. § 10.402.

[3] 5 U.S.C. § 8115(a).

[4] *Dennis E. Maddy*, 47 ECAB 259 (1995).

are based on the wage-earning capacity determination, and OWCP's finding remains undisturbed until properly modified.[5]

A light-duty position that fairly and reasonably represents an employee's ability to earn wages may form the basis of an LWEC determination if that light-duty position is a classified position to which the injured employee has been formally reassigned.[6] The position must conform to the established physical limitations of the injured employee; the employing establishment must have a written position description outlining the duties and physical requirements; and the position must correlate to the type of appointment held by the injured employee at the time of injury.[7] If these circumstances are present, a determination may be made that the position constitutes regular federal employment.[8] In the absence of a light-duty position as described above, OWCP will assume that the employee was engaged in noncompetitive, makeshift, or odd-lot employment.[9]

With respect to part-time employment, the FECA Procedure Manual provides that: (1) a part-time position may form the basis of an LWEC determination if the employee was a part-time worker at the time of injury; and (2) for an employee who was a full-time employee on the date of injury, a part-time position may form the basis of an LWEC determination if the employee's stable, established work restrictions limit him or her to part-time work.[10]

Reemployment may not be considered representative of the injured employee's wage-earning capacity where the job is temporary and the employee's date-of-injury job was permanent.[11] However, if the employee was a temporary employee when injured, a temporary position may reasonably represent his or her wage-earning capacity as long as the position will last for 90 days or more.[12]

As long as there is no work stoppage due to the accepted condition(s), a formal LWEC determination should be issued following 60 calendar days from the date of return to work.[13] If the injured employee is no longer working in the alternative position upon which a rating is

[5] *See Katherine T. Kreger,* 55 ECAB 633, 635 (2004).

[6] 20 C.F.R. § 10.510.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings,* Chapter 2.815.5(c)(1)(b) (June 2013).

[11] *Id.* at Chapter 2.815.5(c)(2)(d). A job is considered temporary when expressly stated in the job offer, position description, or other supporting documentation. *Id.* If the language in the job offer is ambiguous, OWCP should ask the employing establishment if the position represents temporary work and document the file accordingly. *Id.*

[12] *Id.*

[13] *Id.* at Chapter 2.815.6(a).

being considered, OWCP may consider a retroactive LWEC.[14] However, this is rare and should only be made where the employee worked in the position for at least 60 days, the employment fairly and reasonably represented his or her wage-earning capacity as outlined under FECA Chapter 2.815.5, and the subsequent work stoppage or change in the alternative positions(s) did not occur because of any change in the employee's injury-related condition affecting his or her ability to work.[15]

The formula for determining LWEC based on actual earnings, developed in the *Albert C. Shadrick* decision,[16] has been codified at 20 C.F.R. § 10.403. 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.[17]

ANALYSIS -- ISSUE 1

In the present case, appellant, a full-time border patrol officer, sustained left shoulder injuries in the performance of duty on March 30, 2011. He accepted a permanent full-time position as a technician, beginning work on July 3, 2014. The job was a classified position to which appellant was assigned. There was no indication that the job was part-time, makeshift, temporary, or otherwise potentially inappropriate for a wage-earning capacity determination. As noted, generally wages earned are the best measure of a 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.[18] After 60 days OWCP may properly issue a formal LWEC determination. The Board finds that the wages earned in the technician position were properly found to fairly and reasonably represent appellant's wage-earning capacity.

The next issue is whether OWCP properly applied the *Shadrick* formula in determining the LWEC. Under the *Shadrick* formula, it first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's actual earnings by the current or updated pay rate for the position held at the time of injury.[19] OWCP found that appellant's earnings in the technician position were $1,076.08 per week. For the date-of-injury (March 30, 2011) position, appellant was a GS-9, Step 1 employee. OWCP found that, with appropriate premium pay, the current date-of-injury earnings were $1,132.25 per week.

Appellant does not contest the finding that current GS-9, Step 1 earnings were $1,132.25. It is his contention that OWCP should not use the current date-of-injury earnings, but those of a GS-12 employee. After the March 30, 2011 injury, appellant had worked full-time light-duty

[14] *Id.* at Chapter 2.815.7.

[15] *Id.*

[16] 5 ECAB 376 (1953).

[17] 20 C.F.R. § 10.403(d).

[18] *Supra* note 4.

[19] *Supra* note 16. *See also* 20 C.F.R. § 10.403.

positions and had received grade increases resulting in an increased salary. The comparison under *Shadrick* is between the current actual earnings in the technician 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.[20] The Board noted in *Fabian W. Fraser*,[21] 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.[22] OWCP properly applied *Shadrick* in this case by comparing the technician salary with the current date-of-injury salary, resulting in 95 percent wage-earning capacity.

The next step in the *Shadrick* formula, however, is to multiply the pay rate for compensation purposes, defined in 5 U.S.C. § 8101(4) and 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.[23] OWCP found that the pay rate for compensation purposes was based on a pay rate for a recurrence of disability on July 26, 2013. Such a determination is not in accord with 5 U.S.C. § 8101(4) and the evidence of record.

5 U.S.C. § 8101(4) clearly indicates that using monthly pay when "compensable disability recurs" is proper only when "the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States." There is no evidence in the record that appellant ever resumed regular employment after the March 30, 2011 injury. The employing establishment indicated that he worked only in modified, light-duty positions, and the medical evidence continued to provide work restrictions. The Board has held that a return to modified duty does not constitute a return to regular full-time employment under 5 U.S.C. § 8101(4).[24]

The Board accordingly will remand the case to OWCP for further development with respect to the application of the *Shadrick* formula. OWCP should properly explain its calculations in this regard. After such additional development as is deemed necessary, it should issue an appropriate decision as to wage-earning capacity.

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[20] *Id.*

[21] 9 ECAB 865 (1958).

[22] *See 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).

[23] *See* 20 C.F.R. § 10.403(e).

[24] *R.G.*, Docket No. 13-0010 (issued February 4, 2014); *G.G.*, Docket No. 13-0770 (issued July 9, 2013); *B.W.*, Docket No. 11-1927 (issued May 3, 2012).

On appeal appellant again indicates his belief that OWCP should use the GS-12 position wages to compare with his current wages in the technician position. For the reasons noted, OWCP properly applied the *Shadrick* formula regarding this issue.

LEGAL PRECEDENT -- ISSUE 2

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of OWCP. Section 8124(b)(1) provides as follows: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary…."

If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing as a matter of right.[25] The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.[26]

ANALYSIS -- ISSUE 2

The initial merit decision with respect to wage-earning capacity was dated August 20, 2015. Appellant did not request a hearing until a letter postmarked March 19, 2016. As this was more than 30 days after the August 20, 2015 decision, he was not entitled to a hearing as a matter of right.[27]

As noted, OWCP must exercise its discretion with respect to an untimely hearing request. It advised appellant that he could submit additional relevant evidence on the issue through the reconsideration process. This is considered a proper exercise of OWCP's discretionary authority.[28] The Board finds that OWCP properly denied the hearing request in this case.

CONCLUSION

The Board finds that OWCP properly determined that the position of technician represented appellant's wage-earning capacity, but the case is remanded for proper calculation of the LWEC. The Board further finds that OWCP properly denied his request for a hearing.

[25] *Claudio Vazquez,* 52 ECAB 496 (2001).

[26] *Marilyn F. Wilson,* 52 ECAB 347 (2001).

[27] *Supra* note 24.

[28] *See Mary E. Hite,* 42 ECAB 641, 647 (1991).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 7, 2016 is set aside and the case is remanded for further action consistent with this decision of the Board. The decision dated April 22, 2016 is affirmed.

Issued: July 25, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board