

and paid appropriate compensation.¹ On October 12, 1988 appellant returned to a sedentary limited-duty assignment.² On May 21, 1997 the Office determined that appellant was reemployed as a support reinforcement aide with wages of \$280.87 per week, effective February 15, 1995. It determined that her actual earnings fairly and reasonably represented her wage-earning capacity and terminated appellant's compensation as her actual wages met or exceeded the wages of the job she held when injured.

On December 28, 1998 appellant filed a claim for a recurrence on November 9, 1998. On March 29, 1999 the Office accepted her claim for a right ankle triple arthrodesis and subtalar joint fusion. Appellant underwent the procedure on April 13, 1999. On April 9, 1999 she was placed on the periodic rolls. Appellant was also advised that her compensation benefits for total disability were payable only while she could not perform the duties of her regular job because of her injury at work.

By letter dated July 15, 2005, the Office informed appellant that she would receive \$758.00 dollars in compensation every 28 days. Appellant was also advised that her compensation would continue as long as the medical evidence supported her disability.

By letter dated February 13, 2006, appellant requested that the Office provide her with information regarding her claim. She inquired into the status of a schedule award if she returned to work.

By letter dated July 19, 2006, the Office requested information from appellant regarding her wages and compensation for the prior 15-month period and provided a Form EN1032 for completion.

By letter dated August 22, 2006, appellant requested information regarding filing a request for a schedule award when her part-time position ended. She also completed an EN1032 form on August 22, 2006. Appellant indicated that she had part-time employment from October 31, 2005 to August 31, 2006 at the rate of \$15.00 dollars per hour. She stated that she had earnings in the total amount of \$4,101.17. In Part-H certification, the form contained a provision which indicated:

“I know that anyone who fraudulently conceals or fails to report income or other information which would have an effect on benefits or who makes a false statement or misrepresentation of a material fact in claiming a payment or benefit under the Act may be subject to criminal prosecution, from which a fine or imprisonment or both, may result.

¹ Appellant received schedule awards totally 37 percent permanent impairment of the right leg.

² The record reflects that appellant was a casual employee who worked 24 hours per week with a night differential.

“I understand that I must immediately report to the Office any improvement in my medical condition, any employment, any change in the status of my claimed dependents, any third party settlement and any change in income from federally assisted disability or benefit programs.”

By letter dated August 30, 2006, the Office requested that the Social Security Administration (SSA) provide information regarding the yearly wages earned by appellant from January 1988 to June 30, 2006. In a separate letter also dated August 30, 2006 and a September 5, 2006 letter, the Office requested that appellant provide a brief description of her job duties, the approximate hours she worked per week and her total gross wages for the period October 31, 2005 to August 31, 2006. The Office subsequently received confirmation from appellant’s employer that she received gross wages of \$5,298.49 to September 2006.

By letter dated September 20, 2006, the Office requested that appellant send a copy of her W-2 form or 1099 depicting any and all 2005 wages received since starting on October 31, 2005 and confirmation from appellant regarding whether August 31, 2006 was the last date that she had worked. On September 25, 2006 appellant confirmed that she was no longer working and enclosed her pay check stub for the week ending September 3, 2006 and tax records for the year 2005 which indicated that she earned \$1,410.10 in 2005. The Office confirmed that appellant was employed on a part-time basis from October 31, 2005 to August 21, 2006 as a data collector.

On October 17, 2006 the Office determined that an overpayment occurred because appellant was employed from October 31, 2005 to August 31, 2006 with earnings while she continued to remain on the periodic rolls and received wage-loss compensation. It determined that she received \$8,434.21 in compensation from October 31, 2005 to August 31 2006. The Office noted that, regarding the loss of wage-earning capacity (LWEC) determination, appellant would now be making \$10.00 per hour as a casual employee based upon her date-of-injury job which she worked 24 hours per week. It determined that, based on a 64 percent LWEC, appellant would now be earning \$240.00 per week, with a night differential of \$1.0127519 or \$243.06 per week. The Office also determined that appellant should have received \$2,011.04 based on her LWEC. It then subtracted the amount that she actually received, (\$8,434.21) from what she should have received for her LWEC (\$2,011.04) and determined that appellant received an overpayment in the amount of \$6,423.17. Copies of worksheets related to the payments were also included.

On January 5, 2007 the Office made a preliminary finding that an overpayment of \$6,423.17 arose because appellant was in receipt of total disability benefits for the period October 31, 2005 to August 21, 2006, after she returned to work in the private sector and did not report those earnings to the Office. It found that she was at fault in creating the overpayment because she failed to provide information which she knew or should have known to be material. The Office also found that appellant accepted payment for total disability which she knew or reasonably should have known to be incorrect. Appellant was informed of her right to challenge the amount of the overpayment or request a waiver of the overpayment by one of three methods including a request for a telephone conference, a request for a written review of the record or a request for a prerecoupment hearing. In a memorandum to the file, the Office noted that on

June 7, 2005 and other occasions, appellant signed and returned Form EN1032 which included that she acknowledged and understood that she “must immediately report to [it] any improvement in my medical condition, any employment, any change in the status of claimed dependents, any third party settlement and any change in income from [f]ederally-assisted disability or benefit programs.” However, the Office noted that appellant failed to notify it of the change in her compensation status until August 22, 2006. It also noted that appellant had sent a letter to the Office in February 2006, inquiring about her entitlement to a schedule award and her entitlement to compensation “if I do return to work.” The Office noted that appellant was working during that time period. It found that she was at fault in creating the overpayment because she knowingly accepted compensation to which she was not entitled.

On January 30, 2007 the Office received a response from appellant to the notice of preliminary overpayment. Appellant completed the Form OWCP-20 and provided her financial information supporting a request for waiver. She reported on the overpayment recovery questionnaire that her monthly income of \$1,119.00 was comprised of her social security benefits and income from her nephew. Appellant also reported that her total monthly expenses were \$576.82. In response to question 10 on the form, she alleged that she was “sent letters years ago regarding her eligibility for compensation payments. Appellant also responded to question 11, in regard to whether she now fully understood her responsibilities and alleged that she “thought she was entitled to [compensation]” because she had a “permanent injury.” She further alleged that she believed her injury was permanent and all monies were permanent. Appellant also alleged that she “reported these changes to my claim ‘rep’ Mr. Bruce Weintraub.”

In a decision dated February 8, 2007, the Office finalized the overpayment findings that appellant was with fault because she failed to provide information which she knew or should have known to be material and accepted payment that she knew or reasonably should have known was incorrect. The Office noted that she had continued to receive and complete EN1032 forms over the years and that the forms clearly indicated that appellant must report her earnings which she verified that she had read and signed. It also found that appellant was entitled to continuing compensation benefits for residuals of her work injury, but that she was not entitled to compensation for total disability when she was only partially disabled. The Office noted that appellant had submitted her financial information, but indicated that there was no allowance for waiver, since appellant was found to be with fault. It determined that the amount of \$100.00 would be withheld from appellant’s continuing compensation beginning on February 18, 2007. The Office noted that \$100.00 dollars was less than 15 percent of her net compensation payment.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees’ Compensation Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.³ When an overpayment has been made to an individual

³ 5 U.S.C. § 8102(a).

because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁴

If the claimant has been receiving compensation on the periodic roll, the claims examiner should delete the payment record from [the periodic rolls] as soon as possible. If the deletion can be made effective with the current roll period, any additional compensation due should be paid on the daily roll. Any compensation paid for total wage loss subsequent to the date of return to work should be declared an overpayment.⁵

If the claimant is entitled to compensation for partial wage loss after return to work, the claims examiner should compute entitlement using the *Shadrick* formula and authorize compensation on a 28-day payment cycle. The claims examiner should make every effort to avoid interruption of income to the claimant.⁶ Earnings of a sporadic or intermittent nature which do not fairly and reasonably represent the claimant's LWEC should be deducted from continuing compensation payments using the *Shadrick* formula (past earnings must be declared an overpayment). Sporadic or intermittent earnings should not be used as the basis for an LWEC determination but they should be used to help establish the kind of work the claimant can perform.⁷

ANALYSIS -- ISSUE 1

The record establishes that an overpayment was created as appellant was employed from October 31, 2005 to August 31 2006, while she remained on the periodic rolls and received compensation for total disability. The Office determined that appellant received \$8,434.21 in compensation for total disability. As appellant returned to work and had earnings for part-time work, she should not have received compensation for total disability. Her receipt of compensation caused an overpayment. The Board will affirm the Office's February 8, 2007 decision on the issue of fact of overpayment.

The Board notes that, for the period October 31, 2005 to August 31, 2006, appellant received \$8,434.21 in compensation for total disability. The Office subsequently determined that as appellant was working during this time frame and should not have received compensation for total disability. It utilized the *Shadrick* formula⁸ to determine that, on the date of injury appellant worked 24 hours a week and that would equate to a 64 percent LWEC.⁹ The Office determined that for appellant's date-of-injury job, she would now be earning \$240.00 per week, plus a night

⁴ *Id.* at § 8129(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.814.7(b)(1) (July 1997).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.814.7(b)(2) (July 1997). *See Albert C. Shadrick*, 5 ECAB 376 (1953).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.814.7(d)(3) (July 1997).

⁸ *Supra* note 6.

⁹ Although the Office used the *Shadrick* formula to compute appellant's compensation entitlement pursuant to Office procedures, it did not make a formal loss of wage-earning capacity decision. *See supra* note 7.

differential of \$1.0127519 or \$243.06 per week. For the time period October 31, 2005 to August 31, 2006, appellant should have received \$2,011.04. The Office subtracted this amount from the \$8,434.21 that she received for total disability and found that appellant received an overpayment of \$6,423.17. Appellant has not submitted any evidence showing that she did not receive an overpayment of compensation or contesting the existence and amount of the overpayment. As she had earnings from part-time employment, she was not entitled to compensation for total disability. The Board will affirm the February 8, 2007 decision on the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to, or the amount of, benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).¹⁰

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹¹

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that she accepted a payment which she knew or should have known to be incorrect.¹²

In order for the Office to establish that appellant was at fault in creating the overpayment, it must show that at the time she received and accepted the compensation checks in question she knew or should have known that the payment was incorrect.¹³

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ 20 C.F.R. § 10.433(b).

¹² The Board notes that the Office also found that appellant failed to provide information which she knew or should have known to be material under the second criterion. However, as the Office met its burden of proof to establish that appellant was at fault under the third standard, the second standard does not need to be addressed.

¹³ *Robin O. Porter*, 40 ECAB 421 (1989).

The Board finds that at the time appellant received the compensation checks in question, she knew or should have known that the payments were incorrect. The record shows that appellant contacted the Office on February 13, 2006 to inquire into the status of a schedule award if she returned to work. The Board notes that appellant was working at this time and that this would indicate that she knew or should have known that her return to work would affect her compensation entitlement. Appellant also completed the EN1032 form on August 22, 2006 and certified that she had read the form and certified that she understood that she must immediately report that she was employed and that she must report any income that she received. The form covered the 15 months prior to the date that she signed it. However, appellant did not report that she had returned to work until she signed the form on August 31, 2006 and she continued to collect compensation for total disability while working from October 31, 2005 to August 31, 2006. Additionally, appellant was advised on more than one occasion that her compensation payments for total disability were only payable while she could not perform the duties of her job because of her work-related injury. The evidence establishes that she accepted a payment which she knew or should have known to be incorrect and she is at fault under section 10.433(a). Since appellant was at fault in the creation of the overpayment, waiver of the overpayment is precluded.

On appeal, appellant contends that she was without fault in creating the overpayment. She contends that she informed her claims examiner that she was working. However, the Board has held that the fact that the Office may have been negligent in issuing a check for temporary total disability after being informed by a claimant of a return to work, does not excuse the claimant's acceptance of such checks, which she knew or should have been expected to know to be incorrect.¹⁴

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.¹⁵

ANALYSIS -- ISSUE 3

The Board finds that the Office properly required repayment by withholding the overpayment amount of \$100.00 from appellant's compensation checks until the overpayment was recouped. On January 5, 2007 the Office advised appellant of her right to request a hearing or telephone conference regarding its preliminary decision that an overpayment had occurred and that, if she wished a waiver of the overpayment, she was specifically directed to submit financial information. Appellant submitted financial documentation which revealed that her monthly income was \$1,119.00 and that her total monthly expenses were \$576.82. This would amount to

¹⁴ *Robert W. O'Brien*, 36 ECAB 541 (1985).

¹⁵ 20 C.F.R. § 10.441(a).

a remainder of \$542.18. The Board also notes that this did not include her continuing compensation payments from the Office in the amount of \$758.00 every 28 days. The Office noted that the overpayment was less than 15 percent of appellant's continuing compensation payments. In view of appellant's monthly income surplus of \$542.18 and her continuing compensation payments, the Board finds that the Office properly considered appellant's circumstances and imposed a repayment schedule of \$100.00 from her compensation every 28 days. The Office acted properly in determining that the overpayment would be recovered by deducting this amount from appellant's continuing compensation.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$6,423.17 which occurred for the period October 31, 2005 to August 31, 2006, for which she was at fault in creating. Also, the Office properly set the rate of recovery in the amount of \$100.00 from appellant's continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the February 8, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 15, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board