

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAYCON C. HOGUE and DEPARTMENT OF HEALTH & HUMAN
SERVICES, NATIONAL ARCHIVES & RECORDS ADMINISTRATION,
College Park, MD

*Docket No. 00-1963; Submitted on the Record;
Issued November 8, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$1,289.56 occurred; (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; (3) whether the Office properly denied appellant's request for waiver of recovery of the overpayment; and (4) whether the Office properly determined that \$50.00 should be withheld from appellant's continuing compensation checks to recover the overpayment.¹

The Office accepted appellant's claim for left leg contusion, pelvis and acetabulum fracture, and placed him on the periodic rolls on July 9, 1986 from May 5, 1986 to "further notice."

In a preliminary determination dated February 18, 1998, the Office found that appellant received an overpayment of \$1,289.56. The Office noted that the overpayment was due to its reliance on incorrect loss of wage-earning capacity figures for the periods December 19, 1986 to January 9, 1987, from January 12 to January 30, 1987 and from July 6 to September 26, 1987. The Office also found that appellant was without fault in the creation of the overpayments. The Office informed appellant that he should provide information regarding his income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of the Federal Employees' Compensation Act² to recover the overpayment.

¹ Appellant left the employing establishment in March 1997. He then filed his appeal with the Board on May 19, 2000. By letter dated November 5, 2000, Lucille A. Hogue, appellant's mother, notified the Board that appellant had died on August 2, 2000. In a letter dated January 18, 2001, Mrs. Hogue notified the Board that she was the legal representative in this appeal.

² 5 U.S.C. §§ 8101-8109.

By decision dated April 28, 2000, the Office finalized the February 18, 2000 preliminary determination that appellant received an overpayment of \$1,289.56 and was without fault in the creation of the overpayment. The Office also found that appellant was not entitled to waiver of recovery of the overpayment. Further, the Office determined that \$50.00 a month should be deducted from appellant's continuing compensation payments.

The Board has reviewed the record and finds that the issue of overpayment has not been properly resolved, and therefore the case is not in posture for decision on the issues presented.

In a decision dated August 3, 1988, the Board determined that the Office improperly relied on appellant's actual earnings from December 19, 1986 to February 3, 1987 to determine his loss of wage-earning capacity.³ The Board noted that appellant had returned to a light-duty position at the recommendation of his treating physician but was determined to be totally disabled by a subsequent medical report, and stopped work on February 3, 1987. The Office determined appellant's loss of wage-earning capacity based on his actual earned wages from December 19, 1986 to February 3, 1987 which the Board found was improper.

Upon review of the record in this case, the Office again relied on appellant's actual earned wages in determining his loss of wage-earning capacity from December 19, 1986 to January 9, 1987 and from January 12 to January 30, 1987, and thus the Office's determination that an overpayment was made for these two time periods is reversed for the reasons contained in the Board's August 3, 1988 decision.⁴

With respect to the July 6 to September 26, 1987 time period, neither the Office's February 18, 2000 notification letter dated nor its April 28, 2000 final determination decision clearly note the amount of overpayment or reasons why it occurred for this time period. The Office on remand will develop the issue of overpayment from July 6 to September 26, 1987 further to determine the amount of overpayment, the reasons why the overpayment occurred, and whether recovery of the overpayment would be appropriate in this case.

³ Docket No. 88-640.

⁴ The Board held that an appellant's earned wages cannot be used to calculate loss of wage-earning capacity if he is not working at that job at the time of the wage-loss determination. The Office's loss of wage-earning capacity determination was made on February 15, 1987, effective February 5, 1987.

The April 28, 2000 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further development consistent with this decision.⁵

Dated, Washington, DC
November 8, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

⁵ The Board, on February 28, 2000, denied appellant's appeal on a recurrence of disability claim. This issue is not before the Board in this appeal.