

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELIZABETH A. CHAMPION and DEPARTMENT OF VETERANS
AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER,
Oklahoma City, OK

*Docket No. 00-2162; Submitted on the Record;
Issued September 19, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to modify appellant's October 12, 1990 wage-earning capacity determination; and (2) whether the Office properly determined that appellant received an overpayment in the amount of \$37,305.48 for the period January 29, 1990 through April 24, 1999 and that she was not entitled to a waiver of recovery of the overpayment.

On April 2, 1984 appellant, then a 40-year-old food service clerk, sustained a traumatic injury in the performance of duty, which the Office accepted for lumbosacral sprain and disorder of the sacrum. Appellant's employment-related injury precluded her from resuming her former duties. However, on January 29, 1990 appellant returned to work in a part-time, limited-duty capacity as a medical clerk. She resumed full-time employment on March 11, 1990.

In a decision dated October 12, 1990, the Office determined that appellant's position as a medical clerk effective March 11, 1990, with weekly earnings of \$248.80, represented her wage-earning capacity. As appellant earned less as a medical clerk than she did in her date-of-injury job, the Office continued to pay appellant appropriate compensation based upon her loss of wage-earning capacity.¹

In a letter dated November 3, 1993, the employing establishment advised the Office that it planned to adjust appellant's pay rate retroactive to January 28, 1990. Whereas appellant originally received an hourly wage of \$6.22 as a medical clerk when she returned to work in January 1990, the retroactive adjustment increased appellant's hourly wage to \$9.29, which represented a full-time, average weekly pay rate of \$371.59. The adjustment took effect June 1, 1994 and appellant received back pay from the employing establishment.

¹ On November 6, 1990 appellant accepted a full-time, permanent position as a program clerk with an annual salary of \$17,990.00. She promptly advised the Office of the change in her employment status.

In a decision dated May 10, 1999, the Office modified the October 12, 1990 wage-earning capacity determination. The Office found that the prior decision was in error because the employing establishment subsequently adjusted appellant's pay rate retroactive to the date she returned to work as a medical clerk in January 1990. Moreover, the Office determined that the adjusted pay rate effective January 28, 1990, met or exceeded the pay appellant would have received in her date-of-injury job. Consequently, the Office determined that no loss of wages had occurred dating back to January 28, 1990.

On May 11, 1999 the Office issued a preliminary determination of overpayment. The Office advised that appellant received an overpayment of \$37,305.48 during the period January 29, 1990 through April 24, 1999. The overpayment arose as a result of the compensation she received based on the erroneous wage-earning capacity determination issued October 12, 1990.

Appellant requested an oral hearing, which was held January 6, 2000. In a decision dated March 23, 2000, the hearing representative found that the Office properly modified the October 12, 1990, loss of wage-earning capacity determination and that appellant had received an overpayment in the amount of \$37,305.48 for the period January 29, 1990 through April 24, 1999. The hearing representative, however, disagreed with the Office's prior finding that she was at fault in creating the overpayment. Although the hearing representative determined that appellant was not at fault in creating the overpayment, he found that a waiver of overpayment was not warranted.

The Board finds that the Office met its burden of proof to modify appellant's October 12, 1990 wage-earning capacity determination.

Once the Office properly determines the wage-earning capacity of an injured employee, modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.²

In the instant case, the Office modified appellant's October 12, 1990 wage-earning capacity determination on the basis that the original determination was erroneous. When the decision was initially issued appellant was receiving actual weekly wages of \$248.81 as a full-time medical clerk effective March 11, 1990. On June 1, 1994 appellant received additional wage pay from the employing establishment retroactive to January 28, 1990. This retroactive adjustment increased appellant's hourly wage to \$9.29, which represented a full-time, average weekly pay rate of \$371.59. The employing establishment's retroactive increase of appellant's hourly wage effectively rendered the Office's October 12, 1990, wage-earning capacity determination erroneous.

Although the Office met its burden of proof to modify the October 12, 1990 wage-earning capacity determination, the Office erred in applying its findings retroactive to January 28, 1990. While appellant returned to work as a medical clerk on January 29, 1990 she

² *Penny L. Baggett*, 50 ECAB 559, 563-64 (1999).

did not work in a full time capacity. As correctly noted in the October 12, 1990 decision, appellant began working full time on March 11, 1990. As she did not resume full-time work until March 11, 1990, the Office erred in finding that appellant had weekly wages of \$371.59 effective January 28, 1990. Accordingly, the Office's May 10, 1999 wage-earning capacity determination is modified to reflect appellant's full-time, weekly wage-earning capacity of \$371.59, effective March 11, 1990. In all other respects, the May 10, 1999 decision is affirmed.

The Board finds that the case is not in posture for a decision regarding the issue of overpayment.

Under section 8129 of the Federal Employees' Compensation Act and the implementing regulations, an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.³

The May 10, 1999 modified wage-earning capacity determination formed the basis for the Office's finding that appellant had received an overpayment. In essence, she received compensation during an approximate 9-year period when she had no loss of wage-earning capacity. The Office declared an overpayment of all monetary compensation paid during the period January 29, 1990 through April 24, 1999. The Office determined that appellant was overpaid \$37,305.48 during this period.

As appellant did not resume full-time work until March 11, 1990, the Office improperly determined that an overpayment existed with respect to the amount of compensation she received during the period January 29, 1990 through March 11, 1990. Appellant remained entitled to partial wage-loss compensation for her hours of disability during this period. As the \$37,305.48 overpayment declared by the Office includes an undetermined amount of compensation that should not have been affected by the May 10, 1999 modified wage-earning capacity determination, the case is remanded to the Office for a proper determination of the amount of overpayment.

³ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.430, 10.433, 10.434, 10.436, 10.437 (1999).

The May 10, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed as modified and the Office's March 23, 2001 decision is hereby set aside and the case is remanded for further consideration consistent with this decision.

Dated, Washington, DC
September 19, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member