United States Department of Labor
Employees' Compensation Appeals Board

CAROL L. FREY, Appellant	)	
and	)	**Docket No. 04-870**
	)	**Issued: May 23, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Lehighton, PA, Employer	)	

Appearances:
Carol L. Frey, 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 February 17, 2004 appellant filed a timely appeal of decisions of the Office of Workers' Compensation Programs dated November 24, 2003, which denied waiver of an overpayment in the amount of $193.39 and January 27, 2004, which finalized the proposed reduction of appellant's compensation to reflect her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of $193.39 because, for the period September 23 through October 4, 2003, she received compensation for total disability and worked part time; (2) whether the Office properly denied waiver of recovery of the overpayment; and (3) whether the Office properly determined appellant's wage-earning capacity effective February 22, 2004.

FACTUAL HISTORY

On April 24, 1999 appellant, then a 39-year-old rural carrier associate, filed a claim for compensation for an occupational disease of acute anxiety and depression, which she attributed to stress at work. Appellant stopped work on April 15, 1999 and did not return. The Office accepted that she sustained an aggravation of a generalized anxiety disorder and began payment of compensation for temporary total disability beginning April 15, 1999.

The Office approved a vocational rehabilitation plan with a goal of an associate degree in nursing. Appellant began attending classes at Lehigh Carbon Community College in September 2001.

In a March 6, 2003 report, Dr. Andrew R. Bolmann, a Board-certified psychiatrist, to whom the Office referred appellant for a second opinion evaluation, concluded that her adjustment disorder with mixed anxiety and depression was precipitated by factors of her employment. He found that the aggravation of her condition was of a temporary nature and ceased with no residuals when she was fired from her job and enrolled in school in 2000. Dr. Bolmann stated:

> "[W]hatever the psychiatric problems that led her to leave the place of employment are no longer operative. However, I noticed that she is still very sensitive to the issue and does not feel that she could go back working for the [employing establishment]. [Appellant] is seeking a degree in nursing and once she obtains that degree she should be able to function in a nursing position.… She is functioning at a good level, as far as attending school, taking care of her household and taking care of her family. She has not had any psychiatric treatment for over two years and is doing fairly well."

In a May 9, 2003 report, the rehabilitation counselor to whom the Office referred appellant noted that, by not obtaining a grade of "C" in one of her classes, she was unable to take the next sequential nursing class and would be dropped from the program. Her only alternative was to take a year off, reapply to the program and retake the class the next time it was offered in January 2004. By letter dated May 15, 2003, the Office advised the school that it would no longer sponsor appellant as of that date.

On September 23, 2003 appellant began a part-time job as an emergency room clerk at Palmerton Hospital for $8.73 per hour working 30 hours every 2 weeks.

On October 23, 2003 appellant was advised that her compensation had been reduced effective October 5, 2003 based on her part-time employment effective September 23, 2003, but that this reduction did not represent her wage-earning capacity, which would be determined at a later date.[1] In an undated letter received by the Office on November 18, 2003 appellant stated

[1] The Office's procedures allow it to offset actual earnings that do not represent a claimant's wage-earning capacity. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(b) (December 1993).

that her application for a full-time unit clerk was turned down in October and that she continued to try to obtain a full-time position.

On October 23, 2003 appellant was advised that the Office had made a preliminary determination that she had received an overpayment of compensation in the amount of $193.39, which occurred because she returned to part-time work on September 23, 2003 yet continued to receive compensation for total disability through October 4, 2003. The Office found that she was without fault in creating the overpayment and it explained that she could be entitled to waiver of recovery of the overpayment. The Office gave appellant 30 days within which to provide further evidence if she disagreed with the fact or amount of the overpayment and it explained her entitlement to a prerecoupment hearing. Appellant did not respond to the notice, nor request a hearing.

By decision dated November 24, 2003, the Office found that appellant received an overpayment of compensation in the amount of $193.39, which occurred because she returned to part-time work on September 23, 2003 yet continued to receive compensation for total disability through October 4, 2003. The Office determined that waiver of recovery of the overpayment would not be granted as appellant had not demonstrated entitlement to waiver.

On December 9, 2003 the Office advised appellant that it proposed to reduce her compensation based on her capacity to earn wages in the constructed position of receptionist, working full time.[2] On November 18, 2003 a rehabilitation counselor contacted the Pennsylvania Job Service and ascertained that the position was reasonably available in appellant's commuting area at a weekly wage of $402.00. In a December 1, 2003 report, an Office rehabilitation specialist opined that appellant was able to work full time.

By letter dated December 18, 2003, appellant disagreed with the proposed reduction of her compensation and argued that she would not be able to work full time and attend classes full time.

By decision dated January 27, 2004, the Office found that appellant had the ability to earn full-time wages as a receptionist in a physician's office and that this position fairly and reasonably represented her wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 1

A claimant is not entitled to receive compensation for total disability while working.[3]

[2] Department of Labor's *Dictionary of Occupational Titles* No. 237-367-038.

[3] *Lorenzo Rodriguez*, 51 ECAB 295 (2000); *see generally* 5 U.S.C. §§ 8105, 8106, 8115; 20 C.F.R. §§ 10.402, 10.403.

ANALYSIS -- ISSUE 1

In this case, for the period September 23 to October 4, 2003, appellant received compensation for temporary total disability while she was earning wages of $8.73 per hour performing part-time work 15 hours per week. As she was not entitled to receive payments for both temporary total disability and part-time work, the Board finds that the Office properly determined that an overpayment had been created. The amount of the overpayment, $193.39, was the difference between the amount of compensation she received for the period September 20 through October 4, 2003 $805.71 and the amount to which she was entitled or $612.32. Her compensation entitlement for total disability was decreased by the amount of money she earned during the period in question at her part-time job.[4] The Office subtracted $612.32 from $805.71 which resulted in $193.39, which is the amount of her overpayment.

Accordingly, the Office properly determined that appellant received an overpayment of compensation in the amount of $193.39 for the period September 23 through October 4, 2003, which occurred because she received compensation for temporary total disability while she was also receiving part-time wages.

CONCLUSION -- ISSUE 1

Appellant received an overpayment of compensation in the amount of $193.39 for the period September 23 through October 4, 2003, which occurred because she received compensation for temporary total disability while she was also receiving part-time wages.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when 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."[5]

20 C.F.R. § 10.438 provides:

> "(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the [Act] or be against equity and good conscience.

[4] The Office properly used the formula for computing loss of wage-earning capacity rather than simple deduction of the earnings, as this was more advantageous to appellant. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7d(1) (December 1993).

[5] 5 U.S.C. § 8129.

This information will also be used to determine the repayment schedule, if necessary.

"(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished."

ANALYSIS -- ISSUE 2

The Office found that appellant was without fault in the creation of the overpayment[6] such that a request for waiver of recovery of the overpayment could be entertained. She requested waiver of recovery but she did not respond to the Office requests for any financial information needed to determine whether recovery of the overpayment should be waived. Therefore, pursuant to 20 C.F.R. § 10.438(b), the Board finds that the Office properly denied waiver of the overpayment.

CONCLUSION -- ISSUE 2

Appellant has not established her entitlement to waiver of recovery of the overpayment due to her failure to provide essential financial information.

LEGAL PRECEDENT -- ISSUE 3

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.[7] Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, appellant's usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[8] The Office's procedure manual provides that a part-time job does not represent a claimant's wage-earning capacity unless the claimant was a part-time worker when injured.[9]

[6] The Office found that because appellant was entitled a portion of a check, she was not at fault in the creation of the overpayment.

[7] *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[8] 5 U.S.C. § 8115(a).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1) (July 1997).

ANALYSIS -- ISSUE 3

At the time the Office issued its January 27, 2004 determination of appellant's loss of wage-earning capacity, she was working 15 hours per week. The Office properly found that appellant's actual earnings did not represent her wage-earning capacity. As noted above, the Office procedure manual states that a part-time job does not represent the wage-earning capacity of an employee who was working full time when injured, as was appellant. In a letter received by the Office on November 18, 2003 appellant stated that she had applied for full-time employment and was continuing to pursue a full-time position. In a March 6, 2003 report, Dr. Bolmann, a Board-certified psychiatrist, to whom appellant was referred for a second opinion evaluation, concluded that she had no residuals of her employment injury, indicating that appellant could resume full-time work. Dr. Bolmann also stated that once appellant obtained her degree, she should be able to function in a nursing position. There is no evidence that appellant was not able to work full time at the time the Office found that she was capable of performing the position of receptionist for 40 hours per week. The Office, through contact with the state job service, ascertained that this position was reasonably available in her commuting area and that the wages were $402.00 per week.

The Office applied the *Shadrick* formula[10] to compute appellant's loss of wage-earning capacity and rate of compensation. Dividing appellant's wage-earning capacity of $402.00 in the constructed receptionist position by the current rate in her date-of-injury job, $540.40, yielded 74 percent, which when multiplied by her salary at her date of injury, $468.00, yielded $346.32 as her adjusted wage-earning capacity. Her loss of wage-earning capacity was her date-of-injury wage minus her adjusted wage-earning capacity equaled $121.68, which was then multiplied by ¾ to yield her weekly compensation rate, which was $91.26.[11] This was increased by applicable cost-of-living adjustments to $97.75 and her new rate of compensation was calculated to be $391.00 each four weeks.

CONCLUSION -- ISSUE 3

The Board finds that the Office properly applied the *Shadrick* formula and properly reduced appellant's compensation to reflect her wage-earning capacity, based upon her ability to work full time as a receptionist for a doctor's office.

[10] *Albert C. Shadrick*, 5 ECAB 376 (1952).

[11] Although the Office's decision stated that the 2/3 rate for employees without dependents was used, the compensation rate was in fact properly derived by multiplying $121.68 by ¾, the rate for employees, such as appellant, with dependents.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 27, 2004 and November 24, 2003 are affirmed.

Issued: May 23, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member