

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of BARBARA PARGAMENT and U.S. POSTAL SERVICE ,  
POST OFFICE, Isleton, Calif.

*Docket No. 97-1144; Submitted on the Record;  
Issued June 7, 1999*

---

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on her potential commissions earned from real estate sales; (2) whether the Office properly determined that there was an overpayment of compensation to appellant in the amount of \$8,447.21 for the period February 24 through August 17, 1996; (3) whether the Office properly determined that appellant was not "without fault" in the creation of the overpayment, and that therefore the overpayment was not subject to waiver; and (4) whether the Office properly required repayment from appellant's continuing compensation at the rate of \$300.00 per month.

On August 8, 1989 appellant, then a 49-year-old postmaster, filed a claim alleging she sustained back and neck injuries on August 7, 1989 in the performance of her employment duties. On October 10, 1991 the Office accepted appellant's claim for cervical and lumbar strains. Appellant returned to her regular duties on November 17, 1989.

On September 24, 1991 appellant filed a claim for traumatic injuries alleging that she sustained a crush injury to her third right finger, cervical, dorsal and lumbar spinal strains, and cervical subluxations when a hinged countertop fell on her while she was in the performance of duty. Appellant stopped work on October 29, 1991. After a period of medical development, the Office accepted each of the conditions claimed.

As the weight of the medical evidence established that appellant was at least partially disabled from her former position as a postmaster, but capable of some form of work, appellant was referred for vocational rehabilitation.

In a report dated August 8, 1995, appellant's rehabilitation counselor forwarded a description of characteristics of the position of real estate agent to appellant's treating physician, who indicated that appellant could perform the position. In this report, the rehabilitation counselor also noted that the expected salary outlook of a real estate agent was \$25,000.00 to

\$32,000.00 per year. On August 21, 1995 appellant began a six-month on-the-job training program for a position as a real estate agent or property manager and leasing agent. Upon her completion of the program on February 23, 1996, she began full-time employment on a commission-only basis with The Champions, Inc. Real Estate and Manufactured Homes in Fallon, Nevada (The Champions, Inc.). In a vocational rehabilitation report dated May 14, 1996, the rehabilitation counselor indicated that appellant's case was being closed because appellant had been successfully employed for more than 60 days, and he recommended computation of loss of wage-earning capacity based on a minimum salary of \$25,000.00 per year.<sup>1</sup>

In a decision dated August 22, 1996, the Office determined that, considering appellant's education, past work experience and age, the position of real estate and mobile home salesperson fairly and reasonably represented appellant's wage-earning capacity. The Office then noted the salary range for the position, as determined by the rehabilitation counselor, to be from a low of \$25,000.00 to a moderately high figure of \$32,000.00 per year. The Office concluded that appellant's date-of-injury pay was \$44,069.00 per year, or \$847.78 a week, and her actual earnings as a real estate sales person equated to \$25,000.00 a year, or \$480.76 a week, and adjusted appellant's benefits accordingly.

After making this determination of appellant's wage-earning capacity, the Office determined that an overpayment existed because appellant received temporary total disability for the period February 24 to August 17, 1996, the same period for which she was reemployed as a real estate sales person earning \$480.76 per week. The Office further found that appellant was not without fault in the creation of the overpayment because she should have been aware that she was not entitled to compensation for temporary total disability for the same period in which she had earnings. By letter dated September 23, 1996, the Office advised appellant that a preliminary determination had been made that there was an \$8,447.21 overpayment, for which appellant was at fault because she continued to accept payments which she knew or should have known were incorrect. The Office allowed appellant 30 days to submitted additional evidence or arguments.

By decision dated October 23, 1996, the Office found that appellant was reemployed as a real estate sales person effective February 24, 1996 earning \$25,000.00 per year or \$480.76 per week, and was also paid, and kept, total disability compensation benefits for this same period. The Office noted that appellant had not replied to its preliminary determination and therefore affirmed its preliminary finding that appellant was at fault in the creation of an \$8,447.21 overpayment of compensation because she should have been aware that she could not receive and keep compensation for total disability after she had returned to some type of work, with earnings, for the same period, and was not entitled to compensation for temporary total disability while earning income from self-employment. The Office further noted that appellant was receiving compensation for loss of wage-earning capacity in the amount of \$1,016.00 gross every 28 days, and was also earning a base salary of \$2,000.00 per month plus commissions. The Office determined, therefore, that the overpayment could reasonably be recovered by

---

<sup>1</sup> At several times throughout her vocational rehabilitation appellant considered accepting a property manager position, with a guaranteed base salary of \$2,000.00 per month plus commissions. Appellant ultimately declined the offer, however, and decided to remain employed on a commission only basis.

withholding \$300.00 from appellant's continuing compensation benefits effective October 13, 1996.

Subsequent to the issuance of the Office's decision, appellant submitted her response to the Office's September 23, 1996 preliminary determination. Appellant disagreed with the amount of the overpayment and asserted that the overpayment occurred through no fault of her own. She submitted earning statements showing total commissions earned between February 28 and August 31, 1996, while employed by The Champions, Inc., of approximately \$6,685.00, and showing draws against commission taken between June 30 and October 31, 1996, while employed by Country Homes, of approximately \$7,854.00. Appellant explained that after changing jobs to Country Homes in June 1996, she had not received any commissions, and that the amounts she had received she was expected to repay as soon as she had received some commission income.

In a letter dated October 25, 1996, the Office informed appellant that her response had not been received in time for review prior to the issuance of the October 23, 1996 decision, but that a review of her reply would not have changed the outcome of the decision.

The Board finds that the Office improperly determined appellant's wage-earning capacity based upon a salary of \$25,000.00 per year, or \$480.76 per week, and thereby improperly determined the existence of an overpayment of compensation benefits in the amount of \$8,447.21 for the period February 24 through August 17, 1996.

For the Office to make a proper determination of existence of an overpayment of compensation, the Office must determine whether a claimant received compensation to which he or she was not entitled under the Federal Employees' Compensation Act.<sup>2</sup> In the present case the Office accepted appellant's claim for a crush injury to her third right finger, cervical, dorsal and lumbar spinal strains, and cervical subluxations sustained in September 1991 and determined that appellant was entitled to temporary total disability for her lost wages. In February 1996 appellant completed a vocational rehabilitation program and returned to full-time employment as a real estate sales person.

The Board notes that when an injured employee is unable to return to the position held at the time of injury but is not totally disabled for all gainful employment, he or she is entitled to compensation for disability computed on loss of wage-earning capacity.<sup>3</sup> The Board further notes that in determining the compensation payable for partial disability, an employee's wage-earning capacity is determined by the employee's actual earnings if those earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual earnings, the employee's wage-earning capacity shall be determined by the Office by selection of a job after having given due regard to the nature and degree of the employee's physical impairment, the employee's age and qualifications for other employment, the availability of

---

<sup>2</sup> See 20 C.F.R. § 10.301, *et. seq.*

<sup>3</sup> 20 C.F.R. § 10.303(a); 5 U.S.C. § 8115(a).

suitable employment, and other factors or circumstances which may affect the employee's wage-earning capacity in his or her disabled condition. The salary of such a job shall then be considered the employee's wage-earning capacity, and his or her partial disability rate of compensation will be calculated.<sup>4</sup> The Board stated in *Raymond E. Romeo*,<sup>5</sup> that, once the Office has made a determination that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction in compensation benefits.<sup>6</sup> The Board finds that the Office failed to meet this burden and improperly determined appellant's loss of wage-earning capacity for the period February 24 through August 17, 1996.

The Office based its determination of appellant's wage-earning capacity on the rehabilitation counselor's determination that a real estate salesperson on a commission only basis could be expected to earn, at a minimum, \$25,000.00 per year. The Office divided this sum by the number of work weeks in a year to arrive at weekly "actual earnings" of \$480.76, which the Office concluded fairly and reasonably represented appellant's wage-earning capacity. The record does not indicate, however, that the Office considered the factors explained in *Lee R. Chronister*,<sup>7</sup> in *Donald R. Shively*,<sup>8</sup> or in the Office's Program Memorandum No. 128 entitled "Determination of Wage-Earning Capacity Where Wages are Based Solely on Commission,"<sup>9</sup> which require consideration before the Office is permitted to consider an employee's earnings solely from commissions as fairly representing his or her wage-earning capacity. Because of these deficiencies the Board finds that the Office improperly determined appellant's wage-earning capacity and improperly determined the existence and amount of overpayment of compensation allegedly paid appellant.

---

<sup>4</sup> 20 C.F.R. § 10.303(b); see also *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>5</sup> 34 ECAB 1010 (1983).

<sup>6</sup> See also *Edward L. Havener*, 35 ECAB 268 (1983); *Ellen G. Trimmer*, 32 ECAB 1878 (1983).

<sup>7</sup> 32 ECAB 841 (1981)

<sup>8</sup> 22 ECAB 34 (1970).

<sup>9</sup> FECA Program Memorandum. No. 128 (1970) states as follows: "Occasionally a wage-earning capacity rating is made on the basis of an occupation wherein earnings are based solely on commissions. In the case of *Donald R. Shively*, [22 ECAB 34 (1970)], the Board held that it was improper to use a position for which only a commission is paid, without making provision for payment of a higher rate of compensation during the beginning period in which a claimant would earn less than the amount used by the Bureau in the wage-earning capacity rating.

"Where a wage-earning capacity rating is to be made on the basis of commissions only, the claims examiner should obtain information as to the average number of weeks, or months it takes for a starting person to reach the level of commissions used as the basis of wage-earning capacity rating. Compensation should then be paid on the basis of the claimant's actual wage loss for that period of time. Thereafter, compensation should be paid on the wage-earning capacity rating which is predicated on the commission."

Accordingly, the decisions of the Office of Workers' Compensation Programs dated October 23 and August 22, 1996 are hereby reversed.

Dated, Washington, D.C.  
June 7, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member