

<sup>1</sup> 20 C.F.R. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board. In a November 9, 2009 decision,<sup>2</sup> the Board reversed a January 12, 2009 determination by OWCP that appellant received a \$4,202.12 overpayment of compensation and that she was at fault in creating the overpayment.<sup>3</sup> The Board found that, while it appeared that appellant might have received some degree of overpayment of compensation beginning in August 2008, OWCP did not present adequate facts and findings to identify the precise cause and extent of any overpayment. The record did not contain any clear determination regarding appellant's entitlement to compensation on or after August 11, 2008. OWCP had not adjudicated the issue of wage-earning capacity in light of appellant's nonfederal employment or analyzed her eligibility for wage-loss compensation under such a wage-earning capacity determination.<sup>4</sup> The Board found that OWCP did not adequately explain its determination that appellant was not entitled to any compensation for the period August 11 to November 22, 2002 and therefore she could not fully understand the consequences of its determination in this regard. The Board remanded the case to OWCP for further development including consideration of appellant's actual wages in the private sector to determine whether they fairly and reasonably reflected her wage-earning capacity.

On remand, OWCP requested additional information from appellant and the Bienville Parish School District regarding her earnings after she started working as a schoolteacher on August 11, 2008. Appellant submitted a pay stub indicating that on August 25, 2008 she received a check for \$1,547.20 in gross earnings from the Bienville Parish School District. She indicated that this represented her earnings for the month of August 2008.<sup>5</sup>

In a July 28, 2010 decision, OWCP concluded, "Based on the evidence of record, a correct determination of wage-earning capacity and the correct amount of overpayment for the overpayment period August 11 [to] November 22, 2008 cannot be made. The decision dated January 12, 2009 remains in place." OWCP indicated that appellant only provided a pay stub for August 2008 but noted that Chapter 2.814.7(d)(4) of its procedure manual dictated that appellant's earnings for the "entire period" should be averaged.

In a December 12, 2010 decision, an OWCP hearing representative reversed OWCP's July 28, 2010 decision and remanded the case to OWCP for further determination of the overpayment issues, including a proper determination of appellant's wage-earning capacity in the

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<sup>2</sup> Docket No. 09-964 (issued November 9, 2009).

<sup>3</sup> The record reflects that appellant started working as a schoolteacher in the private sector on August 11, 2008 but received wage-loss compensation for disability from that date through November 22, 2008. OWCP calculated that she received \$4,202.12 in compensation for the period August 11 to November 22, 2008 and declared that amount as an overpayment of compensation.

<sup>4</sup> The Board indicated that OWCP also did not issue a decision finding that the medical evidence established that appellant had no disabling residuals of her accepted March 13, 2008 employment injury on or after August 11, 2008 such that she would not be entitled to compensation after that point.

<sup>5</sup> The Bienville Parish School District did not provide the requested information indicating that appellant had called and asserted her legal right to prevent it from releasing the information.

teaching position she began on August 11, 2008. The hearing representative found that OWCP had referenced a provision of OWCP's procedure manual that was not relevant to the present case. She found that OWCP should apply Chapter 2.814.7(c)(2) of its procedure manual concerning application of the *Shadrick* formula.<sup>6</sup>

OWCP obtained information from the employing establishment regarding appellant's job classification on the date of injury, the pay rate for that position on the date of injury and the present pay rate for that position. Appellant submitted additional information regarding her pay as a schoolteacher, indicating that she received she received \$1,547.20 in gross earnings for August 2008, \$1,547.20 for September 2008, \$3,094.41 for October 2008 and \$3,094.41 for November 2008. OWCP performed a calculation of the *Shadrick* formula using these figures.<sup>7</sup>

In a January 28, 2011 letter, OWCP advised appellant that it had made a preliminary determination that she had received a \$2,933.12 overpayment of compensation for the period August 11 to November 22, 2008. It also made a preliminary determination that she was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment. Regarding the calculation of the overpayment, OWCP stated:

"You were previously paid \$1,131.34 on the periodic payment roll for the periods August 3 to 30, [20]08; August 31 to September 27, [20]08; September 28 to October 25, [20]08; and October 26 to November 22, [20]08. The overpayment was calculated by taking the net amount of your compensation payment of \$1,131.34, dividing by 28, which is the number of days in the periodic roll cycle ( $\$1,131.34/28 = \$40.405$  daily). \$40.405 was then multiplied by the number of days you were working and were paid for on the periodic roll (August 11 to November 22, [20]08 = 31 days).

"Your overpayment for 104 days is \$4,202.12 ( $\$40.405 \times 104 = \$4,202.12$ ).

"However, you were entitled to receive \$1,269.00 after returning to work in the private sector as a schoolteacher for the period August 11 to November 22, [20]08, thus reducing your overpayment from \$4,202.12 to \$2,933.12.

" $\$4,202.12 - \$1,269.00 = \$2,933.12$  actual overpayment owed."

In a March 2, 2011 decision, OWCP determined that appellant received a \$2,933.12 overpayment of compensation and that she was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment. It stated that the overpayment occurred because she "began employment as a schoolteacher in the private sector on August 11, 2008 and continued to receive compensation on the periodic payment rolls through November 22, 2008."

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<sup>6</sup> The *Shadrick* formula is derived from the case *Albert Shadrick*, 5 ECAB 376 (1953) and is used to calculate a claimant's wage-earning capacity.

<sup>7</sup> In addition to a January 20, 2011 document recording this *Shadrick* calculation, the record contains an undated OWCP document indicating, "The claimant was entitled to \$1,269.00 in compensation after returning to work in the private sector as a schoolteacher on August 11, 2010." No explanation was provided for this statement.

### **LEGAL PRECEDENT**

Section 8102(a) of FECA<sup>8</sup> 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.<sup>9</sup> Section 8129(a) of FECA provides, in pertinent part, “When an overpayment has been made to an individual under this subchapter 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 an individual is entitled.”<sup>10</sup> Section 8116(a) of FECA provides that while an employee is receiving compensation or if she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.<sup>11</sup>

In determining whether a claimant has discharged his burden of proof and is entitled to compensation benefits, OWCP is required by statute and regulation to make findings of fact.<sup>12</sup> OWCP procedure further specifies that a final decision of OWCP must include findings of fact and provide clear reasoning which allows the claimant to “understand the precise defect of the claim and the kind of evidence which would tend to overcome it.”<sup>13</sup> These requirements are supported by Board precedent.<sup>14</sup>

### **ANALYSIS**

In a November 9, 2009 decision, the Board reversed a determination by OWCP that appellant received a \$4,202.12 overpayment of compensation and that she was at fault in creating the overpayment, thereby precluding waiver of the overpayment. The Board noted that OWCP had not adjudicated the issue of wage-earning capacity in light of her employment in the private sector or analyzed her eligibility for wage-loss compensation under such a wage-earning capacity determination. Therefore, OWCP could not indicate what effect such a wage-loss capacity determination might have on the calculation of the overpayment. The Board found that OWCP did not adequately support its finding of a \$4,202.12 overpayment and it remanded the case to OWCP for further development including consideration of appellant’s actual wages in the nonfederal sector to determine whether they fairly and reasonably reflected her wage-earning capacity.

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<sup>8</sup> 5 U.S.C. §§ 8101-8193.

<sup>9</sup> *Id.* at § 8102(a).

<sup>10</sup> *Id.* at § 8129(a).

<sup>11</sup> *Id.* at § 8116(a).

<sup>12</sup> 5 U.S.C. § 8124(a) provides that OWCP “shall determine and make a finding of facts and make an award for or against payment of compensation.” 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP “shall contain findings of fact and a statement of reasons.”

<sup>13</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (July 1997).

<sup>14</sup> See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

On remand, OWCP further developed the evidence and issued a January 28, 2011 letter containing a preliminary determination that appellant received a \$2,933.12 overpayment for the period August 11 to November 22, 2008 and a March 2, 2011 decision finalizing this preliminary determination.

The Board finds that OWCP did not present adequate facts and findings to support its determination that appellant received a \$2,933.12 overpayment. It does not appear that OWCP carried out a wage-earning capacity evaluation which considered her actual wages (in a private teaching position starting August 11, 2008) as previously directed to do by the Board. In its January 28, 2011 preliminary determination, OWCP calculated that appellant received \$4,202.12 in compensation for the period August 11 to November 22, 2008 and indicated that subtracting \$1,269.00 from this amount yielded the overpayment of \$2,933.12. It did not provide any explanation of how it derived the \$1,269.00 figure.<sup>15</sup> OWCP did not make any reference to precedent regarding the determination of wage-earning capacity based on actual wages or otherwise indicate that it performed a wage-earning capacity determination in its January 28, 2011 preliminary determination or March 2, 2011 decision.

The Board finds that OWCP still has not adjudicated the issue of wage-earning capacity in light of appellant's employment in the private sector or analyzed her eligibility for wage-loss compensation under such a wage-earning capacity determination. Therefore, OWCP has not indicated what effect such a wage-loss capacity determination might have on the calculation of the overpayment. In the absence of such a wage-loss capacity determination, it has not adequately explained how it calculated the \$2,933.12 overpayment and therefore appellant could not fully understand the consequences of its determination in this regard. OWCP did not adequately support its finding of the \$2,933.12 overpayment of compensation and the case is remanded to OWCP for further development including consideration of her actual wages in the private sector to determine whether they fairly and reasonably reflected her wage-earning capacity.<sup>16</sup>

### **CONCLUSION**

The Board finds that OWCP did not properly find that appellant received a \$2,933.12 overpayment of compensation.

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<sup>15</sup> OWCP obtained additional information from the employing establishment and appellant and performed a *Shadrick* formula calculation. See *supra* note 6. However, this does not provide further clarification of how OWCP calculated the \$2,933.12 overpayment and OWCP did not mention the *Shadrick* formula calculation in its January 28, 2011 letter or March 2, 2011 decision. The record contains an undated OWCP document indicating, "The claimant was entitled to \$1,269.00 in compensation after returning to work in the private sector as a schoolteacher on August 11, 2010." No explanation was provided for this finding.

<sup>16</sup> Given the Board's finding regarding the first issue of this case, it is not necessary for it to consider the second issue concerning fault and waiver.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 2, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 9, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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