

FACTUAL HISTORY

Appellant, then a 56-year-old former air traffic control specialist, sustained a whiplash-type neck injury in the performance of duty on November 9, 2006. The injury occurred when he stepped out of an elevator and slipped on a wet floor.³ Appellant continued to work until December 14, 2006. OWCP accepted his claim for neck sprain and cervical spondylosis. Appellant received continuation of pay from his employer followed by wage-loss compensation. Effective February 18, 2007, OWCP placed him on the periodic compensation rolls.

Because of limited range of motion in his cervical spine, appellant was unable to resume his regular duties as an air traffic controller.⁴ Although only partially disabled, the employing establishment was unable to extend him an offer of limited-duty work. In early 2008, appellant began participating in an OWCP-sponsored vocational rehabilitation program. He had been a licensed pilot for approximately 30 years and expressed interest in securing work piloting airplanes.⁵ With appellant's input, OWCP developed a rehabilitation program designed to prepare him for employment as either a commercial airplane pilot or an executive pilot (DOT No. 196.263-030).⁶ The rehabilitation program included six month's of on-the-job flight training with BCH Aviation, LLC (BCH), and the prospect of full-time employment with BCH upon successful completion of training. The flight training covered the period September 18, 2008 to March 31, 2009. Appellant was expected to average approximately 40 hours of flight time a month. Once training commenced, the demand for charter flights decreased, and thus, his monthly flight time was reduced. Economic factors also resulted in a reassessment of the projected starting salary.⁷ Although appellant successfully completed training, BCH did not retain him as a full-time pilot due to economic factors. OWCP then provided 90 days of job placement assistance, to no avail.

³ Appellant regained his balance and avoided falling.

⁴ Dr. Stephen E. Rawe, a Board-certified neurosurgeon, advised that while appellant could not perform his date-of-injury job, he was otherwise capable of full-time employment. In a July 29, 2008 work capacity evaluation (Form OWCP-5c), he identified permanent restrictions that included no hyperextension or rotation of the neck and no reaching above shoulder.

⁵ As of February 21, 2008, appellant received medical clearance from the Department of Labor, *Dictionary of Occupational Titles (DOT)*/Federal Aviation Administration (FAA) to continue flying. His Medical Certificate 1st Class was signed by Dr. Ronald P. Hargrave, Board-certified in emergency medicine and a FAA-designated Aviation Medical Examiner. Dr. Hargrave imposed no limitations.

⁶ An "Executive Pilot" is responsible for piloting company-owned aircraft to transport company officials or customers. The duties included: filing flight plans with airport officials; obtaining weather data and interpreting data based on flight plan; operating on-board radio equipment; and conducting preflight and in-flight tests to ensure safety of the flight. Additional duties may include maintaining and repairing aircraft according to limitations set by airframe and engine license. An executive pilot may also be required to represent the company on an executive level when dealing with business associates, officials and customers. Alternate titles include Company Pilot, Corporation Pilot and Private Pilot.

⁷ The rehabilitation plan initially envisioned a starting salary of \$35,000.00. However, by March 2009 that figure was revised to \$25,000.00 to \$30,000.00 annually.

On August 31, 2009 the rehabilitation counselor (RC) prepared job classification reports (Form OWCP-66) for the selected positions of Airline Pilot (Commercial) and Airline Pilot (Charter).⁸ Her research determined that both positions were being performed in sufficient numbers so as to make them reasonably available in appellant's commuting area of Charleston, SC. However, the RC reported there were no current openings for pilots in the local economy. She also noted that the selected positions paid a minimum salary of \$25,000.00 annually. BCH was one of several identified sources of information regarding wage rate and availability.⁹

OWCP's rehabilitation specialist (RS), Georgiana A. Farmer, provided a September 15, 2009 status report (OWCP-3) noting that based on recent information provided by the RC, the positions of Airline Pilot (Commercial) and Airline Pilot (Charter) continued to be performed in sufficient number within appellant's commuting area to be considered reasonably available. She further noted that the latest labor market survey confirmed a starting salary of \$25,000.00 annually. The RS indicated that while the identified positions were suitable, placement efforts had been unsuccessful.

A December 10, 2009 notice of proposed reduction of benefits advised appellant that OWCP anticipated reducing his compensation benefits based on his ability to earn weekly wages of \$480.00 as an Airline Pilot (Charter). OWCP further advised that if he disagreed with the proposed reduction, he had 30 days within which to submit additional evidence or argument regarding his capacity to earn wages in the selected position.

Appellant replied on January 6, 2010. He advised that he recently contacted BCH and was informed that as of late December 2009, a co-pilot's salary was in the range of \$20,000.00 to \$25,000.00.¹⁰ Appellant noted that information he gathered on his own (Avjobs.com) revealed that most airline pilots -- air taxi or charter -- started at \$15,000.00 to \$20,000.00 annually as of January 2010.¹¹

By decision dated February 3, 2010, OWCP reduced appellant's wage-loss compensation effective February 14, 2010 based on his ability to earn wages in the selected position of Airline Pilot (Charter). OWCP found that the selected position was both vocationally and medically suitable. While acknowledging receipt of appellant's recent salary information, OWCP indicated that the RC's latest labor market survey accounted for the recent economic downturn, and thus, the starting salary had already been adjusted downward from \$35,000.00 to \$25,000.00 annually.

⁸ The RC changed the title of the position from Executive Pilot to Airline Pilot (Charter). The corresponding DOT number remained the same (DOT No. 196.263-030).

⁹ The other noted resources included several aviation-related Web sites, USAJobs (Federal employment) and SimplyHired, a Web-based job search engine.

¹⁰ Appellant indicated that he had been advised that the current reported salary was a function of the recent downturn in the economy and the number of available pilots.

¹¹ Although the RC's August 31, 2009 OWCP-66 identified several aviation-related Web sites, Avjobs was not included among her list of resources.

Appellant requested an oral hearing, which was held on August 13, 2010. At the hearing, counsel challenged the reduction in compensation on the basis that there were no available positions in the Charleston, SC area where appellant resided.

By decision dated November 9, 2010, the Branch of Hearings and Review affirmed the February 3, 2010 wage-earning capacity determination.

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.¹² 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.¹³

Under FECA, wage-earning capacity is determined by the actual wages received by an employee if those earnings fairly and reasonably represent his wage-earning capacity.¹⁴ If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regards to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his disabled condition.¹⁵

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity.¹⁶ The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.¹⁷ Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's impairment from both injury-related and preexisting conditions, but not impairment attributable to post injury or subsequently acquired conditions.¹⁸

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position listed in the DOT or otherwise available in the open labor market that fits

¹² *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

¹³ 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

¹⁴ 5 U.S.C. § 8115(a).

¹⁵ *Id.*; *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

¹⁶ *M.A.*, 59 ECAB 624, 631 (2008).

¹⁷ *Id.*

¹⁸ *N.J.*, 59 ECAB 171, 176 (2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (October 2009).

the employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.¹⁹ Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.²⁰

ANALYSIS

OWCP determined that the selected position of Airline Pilot (Charter) (DOT No. 196.263-030) was both medically and vocationally suitable. Based on information provided by the RC and endorsed by the RS, it determined that the selected position was performed in sufficient numbers in the Charleston, SC area such that it was considered reasonably available in the general labor market in appellant's commuting area. The starting annual salary for the selected position was determined to be \$25,000.00, which represented a weekly wage of \$480.00. However, there were no reported openings.

When BCH initially agreed to provide appellant on-the-job training, the parties envisioned the possibility of posttraining employment as a full-time pilot with a starting salary of \$35,000.00. However, because of a subsequent economic downturn affecting the local charter flight industry, the wage rate was revised to reflect a starting annual salary of \$25,000.00 to \$30,000.00. When appellant successfully completed the training in March 2009, BCH did not extend an offer of full-time employment for the same reasons that justified a reduction in the proposed starting salary.²¹ For the next several months, appellant tried to secure employment as a pilot, but was unsuccessful. OWCP subsequently reduced his compensation based on his ability to earn wages as an Executive/Airline Pilot (Charter).

The Board finds that OWCP failed to meet its burden to justify reducing appellant's wage-loss compensation. The record does not support its finding that the selected position was reasonably available in appellant's commuting area.²²

The RC's August 31, 2009 OWCP-66 "Availability" analysis reads as follows: "The job is being performed in sufficient numbers so as to make it reasonably available to the claimant within his/her commuting area." She also noted that the "local economy in and around Charleston, SC does not bear any current openings for [p]ilots."²³ The identified sources of

¹⁹ The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee resides. *David L. Scott*, 55 ECAB 330, 335 n.9 (2004).

²⁰ *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

²¹ In her April 20, 2009 progress report, the RC noted that BCH advised her that given the drastic reduction in chartered flights, it was not currently hiring, and therefore, appellant was not offered a permanent position.

²² The Board expresses no opinion as to whether the selected position is either medically or vocationally suitable.

²³ Lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(c) (October 2009).

information included a BCH representative, USA Jobs, Simply Hired and several aviation-related Web sites.

While a lack of current job openings does not mean that the selected position was not performed in sufficient numbers to be considered reasonably available, the record does not otherwise support OWCP's finding of availability. The RC did not address whether she had obtained relevant employment data from the South Carolina Department of Employment and Workforce (Labor Market Information Department) or any other appropriate state agency. She simply stated that the job was being performed in "sufficient numbers" and listed one individual and several Web sites as purported support. The record does not adequately document what information the RC relied upon in making her determination.²⁴ There is no documentation regarding what specific labor market availability information BCH ostensibly provided beyond its own particular hiring needs. For example the record is devoid of any specific data regarding the number of executive/airline (charter) pilots gainfully employed in the Charleston, SC area where appellant currently resides.

In her September 15, 2009 status report (OWCP-3), the RS approved the RC's unsubstantiated conclusions regarding availability. The procedure manual provides that because she is an expert in the field of vocational rehabilitation, OWCP's claims examiner may rely on the RS's opinion as to whether the job is reasonably available and vocationally suitable.²⁵ Based on the evidence warranty of record, the Board is unwilling to defer to the RS's technical expertise. The RS willingness to accept the finding regarding availability does not erase the fact that those findings were largely unsubstantiated. The lack of specific employment data is particularly troublesome in view of several references in the record to a contracting market for charter flight service in the Charleston, SC area. The Board finds that the record does not establish that the selected position of Executive Pilot/Airline Pilot (Charter) was reasonably available in the general labor market in appellant's commuting area. OWCP failed to meet its burden to justify reducing appellant's wage-loss compensation.

CONCLUSION

OWCP failed to meet its burden of proof in reducing appellant's wage-loss compensation effective February 14, 2010.

²⁴ The RC's reference to USAJobs is odd given that a federal or other civil service position in which the claimant is not actually employed may not be used to make a loss of wage-earning capacity determination because such positions are not considered to be available in the general labor market. *Id.* at Chapter 2.814.8.

²⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2).

ORDER

IT IS HEREBY ORDERED THAT the November 9, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 4, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board