

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SIDNEY STOKES and DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD, Long Beach, Calif.

*Docket No. 96-532; Submitted on the Record;
Issued December 4, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's wage-loss compensation effective July 21, 1994 based on the selected position of full-time tax preparer; (2) whether the Office properly determined that an overpayment of compensation in the amount of \$19,629.78 was created in appellant's case for the period August 26, 1983 to April 2, 1994, as appellant worked while receiving total disability compensation from January 1, 1993 to April 2, 1994, and that an improper pay rate was used to calculate his compensation from August 2, 1983 to April 2, 1994; and (3) whether the Office abused its discretion by denying waiver of the overpayment, requiring repayment of the overpayment at the rate of \$93.00 every four weeks.

The Office accepted that on May 13, 1983, appellant, then a 36-year-old shipfitter, fell from a scaffold and sustained a cervical and lumbar strain, fractures of the 9th and 10th ribs, and a temporary aggravation of a preexisting hysterical personality disorder. He received compensation on the daily rolls beginning in August 1983, and on the periodic rolls effective February 23, 1984.¹ Appellant returned to a light-duty job as a sheet metal mechanic on March 12, 1984, and sustained a recurrence of disability on March 16, 1984. He did not return

¹ There is evidence of file indicating that the Office failed to deduct health insurance premiums from appellant's compensation checks. On February 10, 1984, a periodic roll checklist indicated appellant was enrolled in the health benefits and optional insurance plans. but a payment worksheet stated that appellant was not enrolled in a health benefits program. Yet, explanation of benefits forms dated January 15 to 18, 1990 indicate that appellant received health insurance under the employing establishment's health plan. In a May 18, 1993 letter, the Office advised appellant that it had "been unable to obtain any forms showing that [he] [was] enrolled in the Health Benefits Program at the time of [his] injury on May 13, 1983. Health Benefits deductions have never been made, and [the Office] [was] still unable to enroll [appellant] in this program." At the February 2, 1995 hearing, appellant brought this matter to the attention of the Office hearing representative, who found the "possibility of an underdeduction and definitely an overpayment." However, there is no final decision of record regarding the underdeduction issue. Therefore, the Board does not have jurisdiction on the issue of whether an overpayment of compensation was created due to an underdeduction of health benefits premiums from appellant's compensation payments.

to work at the employing establishment, and received total temporary disability compensation beginning March 16, 1984. Following vocational rehabilitation, appellant earned an associate's degree in accounting in 1989.

In a December 12, 1991 report, Dr. Douglas Smith, an orthopedic surgeon providing consultation to the Office, found appellant permanent and stationary regarding the accepted injuries.² He opined that appellant could sit and walk for 8 hours per day, with lifting limited to 20 pounds.³

Vocational rehabilitation reports dated May 28, 1992 and February 26, 1993 note that appellant set up a home-based tax preparation business.⁴ In an affidavit of earnings and employment dated August 10, 1993, appellant reported earning \$6,000.00 during the previous 15 months as a self-employed tax preparer. His 1993 federal income tax return showed a net profit of \$6,128.00.

In a November 1, 1993 letter, appellant noted earning \$4.50 per hour, but would have to pay an employee \$15.00 per hour to do the same work. He worked an average of 32 hours per week 12 months a year. Appellant noted that the position was sedentary, requiring sitting, walking, filing and photocopying.⁵ In an April 21, 1994 letter, appellant stated that he worked an average of 65 hours per week from January to April 1994, earning \$5.00 per hour doing "tax preparation and bookkeeping."

In a June 15, 1994 report, a vocational rehabilitation specialist stated that the position of full-time tax preparer was performed in sufficient numbers in appellant's commuting area to be considered reasonably available, with an average hourly salary of \$10.00. The specialist attached a copy of the position description for tax preparer DOT (U.S. Department of Labor, *Dictionary of Occupational Titles*) #219.362.070. The specialist noted that the physical requirements of the position were within the restrictions noted by Dr. Smith in his December 12, 1991 report.

² In a January 26, 1987 report, Dr. William B. Simpson, an Board-certified orthopedic surgeon, opined that appellant was permanent and stationary regarding his back and neck injuries as of an April 4, 1985 examination.

³ It appears from the record that this is the most recent medical report of record.

⁴ Appellant's 1991 federal income tax return indicated a net business loss of \$3,663.00. Appellant's 1992 federal income tax return indicated a net business loss of \$3,943.00

⁵ Vocational rehabilitation reports from August 1993 to February 16, 1994 note appellant's full-time self-employment as a tax preparer.

In file memoranda dated June 15 and 17, 1994, the Office noted its intention to use appellant's average actual earnings of \$134.28 per week for the period January 1, 1993 to April 2, 1994 in determining his loss of wage-earning capacity.⁶

By notice dated June 17, 1994, the Office advised appellant that it proposed to reduce his compensation on the grounds that the evidence demonstrated that he could perform the position of full-time tax preparer,⁷ as he had been self-employed as a tax preparer with wages of \$134.28 per week as of January 1, 1993.⁸ The Office found that the tax preparer position was within Dr. Smith's December 12, 1991 medical restrictions, and that appellant had appropriate schooling for the position.⁹

By decision dated July 21, 1994, the Office found that the position of tax preparer fairly and reasonably represented appellant's wage-earning capacity, and reduced appellant's compensation benefits effective that day based on his actual earnings as a tax preparer.¹⁰

Appellant disagreed with this decision, and requested a hearing before a representative of the Office's Branch of Hearings and Review held on February 2, 1995. At the hearing appellant testified that his business as a self-employed tax preparer tripled from 1990 to 1994. He performed 80 percent of his work from January 13th to April 15th each year, but kept his business open year-round to attract customers.

By decision dated and finalized April 4, 1995, the Office hearing representative found that the position of tax preparer was within appellant's medical restrictions, and fairly and reasonably represented his wage-earning capacity. However, the hearing representative directed that appellant's wage-earning capacity for the period January 1, 1993 to April 2, 1994 be recalculated based on appellant's actual earnings, as it was unclear from the record as to whether

⁶ The Office chose April 2, 1994 as the end date as this was the "last date that [appellant] received compensation before delet[ion] due to the separation incentive pay." Effective January 3, 1994, appellant accepted a \$25,000.00 lump sum "pay incentive for voluntary resignation." In an April 15, 1994 letter, the Office advised appellant that to avoid an overpayment of compensation as he accepted the \$25,000.00 while receiving compensation, his compensation would be terminated effective April 3, 1994 and reinstated effective December 25, 1994.

⁷ The Office noted that as appellant reported working 65 hours per week from January to April 1994, a constructed wage-earning capacity "based on a full-time tax preparer" was more appropriate than a decision based on actual earnings, considering that he was earning "only half of the average hourly earnings as that of a similar tax preparer in his area." However, there is no indication of record that the Office based its loss of wage-earning capacity determination on a constructed position. The Office appears to have used appellant's actual earnings.

⁸ Appellant was advised that he had 30 days in which to submit additional evidence or argument establishing that he could not perform the tax preparer position. The record indicates that appellant did not submit additional evidence prior to issuance of the Office's July 21, 1994 decision.

⁹ The Office noted that as appellant was not then receiving wage-loss compensation, if his compensation were reduced, it would change the date that he would again be eligible for compensation.

¹⁰ The Office noted that appellant would again receive compensation from the Office effective December 25, 1994, at the new rate of \$901.00 every four weeks.

the Office used a constructed pay rate instead of appellant's actual earnings, and applied the constructed pay rate retroactively to January 1, 1993.¹¹

By decision dated and finalized June 26, 1995, the Office, on its own motion, vacated the portion of its April 4, 1995 decision regarding the alleged retroactiveness of the wage-earning capacity determination. The Office explained that although a nondispositive July 15, 1994 file memorandum mentioned the possibility of using a constructed position, the wage-earning capacity determination was based on appellant's actual earnings from January 1, 1993 to April 2, 1994, and not on a constructed position. The Office therefore found the determination of wage-earning capacity was not retroactive or otherwise erroneous.

By notice dated September 29, 1995, the Office advised appellant that an overpayment of \$19,629.78 had occurred in his case due to two Office errors. First, the Office used an incorrect date of injury pay rate of \$538.40 in calculating appellant's compensation from August 26, 1983 to April 2, 1994, whereas the correct pay rate was \$510.40. The record indicates that this resulted in an overpayment of compensation of \$11,142.61.¹² Second, appellant received total disability compensation from January 1, 1993 to April 2, 1994 while employed, earning an average of \$134.28 per week, resulting in an overpayment of compensation in the amount of \$8,487.17. The Office noted the corrected entitlement for the period August 26, 1983 to April 2, 1994 was \$233,632.11, but appellant was paid \$253,261.89, a difference of \$19,629.78, a total of the \$11,142.61 and \$8,487.17 overpayments of compensation. The Office found appellant without fault in creating the overpayment as he reported his earnings, and had no knowledge of the Office's error in calculating his pay rate.

On October 18, 1995 appellant submitted an overpayment recovery questionnaire, contending that recovery of the overpayment would cause undue hardship. He provided additional information in a November 1, 1995 teleconference. He indicated that his tax preparation business was not prospering, and that his wife would be laid off as of January 1, 1996.¹³ Appellant reported monthly income of \$3,516.08 as follows: \$1,002.08 in periodic roll compensation payments; \$480.00 in veteran's benefits; \$168.00 in self-employment income as a tax preparer from January 1 to September 30, 1995; spousal income of \$1,866.00. He listed total

¹¹ The hearing representative noted that the Office appeared to have recalculated and reduced appellant's compensation benefits effective January 1, 1993, thereby making the decision retroactive, in violation of Office procedures. He found that although the June 15 and 17, 1994 file memoranda indicated that the Office used appellant's actual earnings of \$134.28 per week, the Office used the constructed position earnings of \$400.00 per week effective January 1, 1993. He concluded that the Office could not find an overpayment based on wage-earning capacity for the period January 1, 1993 to July 21, 1994, and should recalculate appellant's wage-earning capacity based upon the pay rate in effect on July 21, 1994.

¹² A July 6, 1994 worksheet indicates that the overpayment amount for the period August 26, 1983 to April 2, 1994 due to compensation being based on an incorrect pay rate was \$12,508.38. The record indicates that the Office adjusted this amount to \$11,142.61.

¹³ Appellant submitted supporting documentation, including an October 3, 1995 notice to his wife that she was about to be laid off, and a list of monthly bills. He noted the following monthly expenses: food \$500.00; mortgage and home insurance \$1,301.00; clothing \$133.00; home maintenance \$57.00; utilities and basic telephone \$293.00; automobile expenses of approximately \$900.00; life insurance \$105.00; credit card debt of \$228.00 per month.

monthly expenses of \$3,892.98. Appellant had includable assets of \$10,000.00 in stocks and \$34.00 in a checking account. He requested waiver of interest charges.

By decision dated November 17, 1995, the Office found an overpayment of \$19,629.78, as appellant was overpaid \$8,417.17 for the period January 1, 1993 to April 2, 1994 as he received compensation for temporary total disability while employed, and was overpaid \$11,142.61 as he was paid compensation based on an incorrect pay rate for the period August 26, 1983 to April 2, 1994. The Office found that the overpayment was not subject to waiver as appellant and his spouse had assets in excess of the allowable resource base of \$5,000.00 and there was no indication of detrimental reliance. The Office directed recovery by withholding \$93.00 from appellant's continuing periodic roll payments effective December 9, 1995 until approximately March 1, 2011, and granted waiver of all interest charges.¹⁴

Regarding the first issue, the Board finds that the Office properly determined that the position of tax preparer fairly and reasonably represents appellant's wage-earning capacity.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.¹⁵ In this case, the Office reduced appellant's wage-loss compensation effective July 21, 1994 on the grounds that appellant was no longer totally disabled for work, and was capable of earning wages as a full-time income tax preparer.

The Board finds that the position of full-time tax preparer was suitable work. Dr. Smith, an orthopedic surgeon, found appellant permanent and stationary regarding the accepted injuries and capable of full-time sedentary work as of December 12, 1991. Thus, the position was within appellant's medical restrictions. The position was also suitable for appellant's training and employment experience, as he earned an associate's degree in accounting in 1989, and worked as a self-employed tax preparer beginning in 1990.

Once the determination of suitability has been made, it must then be ascertained if the Office followed proper procedures in reducing appellant's wage-loss compensation benefits to reflect partial disability as opposed to total disability. Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, an employee's wage-earning capacity "is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity." The Board has held, that actual wages earned generally must be accepted as fairly and reasonably representing the injured employee's wage-

¹⁴ An attached worksheet notes that interest charges were waived as the "period necessary to repay the debt with charges is 399.16 months, which is more than the [appellant's] life expectancy of 350.40 months ..."

¹⁵ *Carla Letcher*, 46 ECAB 452 (1995).

earning capacity.¹⁶ Finally, application of the principles set forth in *Albert C. Shadrick*¹⁷ will result in the percentage of the employee's loss of wage-earning capacity.

The Board finds that the Office met its burden of proof in this case in reducing appellant's wage-loss compensation, and properly applied the *Shadrick* principles in determining the percentage of loss of wage-earning capacity, based on appellant's actual earnings as a tax preparer over a period greater than one year. In determining appellant's wage-earning capacity, the Office used appellant's average actual earnings of \$134.28 per week for the period January 1, 1993 to April 2, 1994 in the position of tax preparer. The Board finds that the Office's numeric and financial calculations were correct in determining the amount of appellant's compensation payments.

Thus, the Office properly found that appellant was no longer totally disabled as a result of his accepted May 13, 1983 injury and it followed established procedures for determining appellant's employment-related loss of wage-earning capacity. The Board therefore finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

Regarding the second issue, the Board finds that the Office properly determined that an overpayment of compensation in the amount of \$19,629.78 was created in appellant's case for the period August 26, 1983 to April 2, 1994, as appellant worked while receiving compensation for temporary total disability from January 1, 1993 to April 2, 1994, and that an improper pay rate was used to calculate his compensation from August 2, 1983 to April 2, 1994.

The Board finds that the Office's calculations of the period and amount of the overpayment are correct. Appellant does not contest the fact or amount of the overpayment, but asserts that the overpayment should be waived as he is not with fault in its creation and has financial hardship.

Regarding the third issue, the Board finds that the Office properly found that appellant was without fault in the creation of the overpayment and did not abuse its discretion by denying waiver of the overpayment.

Section 8129 of the Act¹⁸ provides that an overpayment of compensation 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 this subchapter [Act] or would be against equity and good conscience."¹⁹ (Emphasis added.) Thus, the fact that appellant is without fault in creating the overpayment of compensation does not, under the Act, automatically preclude the Office from recovering all or part of the overpayment. The Office must exercise its

¹⁶ *Hubert F. Myatt*, 32 ECAB 1994 (1981).

¹⁷ 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

¹⁸ 5 U.S.C. §§ 8101-8193.

¹⁹ 5 U.S.C. § 8129(b).

discretion to determine whether waiver is warranted under either the “defeat the purpose of the [Act]” or

the “against equity and good conscience”²⁰ standards pursuant to the guidelines set forth in sections 10.322 and 10.323 Office’s of the regulations respectively.²¹

Section 10.322(a) of the regulations provides in relevant part, that recovery will defeat the purpose of the Act if the overpaid individual needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses” and his or her assets “do not exceed the resource base of ... \$5,000.00 for an individual with a spouse or one dependent, plus \$600.00 for each additional dependent.”²² For waiver under this standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses *and* that his assets do not exceed the resource base.²³

In this case, appellant had includable assets of \$10,000.00 in stocks and \$34.00 in a checking account, in excess of the allowable resource base of \$5,000.00. Thus, in the November 17, 1995 decision, the Office found the \$19,629.78 overpayment was not subject to waiver as appellant and his spouse had assets in excess of the allowable resource base of \$5,000.00 and there was no indication of detrimental reliance. Therefore, the Office did not abuse its discretion in denying waiver of the overpayment.

With regard to the amount withheld from appellant’s continuing compensation payments to recover the amount of the overpayment, 20 C.F.R. § 10.321(a) provides that any future compensation payments to which an overpaid individual is entitled will be decreased with “due regard to 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 resulting hardship upon such individual.”²⁴ In establishing the initial collection strategy, the Office must weigh the individual’s income, ordinary and necessary expenses, and assets in a manner similar to the issues considered in waiver. The Office did weigh the information appellant provided regarding his income, expenses, and assets, and determined that it was fair and reasonable to withhold \$93.00 from appellant’s continuing compensation payments, as this would leave him with sufficient resources to pay his ordinary and necessary living expenses. As the Office gave due regard to the factors cited in section 10. 321(a), the Board finds that the Office did not abuse its discretion in determining the rate of recovery.

²⁰ The evidence in this case does not establish that appellant relinquished a valuable right or changed his position for the worse in reliance on the payment of compensation. To show detrimental reliance under section 10.323(b), appellant must show that he made a decision he otherwise would not have made in reliance on the overpaid compensation and that this decision resulted in a loss. *Forrest E. Brown, II*, 44 ECAB 278 at 285-86 (1992). Appellant did not allege any substantial reliance on the overpayment of compensation in this case, nor was detrimental reliance shown.

²¹ *Ella M. Moore*, 41 ECAB 1012, 1014-15 (1990). 20 C.F.R. §§ 10.322-23.

²² 20 C.F.R. § 10.322(a).

²³ *Forrest E. Brown, II*, *supra* note 20.

²⁴ 20 C.F.R. § 10.321(a).

The decisions of the Office of Workers' Compensation Programs dated November 17 and June 26, 1995 are hereby affirmed.

Dated, Washington, D.C.
December 4, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member