

**United States Department of Labor
Employees' Compensation Appeals Board**

M.B., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CITIZEN & IMMIGRATION SERVICES,
Brownsville, TX, Employer**

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**Docket No. 08-1471
Issued: November 25, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 25, 2008 appellant filed a timely appeal from the November 30, 2007 merit decision of the Office of Workers' Compensation Programs finding an overpayment in the amount of \$3,011.43, for which he was without fault. He also appealed from a February 25, 2008 nonmerit decision denying his request for a precoupment hearing and an October 17, 2007 wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that the digital imaging technician fairly and reasonably represented appellant's wage-earning capacity; (2) whether the Office properly determined that appellant received an overpayment in the amount of \$3,011.43 during the period June 14 through September 1, 2007; (3) whether the Office properly denied waiver of the recovery of the overpayment; (4) whether the Office properly directed recovery of the overpayment by deducting \$74.00 from continuing compensation payments; and (5) whether the Office properly denied appellant's request for a precoupment hearing as untimely filed.

FACTUAL HISTORY

On January 29, 2003 appellant, then a 33-year-old immigration inspector, sustained injury to his low back while chasing and wrestling a port runner to the ground. On March 6, 2003 the Office accepted appellant's claim for lumbar radiculitis. On June 18, 2003 appellant underwent surgery for a right L5-S1 partial hemilaminectomy and discectomy.

On November 23, 2004 the Office referred appellant to vocational rehabilitation. In a June 14, 2007 report, the vocational counselor noted that appellant returned to work as a digital imaging technician with D & B Research on June 14, 2007. Appellant's starting salary in this position was \$10.00 per hour or \$20,800.00 per year. In an August 17, 2007 report, the vocational counselor noted that appellant had been successfully employed for over 60 days and that therefore the file was being closed.

In a decision dated October 17, 2007, the Office found that appellant was employed as a digital imaging technician for D & B Research with actual wages of \$400.00 per week. Appellant's employment was effective June 14, 2007 and there was no evidence that his position was temporary and appellant had performed the job for over two months. The Office found that his actual earnings fairly and reasonably represented his wage-earning capacity. It determined that appellant's gross weekly pay rate on the date of injury was \$612.06 and the current pay rate for the job when injured was \$687.54. As appellant earned \$400.00 per week, he had a 58 percent of wage-earning capacity. He was paid compensation at a rate of 66 2/3 percent and his new compensation rate was equivalent to \$171.38 per week.

On October 17, 2007 the Office made a preliminary determination that appellant received an overpayment in the amount of \$3,011.43. The overpayment occurred because appellant received wage-loss compensation for total disability from June 14 through September 1, 2007 after returning to full-time employment with D & B Research. Appellant received compensation in the amount of \$5,191.43 whereas he should have been paid compensation in the amount of \$2,180.00,¹ which resulted in the overpayment of \$3,011.43. He was found without fault in the creation of the overpayment.² The Office advised appellant of his rights and the opportunity to request waiver of the recovery of the overpayment or a precoupment hearing. Appellant was asked to submit financial information or make any requests within 30 days of the date of the preliminary determination. No response was received.

By decision dated November 30, 2007, the Office finalized the overpayment in the amount of \$3,011.43. It noted that appellant had not submitted any information in response to

¹ The Office noted that, for the period June 14 through September 1, 2007, appellant received compensation in the amount of \$5,191.43 based on a weekly pay rate of \$612.06. It noted that for the same time period he earned actual wages of \$400.00 per week. Based on the wage-earning capacity calculations previously noted, the Office determined that appellant's compensation rate was \$171.38 per week when one considered his new employment. It then determined that appellant should have received \$2,180.00 for this time period. The Office determined that this difference yielded an overpayment of \$3,011.43.

² The Office stated, "[B]ecause of the [O]ffice's involvement in [appellant's] reemployment, his expectation of pay through loss of wage-earning capacity and our failure to timely delete the compensation payments, the claimant could not have been expected to know that the payments received were incorrect."

the preliminary determination. The Office directed recovery by deduction of \$74.00 from continuing compensation payment.

In a request received by the Office on December 6, 2007, appellant asked for a prerecoupment hearing and submitted arguments regarding the overpayment and financial information. Additional financial information was received by the Office on December 11, 2007.

By decision dated February 25, 2008, the Office denied appellant's request for a prerecoupment hearing. It determined that his request was untimely filed. The Office reviewed appellant's request under its discretionary authority and determined that the issue could equally well be addressed through reconsideration and the submission of evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of the Federal Employees' Compensation Act³ provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.⁴ Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.⁵ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁶ has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.⁷ The procedures provide for a retroactive determination where an employee has worked for at least 60 days, the employment fairly and reasonably represents the claimant's wage-earning capacity and work stoppage did not occur due to any change in the claimant's injury-related condition.

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for lumbar radiculitis and he underwent surgery for an L5-S1 partial hemilaminectomy and discectomy. After vocational rehabilitation, he returned to work full time as a digital imaging technician at D & B Research, earning a salary of \$400.00 a week. Appellant began his position on June 14, 2007. The Board notes that appellant has

³ 5 U.S.C. § 8115(a).

⁴ *Id.*; *Loni J. Cleveland*, 52 ECAB 171, 177 (2000).

⁵ *Lottie M. Williams*, 56 ECAB 302 (2005); *see Edward Joseph Hanlon*, 8 ECAB 599 (1956).

⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁷ 20 C.F.R. § 10.403(c).

performed in this job in excess of 60 days and received a salary for full-time work.⁸ There is no evidence that, the position was seasonal, temporary or make-shift work designed for appellant's particular needs.⁹ The record reflects that appellant earns \$400.00 per week. His gross weekly pay rate on the date of injury was \$612.06 and the current pay rate for the job and step when injured was \$687.54. The Office noted that appellant's new wage-earning capacity was 58 percent and his adjusted wage-earning capacity per week was \$354.99. This amounted to a loss in wage-earning capacity per week of \$257.07 or a 42 percent loss of wage-earning capacity. It noted that appellant received compensation at a statutory 2/3 rate, which yielded a new compensation rate of \$171.38 per week, which was when increased by applicable cost-of-living adjustments to total \$190.75 per week. The Board finds that the Office properly determined appellant's loss of wage-earning capacity under the *Shadrick* formula.¹⁰

There is no evidence that appellant's actual earnings as a digital imaging technician do not properly represent his wage-earning capacity. The Office properly accepted these earnings as the best measure of his wage-earning capacity. Therefore, it properly reduced appellant's earnings effective June 14, 2007 the day he returned to work.

LEGAL PRECEDENT -- ISSUE 2

The 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.¹¹ When an overpayment has been made to an individual 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.¹²

A claimant is not entitled to receive total disability compensation and actual earnings for the same period. Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.¹³

ANALYSIS -- ISSUE 2

The Office properly found that it received an overpayment of compensation. Appellant began employment as a digital imaging technician on June 14, 2007 with wages of \$400.00 per

⁸ Office procedures provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position more than 60 days. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

⁹ See *Elbert Hicks*, 49 ECAB 283 (1998).

¹⁰ *Supra* note 6.

¹¹ 5 U.S.C. § 8102(a).

¹² *Id.* at § 8129(a).

¹³ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Claims, *Debt Management, Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

week but continued to receive wage-loss compensation for total disability from June 14 through September 1, 2007. He received compensation in the amount of \$5,191.43. However, based on the wage-earning capacity determination, appellant was only entitled to receive \$2,180.00 for this period. The difference between these amounts resulted in an overpayment of \$3,011.43. The Office properly determined the fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of the 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.¹⁴

Office regulations, at 20 C.F.R. § 10.438, provide:

“(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. 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.”¹⁵

ANALYSIS -- ISSUE 3

Although appellant was found without fault in creating the \$3,011.43 overpayment, he bears responsibility for providing the financial information necessary to support a request for waiver. The Office requested that he provide financial information and submit any request for waiver within 30 days of the preliminary overpayment determination. Appellant did not respond within the 30-day time period. The Office noted that his failure to submit the requested information would result in the denial of waiver. Appellant failed to respond within 30 days, as requested by the Office, under the implementing federal regulations, the Board finds that the Office properly denied waiver of the overpayment pursuant to 20 C.F.R. § 10.438(b).¹⁶

¹⁴ 5 U.S.C. § 8129.

¹⁵ 20 C.F.R. § 10.438.

¹⁶ *Id.* at § 10.438(b) provides that failure to submit requested information within 30 days shall result in the denial of waiver of an overpayment. See *Madelyn Y. Grant* ECAB 533 (2006).

LEGAL PRECEDENT -- ISSUE 4

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. Section 10.441(a) of the regulations provides:

“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 the 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 hardship.”¹⁷

ANALYSIS -- ISSUE 4

The record reflects that appellant continues to receive wage-loss compensation under the Act. As noted, he failed to timely complete the financial documents. When an individual fails to provide the financial information, the Office should follow minimum collection guidelines designed to collect the debt promptly and in full.¹⁸ On appeal, appellant contends that he submitted the requested information. However, it was not received by the Office in the time requested. The Board finds that the Office did not abuse its discretion in following its regulations and directing that \$74.00 be recovered from continuing compensation payments until the debt is repaid.

LEGAL PRECEDENT -- ISSUE 5

Section 10.432 of the Office's regulations provides that in response to a preliminary notice of an overpayment, a claimant may request a prerecoupment hearing within 30 days of the written notice of overpayment.¹⁹ Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.²⁰

ANALYSIS -- ISSUE 5

The Office issued a preliminary finding of overpayment on October 17, 2007 and informed appellant that any request for prerecoupment hearing must be filed within 30 days. Appellant requested a prerecoupment hearing on December 6, 2007. As he did not request the

¹⁷ 20 C.F.R. § 10.441(a).

¹⁸ *Ralph P. Beachum, Sr.*, 55 ECAB 442, 448 (2004); *Frederick Arters*, 53 ECA 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- Claims, *Debt Management, Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (September 1994).

¹⁹ 20 C.F.R. § 10.432; *see Willie C. Howard*, 55 ECAB 564 (2004).

²⁰ *Id.*

prerecoupment hearing within 30 days of the required 30-day time period, the Board finds that he waived his right to this hearing.

CONCLUSION

The Board finds that the Office properly determined appellant's wage-earning capacity. The Office properly determined that appellant received an overpayment in the amount of \$3,011.43 and directed recovery by deducting \$74.00 from continuing compensation payments. The Board also finds that the Office properly denied appellant's request for a prerecoupment hearing as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 25, 2008 and November 30 and October 17, 2007 are affirmed.

Issued: November 25, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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