

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SALVADOR NIEVES, U.S. POSTAL SERVICE,
HAYWARD POST OFFICE, Hayward, CA

*Docket No. 98-1306; Submitted on the Record;
Issued October 26, 2000*

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 determined that appellant's actual earnings in the part-time position of modified city carrier fairly and reasonably represented appellant's wage-earning capacity; (2) whether the Office properly determined that appellant received an overpayment in the amount of \$23,040.68 for the period June 3, 1994 through April 27, 1996 because appellant received temporary total disability compensation during this period when he should have received compensation for loss of wage-earning capacity; (3) whether the Office properly found that appellant was with fault in the creation of the overpayment in the amount of \$23,040.68; and (4) whether the Office properly required appellant to repay the overpayment in the amount of \$7,438.22 immediately and \$150.00 per month thereafter.

On September 23, 1985 appellant, then a 46-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 21, 1985 he sustained a twisted left foot injury, while in the performance of duty.

The Office accepted appellant's claim for an acute left foot sprain. Subsequently, the Office expanded the acceptance of appellant's claim to include a lumbar strain.

Appellant returned to part-time work at the employing establishment in the position of modified city carrier for four hours per day in October 1990.¹

By decision dated October 1, 1996, the Office reduced appellant's compensation effective October 1, 1990 based on its determination that appellant's actual earnings in the

¹ Although appellant worked four hours per day in October 1990, he submitted intermittent claims for temporary total disability. On September 19, 1993 appellant was placed on the periodic roll and received temporary total disability compensation while he continued to work four hours per day. Appellant stopped work for the employing establishment on July 1, 1996 when he moved out of the commuting area.

position of modified-duty clerk fairly and reasonably represented appellant's wage-earning capacity pursuant to 5 U.S.C. § 8115.

In a letter of the same date, the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of \$14,447.27, during the period September 19, 1993 through April 27, 1996 because appellant received temporary total disability compensation during this period when he should have received compensation for loss of wage-earning capacity. The Office advised appellant that he was at fault in the creation of the overpayment because he accepted payments that he had good reason to know were incorrect. In addition, the Office advised appellant that he could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment, if he believed that the overpayment occurred through no fault of his own and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

In an October 11, 1996 letter, received by the Office on October 16, 1996, appellant requested an oral hearing before an Office representative regarding the Office's preliminary overpayment determination. By letter of the same date, which was received by the Office on November 7, 1996, appellant requested reconsideration of the Office's wage-earning capacity determination.

In an October 24, 1996 letter, the Office advised appellant that the original overpayment amount of \$14,447.27 was incorrect and that the actual overpayment was now \$33,967.84. The Office also advised appellant that the period for the overpayment had been changed. The Office stated that it only calculated the amount previously paid from June 26, 1994 through April 27, 1996 rather than from September 13, 1993 through April 27, 1996. The Office advised appellant that during a period of time covered by a schedule award he can have earnings or receive benefits from the Office of Personnel Management.² Therefore, the Office stated that the overpayment ran from June 3, 1994 the day after the expiration of the schedule award until April 27, 1996 and that the amount of the overpayment was \$23,040.68 during this period. The Office noted that the reason for the overpayment remained the same as provided in its October 1, 1996 letter. The Office further noted that compensation for temporary total disability and/or a loss of wage-earning capacity cannot be paid concurrently with a schedule award.³ The Office, therefore, concluded that it could not apply the schedule award in the amount of \$18,243.09 to

² By decision dated November 28, 1986, the Office granted appellant a schedule award for a 13 percent permanent impairment of the left lower extremity for the period October 9, 1986 through June 28, 1987. On May 2, 1990 appellant filed a claim for an additional schedule award. By decision dated October 24, 1996, the Office granted appellant a schedule award for an additional 13 percent, thus, totaling a 26 percent impairment of the left lower extremity for the period September 13, 1993 through June 2, 1994. The total amount of the schedule award was \$18,243.09.

³ The Board has consistently held that compensation under a schedule award and compensation for a loss of wage-earning capacity cannot be paid for the same period of time. *Benjamin Swain*, 39 ECAB 448 (1988); *Andrew B. Poe*, 27 ECAB 510 (1976); *Stanley F. Stuczynski*, 12 ECAB 159 (1960).

the total overpayment because that would effectively be compensation for both the schedule award and the loss in wage-earning capacity for the period September 13, 1993 to June 2, 1994. The Office then determined that this award converted the payments appellant previously received during this period of time to schedule award payments, thus, reducing the time period covered by the overpayment of his benefits. The Office also advised appellant that it had received his previous request for reconsideration and a request from the Branch of Hearings and Review for his file. The Office also advised appellant that the hearing request took precedence over the reconsideration request even if it was limited to the overpayment issue. The Office then advised appellant that, following the hearing, he could resubmit his request for reconsideration if he wished to do so.

By decision dated August 20, 1997, the hearing representative finalized its preliminary overpayment determination and finding of fault. The Office found that appellant was capable of repaying \$7,438.22 at that time and repaying the balance of \$15,602.46 in monthly payments of \$150.00.

In a September 12, 1997 letter, appellant again requested reconsideration of the Office's wage-earning capacity determination.

By decision dated January 30, 1998, the Office denied appellant's request for modification of its wage-earning capacity determination based on a merit review of the claim. In its decision, the Office modified its October 1, 1996 decision to reflect that appellant was employed as a modified city carrier rather than a modified-duty clerk. The Office, however, found that its wage-earning capacity determination was properly based on the pay rate of a city carrier.

The Board has duly reviewed the case record in this appeal and finds that the Office properly determined that appellant's actual earnings in the part-time position of modified city carrier fairly and reasonably represented his wage-earning capacity.

When an individual sustains an employment-related injury, that prevents return to the employment held at the time of injury, but that does not render the employee totally disabled for all gainful employment, the employee is considered partially disabled and is entitled to compensation for his loss of wage-earning capacity as provided for under section 8115 of the Federal Employees' Compensation Act.⁴

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.⁵ Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁶

⁴ 5 U.S.C. § 8115.

⁵ 5 U.S.C. § 8115(a).

⁶ *Dennis E. Maddy*, 47 ECAB 259 (1995).

In this case, the record establishes that appellant returned to work at the employing establishment in October 1990 in the part-time position of modified city carrier. Under the Office's procedures, after a claimant has been working in a position for 60 days, the Office will make a determination as to whether the actual earnings fairly and reasonably represent the claimant's wage-earning capacity.⁷ In this case, the Office determined that actual earnings did fairly and reasonably represent appellant's wage-earning capacity and there is no contrary evidence. The Office properly determined appellant's wage-earning capacity based on the weekly wages of \$284.90 of a part-time modified city carrier and properly reduced his compensation to reflect his wage-earning capacity.⁸ As noted above, wages earned are generally the best measure of wage-earning capacity. The Board, therefore, finds that the position of modified city carrier fairly and reasonably represented appellant's wage-earning capacity.

The Board further finds that the Office properly determined that appellant received an overpayment in the amount of \$23,040.68 for the period June 3, 1994 through April 27, 1996 because appellant received temporary total disability compensation during this period he should have received compensation for loss of wage-earning capacity.

In the present case, the record reveals that appellant received \$23,040.68 in compensation for temporary total disability during the period June 3, 1994 through April 27, 1996, while he was working part time for the employing establishment in the position of modified city carrier. Thus, the Board finds that an overpayment was created in the amount of \$23,040.68.

Additionally, the Board finds that the Office properly found that appellant was with fault in the creation of the overpayment in the amount of \$23,040.68.

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.⁹ The only exception to this requirement is a situation, which meets the test set forth as follows in section 8129(b): "[A]djustment 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."¹⁰ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.¹¹ In evaluation of whether appellant is without fault, the Office will consider whether appellant's receipt of the

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

⁸ The Office determined that appellant's current rate of pay in his date-of-injury job as a city carrier was \$608.94 per week. The Office further determined that appellant's part-time modified position of city carrier had an adjusted earning capacity of \$359.27 per week. Appellant is entitled to compensation based on the difference between his current date-of-injury pay and his new earning capacity, which results in \$249.67 per week.

⁹ 5 U.S.C. § 8129.

¹⁰ 5 U.S.C. § 8129(b).

¹¹ *Harold W. Steele*, 38 ECAB 245 (1986).

overpayment occurred because he relied on misinformation given by an official source within the Office or another government agency, which appellant had reason to believe was connected with administration of benefits as to the interpretation of the Act or applicable regulations.¹²

In determining whether an individual is at fault, section 10.320(b) of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact, which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information, which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment, which the individual knew or should have been expected to know was incorrect.”¹³

In this case, the Office applied the third standard -- appellant accepted payments, which he knew or should have been expected to know were incorrect. The Board finds that the Office was correct in determining that appellant knew or should have been expected to know he accepted incorrect payments inasmuch as appellant received temporary total disability compensation during the period June 3, 1994 through April 27, 1996, while he worked part time in the position of modified city clerk.

Appellant received temporary total disability compensation from September 19, 1993 through April 27, 1996 although he had returned to part-time work at the employing establishment in the position of modified city carrier in October 1990. Appellant contended that he had no reason to believe that the amount of the award was incorrect because on April 17, 1990 he had requested a supplemental schedule award and thought that the new amount received included that schedule award. Appellant also stated that he had been filling out Forms CA-1032 every 15 months and sending them to the Office to verify his wages with the Social Security Administration. Appellant noted that the Office had never previously mentioned anything to him about an overpayment or a problem until now.

In determining whether an individual is with fault in the matter of an overpayment, section 10.320 requires the Office to consider “all pertinent circumstances, including age, intelligence, education and physical and mental condition.”¹⁴ The record reveals that the amount of compensation appellant accepted beginning September 19, 1993 was more than double his usual

¹² 20 C.F.R. § 10.320(c)(1).

¹³ 20 C.F.R. § 10.320(b) (revised April 1, 1997).

¹⁴ *Id.*

compensation for loss of wage-earning capacity.¹⁵ Further, the record is replete with letters from appellant to the Office, which reveal an alert individual who has diligently monitored the processing of his claims by the Office, has carefully reviewed all letters and decisions of the Office and, through his letters to the Office has questioned findings and conclusions and pointed out errors and discrepancies, which he believed have occurred in his case. Given this pattern of attentiveness to the details of his case, appellant's contention that he assumed the compensation for total temporary disability included an additional schedule award is not persuasive. Appellant's letters do not support that he would have made such an assumption. The evidence currently of record supports a finding that appellant should have been aware that the compensation checks he received were incorrect and that he was not entitled to such checks. Therefore, the Board finds that appellant knew or should have known that he was not entitled to receive compensation for temporary total disability, while working a part-time modified position of city carrier.

Appellant contended that he was unaware that the compensation checks he received during this period were for an amount greater than to which he was entitled. Specifically, appellant contended that, because a previous overpayment had occurred, he called the Office when he received a Form CA-837 to verify the amount of his schedule award so that he could be confident that another overpayment would not occur. Appellant further contended that upon speaking with the Office he was told that he would be notified if there was a problem. Appellant has failed to submit evidence to substantiate his allegations. Although the Office may have been negligent in continuing to issue appellant checks for temporary total disability after appellant returned to work part time in the position of modified city carrier, this does not excuse appellant's acceptance of such checks if he knew or should have known that the payments were incorrect.¹⁶

The Board finds that the Office improperly required appellant to repay the overpayment of compensation in a lump sum of \$7,438.22 in addition to paying \$150.00 per month thereafter.

In the present case, the method of recovery determined by the Office hearing representative is improper under the Act. Appellant is receiving continuing compensation benefits and there are no accrued compensation benefits due and owed to appellant. The Office's regulation on recovery of overpayments provides:

"Whenever an overpayment has been made to an individual who is entitled to further payments proper adjustment shall be made by decreasing subsequent payment of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual

¹⁵ The record reveals that appellant received a compensation check for the period August 26 through September 18, 1993 in the amount of \$828.00. Beginning September 19, 1993, appellant received compensation checks in the amount of \$1,932.00 and subsequently received compensation checks in even higher amounts through April 27, 1996.

¹⁶ *Robert W. O'Brien*, 36 ECAB 541 (1985).

and any other relevant factors, so as to minimize any resulting hardship upon such individual.”¹⁷

As appellant is receiving continuing compensation benefits, recovery of the overpayment must be made by decreasing subsequent payment of compensation. The Office hearing representative ordered payment of a lump sum in the amount of \$7,432.22 by appellant, in addition to requiring appellant to pay \$150.00 per month thereafter. The Act and its implementing regulations make no provision for a mandatory lump-sum repayment by a claimant who is receiving continuing compensation benefits and is not entitled to accrued compensation. Therefore, the Board finds that the Office hearing representative improperly required that appellant repay the overpayment, pursuant to the Act, by payment of a mandatory lump sum, as well as, by subsequent monthly payments.¹⁸

This case must, therefore, be remanded to the Office so that a repayment schedule may be determined pursuant to the factors stated in 20 C.F.R. § 10.321(a).

The January 30 1998 decision of the Office of Workers’ Compensation Programs regarding appellant’s wage-earning capacity is hereby affirmed. The decision of the Office hearing representative dated August 20, 1997 is affirmed on the issues of overpayment and fault, and set aside on the method of repayment of overpayment.

Dated, Washington, DC
October 26, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

¹⁷ 20 C.F.R. § 10.321.

¹⁸ *Jesse T. Adams*, 44 ECAB 256 (1992).