United States Department of Labor
Employees' Compensation Appeals Board

HAYDEN C. ROSS, Appellant	)	
and	)	**Docket No. 04-136**
	)	**Issued: April 7, 2004**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Las Vegas, NV, Employer	)	

Appearances:
Hayden C. Ross, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 23, 2003 appellant filed a timely appeal from a September 22, 2003 Office of Workers' Compensation Programs' decision. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the wage-earning capacity issue.[1]

ISSUE

The issue is whether the Office properly determined appellant's wage-earning capacity based on her actual earnings in the position of a teacher.

[1] The Office also issued a decision dated October 29, 2003 denying a recurrence of disability claim. As appellant's appeal in this case was filed prior to the issuance of the Office's decision, the Board does not have jurisdiction to review the October 29, 2003 Office decision. *See* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On September 17, 1999 appellant, then a 30-year-old Special Agent Trainee, injured her back in the performance of duty while engaged in a defensive tactics exercise at the Federal Bureau of Investigation (FBI) Academy in Quantico, Virginia. The Office assigned her traumatic injury claim as case number 25-0548978 and accepted a lumbar strain and displacement of the L4-5 lumbar intervertebral disc without myelopathy. On September 22, 1999 the employing establishment reassigned appellant to the Las Vegas field office for light-duty work as a support services clerk, GS-5 step 1, at a retained GS-10 step 1 pay rate. While in the course of her light duty on January 20, 2000, appellant lifted some boxes and experienced an increase in her back pain. On February 5, 2000 she filed a new injury claim, which was assigned claim number 13-1210849. The Office accepted this claim for an aggravation of the lumbar strain and displacement of the L4-5 lumbar intervertebral disc without myelopathy. Appellant resigned from the clerk position on June 16, 2000 and started working as a teacher for the Clark County School District effective August 28, 2000.

In an April 17, 2000 medical report, Dr. Anthony Ruggeroli, a Board-certified anesthesiologist, provided an impression of disc disruption at L4-5 and a reported small central disc bulge at L3-4. As complaints were suspicious for discogenic low back pain, a provocative lumbar discography was recommended.

The Office referred appellant, together with a statement of accepted facts, a set of questions to be resolved and the medical record, to Dr. Reynold L. Rimoldi, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a May 25, 2000 report, Dr. Rimoldi noted the examination results and concluded that a disc protrusion with an acute annular tear at L4-5 arose directly from the September 17, 1999 injury. He concurred with appellant's treating physician, Dr. Thomas Dunn, that appellant was a good surgical candidate. He concluded that appellant had permanent residuals of her back condition and provided work restrictions of no lifting greater than 25 pounds, no frequent bending, stooping or twisting at the waist and no constant driving or sitting.

In a May 31, 2000 report, Dr. Thomas Dunn, a Board-certified orthopedic surgeon and appellant's treating physician, advised that she had achieved a plateau of improvement and was discharged from formal care as she was not interested in pursuing surgical treatment. A disc disruption at L4-5 was diagnosed with formal restrictions of no frequent bending, stooping or lifting more than 10 to 15 pounds.

In a June 8, 2000 letter, appellant alleged that as she was employed in a learner's capacity at the time of her 1999 employment injury, her compensation should be based under section 8113 of the Federal Employees' Compensation Act. She requested a lump sum payment for any disability compensation equal to the present value of all future payments of compensations, back pay of her GS-10 salary, and administratively uncontrollable overtime (AUO) pay.[2]

[2] In developing the pay rate issues, the Office initially found, on July 25, 2001 that appellant's pay rate fell under the learner's capacity pay rate under 5 U.S.C. § 8113.

By decision dated October 3, 2001, the Office denied appellant's request for a lump sum payment of her wage-loss benefits.

On December 14, 2001 Madeline Moxley, a workers' compensation programs supervisor at the employing establishment, responded to an Office inquiry regarding appellant's pay rate. She advised that appellant's salary on the date of injury was a GS-10, step 1 and that appellant was not entitled to availability pay. Ms. Moxley advised that the employing establishment did not guarantee agent trainees promotion to the GS-11 level as all promotions were based on performance and not merely on completion of formal training. She further stated that an agent was eligible for availability pay only if the agent actually worked two or more hours of unscheduled duty during a regular workday. Other pay additions, such as night differential and Sunday premium pay, applied only to those agents who worked those hours and there was no "weapons pay."

In a March 4, 2002 letter, the Office advised appellant that she did not qualify as a "learner" under section 8113 and was not entitled to other pay adjustments which would have been based on promotion, duty location or duty schedule. The Office noted that, if she disagreed with the determination, she could request an appealable decision. By letter dated March 8, 2002, appellant requested a formal decision that she be considered a learner under section 8113.

In a decision dated May 22, 2002, the Office determined that appellant's actual earnings as a teacher fairly and reasonably represented her wage-earning capacity and reduced her compensation to reflect her loss in wage-earning capacity effective March 24, 2002.[3] It further found that appellant was not entitled to increases in pay under the "learners" provisions of 5 U.S.C. § 8113.

In a June 5, 2002 letter, appellant requested a hearing, which was held on December 20, 2002. She contended that the clerk position at the employing establishment exceeded her physical limitations and that her job as a teacher paid more than the clerk position.[4] Appellant argued that the Office used an incorrect rate of pay in calculating her loss of wage-earning capacity. She claimed that she was entitled to learner's pay and would have received AUO representing an extra 25 percent of her salary had she graduated from the FBI Academy. Appellant submitted a FECA Program Memorandum, No. 10, authorizing inclusion of AUO as a percentage of basic pay in the compensation pay rate, and a job announcement for special agent from the FBI's internet site, indicating a GS-10 salary range of $53,743.00 to $58,335.00 "upon graduation including locality/availability pay" with promotion potential to GS-11 to 13. She argued that her case was similar to *Mary K. Rietz*,[5] in which the Board found that the employee's

[3] Compensation benefits were based on a 66 2/3 percent (no dependents) of the difference between appellant's pay rate on the date of injury (GS 10 step 1) and her ability to earn wages in the new position.

[4] The Office hearing representative noted that the record contained no indication that a formal job offer had been made with regard to the clerk position at the employing establishment and found that termination of benefits under 5 U.S.C. § 8106(c) would be inappropriate as appellant had attained employment representing her wage-earning capacity and would have grounds for refusal of a job offer.

[5] 49 ECAB 613 (1998).

wage-earning capacity was that of a journeyman air traffic control specialist, the position she would have held upon graduation from her trainee air traffic program.

By decision dated May 7, 2003, the Office hearing representative affirmed the May 22, 2002 decision, finding that appellant was not entitled to availability pay. The case was remanded for further development on the issue of whether appellant was entitled to increased compensation based on a "learner's" capacity under section 8113.

In a May 16, 2003 medical report, Dr. Dunn noted that appellant was employed as a physical education teacher and had a flare-up of back pain without any additional trauma. Radiographs revealed retrolisthesis of L5 on S1 with loss of disc space at L5-S1. On May 29, 2003 Dr. Dunn reported that his request for a magnetic resonance imaging (MRI) scan was denied. On June 5, 2003 appellant presented with decreased sensation along the S1 distribution of her leg and notable nerve tension signs. She underwent a microdiscectomy of the right side L5-S1 on June 6, 2003, during which a herniated nucleus pulposus at L5-S1 was diagnosed as contributing to intractable right sciatica. Progress reports regarding appellant's condition were submitted. On June 16, 2003 she filed a recurrence of disability claim alleging that her present condition related to her federal employment-related back injuries.

In a September 12, 2003 letter, Ms. Moxley advised that new agents were considered trainees until they completed the 83-day training program at the FBI Academy in Quantico, Virginia. Immediately upon graduation from the training program, the new agent would be assigned to duty as a special agent with full statutory investigative authority and responsibilities and would no longer be considered a trainee. Special agents with less than two years service were referred to as "probationary agents" as the appointment was contingent upon satisfactory completion of a two-year probationary period.[6] A probationary agent who completed the new agents training program was a fully qualified special agent of the FBI. The GS-10 special agent position was part of the career ladder in which the agent could be promoted to a Grade 13 without competition. All promotions were based on merit. At the time of appellant's injury through March 2001, the special agents were subject to a performance appraisal system that included five performance levels for each critical element. Under this appraisal system, a GS-10 special agent who did not achieve a "fully successful" rating in each critical element did not meet the criteria for promotion to the next grade level of GS-11 and would continue work indefinitely at the grade level of GS-10.[7] Ms. Moxley stated that appellant was not entitled to any increase in pay based on her employment in a learner's capacity as she would have remained at the grade of GS-10 step 1 even if she had successfully completed her employment in the new agent training course.

In a decision dated September 22, 2003, the Office determined that appellant's actual earnings as a teacher fairly and reasonably represented her wage-earning capacity. Under the provisions of 5 U.S.C. §§ 8106 and 8115, it reduced her compensation to reflect her loss of wage-earning capacity effective August 28, 2000.

[6] For preference-eligible veterans, the probationary period is limited to one year.

[7] Special agents were subject to a two-level "pass/fail" performance appraisal system after April 2001.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[8]

Under section 8115(a) of the Act,[9] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[10] 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."[11] Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.[12]

ANALYSIS

In reaching its loss of wage-earning determination on May 22, 2002, the Office found that appellant received actual earnings in the position of a teacher for more than 60 days beginning August 28, 2000. There is no evidence that appellant's actual earnings as a teacher do not fairly and reasonably represent her wage-earning capacity. The medical evidence contemporaneous to appellant's August 28, 2000 employment as a teacher in Nevada reflects that, both the second opinion examiner, Dr. Rimoldi, and appellant's treating physician, Dr. Dunn, had specified permanent restrictions with regard to bending, stooping and lifting based on her accepted federal employment work injuries. Dr. Dunn's reports as of May 2003 reflect a pathology at the L5-S1 level but contain no medical rationale or explanation causally relating this newly diagnosed condition to the September 17, 1999 or the January 20, 2000 employment injuries. The Board notes that Dr. Dunn, in a May 16, 2003 report, noted that appellant was employed as a physical education teacher, that she had been involved in a car accident in February 2001, and that a December 1, 1999 MRI scan of the L5-S1 level was reported as unremarkable. Accordingly, the medical evidence does not show that there was a material change in the nature and extent of the accepted L4-5 injury-related condition.[13] Appellant performed the position of teacher for more than 60 days after August 28, 2000 and received

[8] *Frederick C. Smith*, 48 ECAB 132 (1996).

[9] 5 U.S.C. § 8115(a).

[10] *Elbert Hicks*, 49 ECAB 283 (1998); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[11] *Joseph M. Popp*, 48 ECAB 624 (1997); *Monique L. Love*, 48 ECAB 378 (1997).

[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, Reemployment: *Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[13] *See Laura E. Vasquez*, 49 ECAB 362 (1998).

actual earnings based on her employment. The medical evidence establishes that appellant's position of teacher fairly and reasonably represents her wage-earning capacity.[14]

Appellant, however, does not challenge that she has actual wages. Rather, she contends error on the Office's reliance on her GS-10, step 1 special agent pay rate for her date-of-injury job. She contends that, based on her inability to complete her training and become a special agent, she is entitled to higher pay rate than the GS-10, step 1 rate as found by the Office.

Section 8113(a) of the Act provides:

> "If an individual: (1) was a minor or employed in a learner's capacity at the time of injury; and (2) was not physically or mentally handicapped before the injury; the Secretary of Labor, on review under section 8128 of this title after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity."[15]

In interpreting this section of the Act, the Board has held that "the Act contemplates but one increase in wage-earning capacity upon the learner's completion of training or the minor's reaching the age of majority; but it does not contemplate such factors as future promotions, increases in salary or advancements, as these rest upon a number of indefinite and uncertain contingencies which place the happening of an event in the realm of possibility, not probability."[16] The Board has long held that section 8113 of the Act provides that a claimant is only entitled to compensation at the pay rate he or she would have received upon completion of training.[17] The Office issued FECA Program Memorandum No. 122 (issued May 19, 1970) which states:

> "In effect, the compensation rate of a learner should be adjusted if the pay rate increased as a result of a change in his learner's status which would have brought him either: (1) to a new level within; or (2) to completion of his learner's program."

Appellant was injured at work on September 17, 1999 while in the special agent trainee position of a GS-10, step 1. Following her injury, the employing establishment reassigned appellant to the Las Vegas Division in a support personnel capacity with retention of her GS-10, step 1 pay for 120 days. On January 20, 2000 she sustained another on-the-job injury. Although

[14] As previously noted, although the Office had issued an October 29, 2003 decision on appellant's recurrence claim, this issue is not presently before the Board.

[15] 5 U.S.C. § 8113(a).

[16] *Mary K. Rietz*, 49 ECAB 613 (1998); *John Olejarski*, 39 ECAB 1138 (1988); *Robert H. Merritt*, 11 ECAB 64 (1959).

[17] The Board has long held that the possibility of future promotions or greater earnings, but for the employment injury, does not support a loss of wage-earning capacity. *See Bobbie P. Beck*, 33 ECAB 146 (1981); *Judith Henderson*, 32 ECAB 501 (1981); *Daniel T. Morisky*, 30 ECAB 350 (1979).

the employing establishment indicated that they offered appellant a support services clerk, GS-5 step 1 position at the retained GS-10, step 1 pay rate, appellant resigned from her federal employment on June 16, 2000. She subsequently accepted a teaching position in the Nevada public school system on August 16, 2000.

The Board finds that appellant was in a formal training program and, due to her work injury, was unable to complete her training and become a special agent. However, the circumstances of this case do not warrant a finding that appellant was a "learner" so as to entitle her to an increase in her "monthly pay" upon which to compute her compensation for a loss of wage-earning capacity.[18] The Board has delineated the circumstances under which an employee will be considered to be employed in a learner's capacity at the time of his or her injury. These include whether the job classification described an "in-training" or learning position, whether the position held was one in which the employee could have remained for the rest of his or her life and whether any advancement would have been contingent upon ability, past experience or other qualifications.[19]

The evidence of record reflects that appellant's pay rate was as a GS-10 step 1 at the time of her injury. Had she been able to complete her training and become a special agent, she would have remained at the GS-10 level for a two-year probationary period. Thereafter, any promotions to the next grade level would have been based on merit with regard to the five tier appraisal system which existed through March 2001. Thus, while promotions to the GS-11, 12, and 13 levels were without competition, they were based on merit and not automatically given. The Board has long held that the possibility of future promotions or greater earnings, but for the employment injury, does not support a loss of wage-earning capacity.[20] The Board concludes that appellant's pay rate was properly based on the salary she received as a GS-10, step 1 agent trainee.

The Board notes that, while there is generally a change in pay upon graduation from the FBI Academy, it is due to the inclusion of AUO/availability pay and locality pay, and not due to a promotion. The Office previously determined that appellant was not entitled to AUO/availability pay.[21] The Office's procedure manual provides that locality pay is to be included in pay rate.[22] With regard to locality pay, the record reflects that the pay rate currently being used includes locality pay for the Washington, DC area, which includes Quantico, Virginia. Appellant would only be entitled to a higher rate for locality pay if she were actually assigned to a duty station which has a higher locality rate than the Washington, DC region. Assignments from the employing establishment appear to be based on staffing needs. Since

[18] *See Robert Allan*, 30 ECAB 1154 (1979).

[19] *Henry M. Van Sant*, 49 ECAB 593 (1998); *Deborah D. Jones*, 37 ECAB 609 (1986); *Raymond W. Goodale*, 25 ECAB 350 (1974); *James L. Parkes*, 13 ECAB 515 (1962).

[20] *Id.*

[21] The Office had previously determined that appellant is not entitled to AUO/availability pay as it was not guaranteed and was contingent on actual performance of unscheduled work.

[22] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7(b)(16) (December 1995). *See also id.*, Chapter 2.901.15(f)(1) (December 1995).

there is no way to determine where appellant would have ultimately been stationed had she completed her training and become a special agent, the Board concludes that appellant is not entitled to any additional locality pay.

Therefore, although appellant was in a formal training program at the time she was injured and was unable to complete the training program due to her work injuries, she is not entitled to an increase in pay under section 8113(a).

Wages actually earned are the best measure of wage-earning capacity and in the absence of evidence that they do not fairly or reasonably represent the injured employee's wage-earning capacity, will be accepted as such measure.[23] The formula for determining loss of wage-earning capacity based on actual earnings, was developed in *Albert C. Shadrick*,[24] has been codified by regulation at 20 C.F.R. § 10.403.[25] Subsection (d) of this regulation provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.[26] Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days.[27]

In the instant case, appellant began working at the Clark County School District on August 28, 2000 and had actual earnings for the requisite 60 days when the Office determined her wage-earning capacity on May 22, 2002. In determining the wage-earning capacity based on actual earnings, as developed in the *Shadrick* decision, the Office first calculates the employee's wage-earning capacity in terms of a percentage by dividing actual earnings by current date-of-injury pay rate. In the instant case, the Board finds that the Office properly used appellant's actual earnings of $795.90 per week and a current pay rate for her date-of-injury job of $819.06 per week to determine that she had a 97 percent wage-earning capacity. The Office then multiplied the pay rate at the time of the injury, $772.73, by the 97 percent wage-earning capacity percentage. The resulting amount of $749.54 was then subtracted from appellant's date-of-injury pay rate of $772.73, which provided a loss of wage-earning capacity of $23.19 per week. The Office then multiplied this amount by the appropriate compensation rate of 66 2/3 percent, to yield $15.46. The applicable cost-of-living adjustments were then added to reach the final compensation figure of $16.75 per week or $67.00 every four weeks. The Board, therefore, finds that the Office properly determined that appellant's actual earnings fairly and reasonably represent her wage-earning capacity and the Office properly reduced appellant's compensation in

[23] *See Elbert Hicks, supra* note 10; *Pamela J. Darling*, 49 ECAB 286 (1998).

[24] 5 ECAB 376 (1953).

[25] 20 C.F.R. § 10.403 (1999).

[26] 20 C.F.R. § 10.403(d) (1999); *see Afegalai L. Boone*, 53 ECAB ____ (Docket No. 01-2224, issued May 15, 2002).

[27] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e)(1) (December 1993); *see William D. Emory*, 47 ECAB 365 (1996).

accordance with the *Shadrick* formula to reflect the receipt of her actual wages as a teacher effective August 28, 2000.

CONCLUSION

The Board finds that the Office used the correct rate of pay in determining appellant's compensation benefits and properly adjusted her wage-earning capacity to reflect the receipt of actual wages in her teacher position effective August 28, 2000.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member