

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

DUANE C. RAWLINGS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Baltimore, MD, Employer**

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**Docket No. 02-2172
Issued: March 8, 2004**

Appearances:
Duane C. Rawlings, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 13, 2002 appellant filed a timely appeal from the May 15, 2002 decision of the Office of Workers' Compensation Programs, which found that an overpayment occurred in his case. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issue.

ISSUES

The issues are: (1) whether an overpayment of \$6,413.71 in compensation occurred from August 9 to November 8, 1999; and (2) whether appellant was at fault in the creation of the overpayment, thereby precluding waiver.

FACTUAL HISTORY

On November 15, 1990 appellant, then a 37-year-old clerk, filed an occupational disease claim asserting that he developed a stress condition in the performance of duty. The Office accepted his claim for dysthymia reaction and paid compensation for temporary total disability. Appellant returned to work as a small parcel and bundle sorter clerk for four hours a day on

March 18, 1991. In a decision dated February 7, 1992, the Office determined that appellant's actual earnings in this position fairly and reasonably represented his wage-earning capacity and, effective the date of his reemployment, adjusted his compensation to reflect a 50 percent loss of wage-earning capacity.

The Office approved a vocational training curriculum scheduled to run from August 6, 1999 to July 5, 2001. While appellant underwent vocational training, the Office paid compensation at the rate for temporary total disability. In an employment report dated January 5, 2000, appellant advised the Office that he had earned \$8,248.65 as an actor on 11 dates between August 9 and November 8, 1999.

The Office contacted the employing establishment to determine the pay rate of appellant's date-of-injury position as of August 9, 1999, which was \$640.88 per week. The Office determined that appellant had earnings of \$687.39 per week as an actor.

On July 26, 2001 the Office made a preliminary finding that an overpayment of \$6,413.71 in compensation occurred because appellant earned wages while in receipt of compensation for temporary total disability. Because his earnings from August 9 to November 8, 1999, (\$8,248.65) exceeded his gross compensation for that period (\$6,413.71), the Office found that appellant had no loss of wage-earning capacity, making all compensation paid for that period an overpayment. The Office also found that appellant was at fault in the matter for the following reason:

"You reasonably should have been aware that you were being paid compensation because you were unable to earn wages due to work[-]related injury. Thus, when you were able to work you should have not only advised this Office but realized that you were being overpaid. Receipt of wages and compensation will result in an overpayment when you are in receipt of compensation for temporary total disability. Therefore, a preliminary finding of fault in the matter of the overpayment is being made."

Appellant requested a prerecoupment hearing before an Office hearing representative on the issues of fault and waiver. He completed an overpayment recovery questionnaire and submitted financial documents. At the hearing, which was held on February 26, 2002 appellant agreed that an overpayment existed. He was under the impression, however, that he could earn some income, "but it could n[o]t be more than what your income was for the whole year and that was my understanding." Appellant noted that he did not work 40 hours a week as an actor: "But understanding that, from August to November [1999], the period in question I only worked eight days."

In a decision dated May 15, 2002, the Office hearing representative found that an overpayment of \$6,413.71 in compensation occurred from August 9 to "November 9" [sic], 1999 because appellant received wages as an actor while receiving compensation for total disability. The hearing representative further found that appellant was at fault because he received

compensation to which he knew, or reasonably should have known, that he was not entitled. The Office hearing representative noted:

“The claimant knew, or reasonably should have known, that he was not entitled to total disability compensation while earning wages as an Actor. The claimant had had his compensation reduced in the past based upon actual earnings and knew that he was not entitled to compensation based upon total disability for a period that he has earnings. Therefore, the preliminary finding that the claimant was at fault in the creation of the overpayment is affirmed and hereby made final.”

From appellant’s monthly income of “approximately \$2,500.00” (\$2,502.24) and monthly expenses of “approximately 2,180.00” (\$2,177.00), the Office determined that appellant had discretionary income of \$400.00 per month and, therefore, could afford to repay the debt at \$400.00 per month until the overpayment was satisfied. The Office found that this amount should be deducted from appellant’s continuing compensation.¹

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees’ Compensation Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.² If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.³ If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability.⁴ Notwithstanding section 8106 (partial disability), individuals directed to undergo vocational rehabilitation by the Secretary shall, while undergoing such rehabilitation, receive compensation at the rate provided in sections 8105 (total disability) and 8110 (augmented compensation for dependents), less the amount of any earnings received from remunerative employment, other than employment undertaken pursuant to such rehabilitation.⁵

¹ According to the Office’s Procedure Manual, an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00). Federal (FECA) Procedure Manual, Part 6 -- Overpayments and Collections, *Initial Overpayment Actions*, Chapter 6.200.6.a (September 1994). In this case, based on accepted income and expenses, the amount of monthly funds available for debt repayment was \$275.24. A finding that appellant could afford to repay the debt at \$400.00 per month would, therefore, leave him with insufficient funds to meet ordinary and necessary living expenses.

² 5 U.S.C. § 8102(a).

³ *Id.* § 8105(a).

⁴ *Id.* § 8106(a).

⁵ *Id.* § 8104(b).

ANALYSIS -- ISSUE 1

Appellant's employment injury left him incapable of earning the wage he received at the time of injury.⁶ He received compensation pursuant to section 8105(a) of the Act on the basis that his disability was total. On February 7, 1992 the Office made a formal determination that appellant was no longer totally disabled for work and that his actual earnings as a small parcel and bundle sorter clerk working four hours a day fairly and reasonably represented his wage-earning capacity. The Office adjusted his compensation to reflect a 50 percent loss of wage-earning capacity. Appellant was capable of earning half the wages he received at the time of injury and the Office compensated him pursuant to section 8106(a) of the Act for his incapacity, because of employment injury, to earn the other half.⁷

Once a loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.⁸

At no point in this case did the Office modify its February 7, 1992 wage-earning capacity decision. Absent such a modification, appellant remains entitled, pursuant to section 8106(a) of the Act, to compensation for the partial loss of wage-earning capacity calculated in that decision.

Appellant's status as a partially disabled compensationner did not change when he began vocational training on August 6, 1999. Vocational training did not render him totally disabled for work. Rather, pursuant to section 8104(b) of the Act,⁹ the Office paid compensation "*at the rate*" for total disability while appellant underwent vocational rehabilitation, notwithstanding his partial disability and capacity to earn wages.¹⁰ (Emphasis added).

While undergoing vocational rehabilitation, however, appellant's entitlement to compensation at the rate for total disability was not unqualified. Section 8104(b) provides that such individuals shall receive compensation at the rate for total disability "less the amount of any earnings received from remunerative employment, other than employment undertaken pursuant to such rehabilitation." Appellant received earnings as an actor between August 9 and November 8, 1999, but this was not employment undertaken pursuant to the vocational rehabilitation effort. This was employment he obtained independent of the vocational

⁶ See 20 C.F.R. § 10.5(f) ("disability" defined).

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

⁸ *Daniel J. Boesen*, 38 ECAB 556 (1987).

⁹ See *supra* text accompanying note 5.

¹⁰ In both its preliminary determination and its final overpayment decision, the Office indicated that appellant was receiving compensation for total disability during the period in question. More accurately, he was receiving compensation for partial disability but at the total disability rate under section 8104(b) of the Act while undergoing vocational rehabilitation.

rehabilitation program. By the terms of section 8104(b), therefore, appellant was not entitled to receive compensation at the rate for total disability during this period. Because the Office paid compensation at that rate, the Board finds that an overpayment occurred from August 9 to November 8, 1999. The Board will affirm the Office's May 15, 2002 decision, on the issue of fact of overpayment.

The amount of the overpayment, however, cannot be the entire amount of compensation paid for that period, as was found. Because the Office did not modify its February 7, 1992 wage-earning capacity decision, appellant remained entitled to compensation, under section 8106(a) of the Act, for the 50 percent loss of wage-earning capacity caused by his employment injury. Section 8106(a) thus creates a limit on the amount of overpayment that can arise in this case. The limit is the amount of compensation paid over and above appellant's entitlement under section 8106(a), in other words, the amount of additional compensation paid pursuant to section 8104(b).

Although the limit is known, the actual amount of the overpayment remains uncertain. The Board is unable to determine how the Office computed a pay rate of \$687.39 per week from the sporadic or intermittent earnings appellant received as an actor from August 9 to November 8, 1999. To determine a weekly pay rate, the Office must first determine the employee's "average annual earnings."¹¹ Section 8114 of the Act provides four methods for determining "average annual earnings" based on the character and duration of the employment.¹² The Board will set aside the Office's May 15, 2002 finding on the amount of the overpayment and remand the case for a clear explanation of appellant's weekly pay rate as an actor and for an application of the *Shadrick* formula.¹³

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 received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits received. 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; (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).¹⁴

¹¹ Federal (FECA) Procedure Manual, Part 2 – Claims, *Computation of Compensation*, Chapter 2.900.4 (March 1996).

¹² 5 U.S.C. § 8114(b).

¹³ See generally *Albert C. Shadrick*, 5 ECAB 376 (1953) (eliminating economic factors in determining loss of wage-earning capacity).

¹⁴ 20 C.F.R. § 10.433(a) (1999).

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.¹⁵

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion; that he knew, or reasonably should have known, that he was not entitled to total disability compensation while earning wages as an actor. The Office noted that appellant had his compensation reduced in the past based upon actual earnings and knew that he was not entitled to compensation based upon total disability for a period that he had earnings.

As noted, that appellant was not totally disabled for work while undergoing vocational rehabilitation, nor did he receive compensation on the basis that he was totally disabled. He was partially disabled for work, as the Office determined in its February 7, 1992 wage-earning capacity decision and still had the capacity to earn wages, as he did when he worked four hours a day as a small parcel and bundle sorter clerk. The record reflects that, following the February 7, 1992 decision, appellant earned wages without creating an overpayment of compensation. He earned wages as a small parcel and bundle sorter clerk until September 1, 1992. Appellant also earned wages from 1991 to 1992 as a counselor in a youth outreach project. From 1992 to 1996 he earned wages as a television actor. None of these periods of earnings caused an overpayment of compensation. Consistent with this experience, appellant testified at the February 26, 2002 prerecoupment hearing that he was under the impression he could earn income within certain limits.

When the Office approved the training curriculum that began on August 6, 1999 earnings from such employment became critically important to the compensation appellant was entitled to receive. The Office, however, neglected to notify him of the provisions of section 8104(b) of the Act. The Office advised that he would receive an additional \$24.80 in compensation per week as a maintenance allowance, but it made no mention that he would also be receiving compensation at the rate for total disability and that any wages he earned outside of the vocational rehabilitation program would create an overpayment.

Considering the interplay of sections 8106(a) and 8104(b) of the Act and the complexity surrounding the creation of the overpayment in this case, together with the Office's failure to notify appellant of the consequences of receiving earnings from employment outside of the vocational rehabilitation program, the Board finds that the Office has presented insufficient evidence to establish that appellant accepted a payment which he knew or should have known to be incorrect. The Board will set aside the Office's May 15, 2002 finding of fault.

CONCLUSION

The Board finds that an overpayment of compensation occurred from August 9 to November 8, 1999 when, while undergoing Office approved vocational rehabilitation and

¹⁵ *Id.* § 10.433(b).

receiving compensation at the rate for total disability, appellant earned wages as an actor outside such rehabilitation. The case is not in posture for a decision on the amount of the overpayment because the Office did not explain how it computed appellant's rate of pay as an actor and did not recognize his entitlement to continuing compensation for partial disability. Finally, the Office presented insufficient evidence to support its finding that appellant was at fault in the creation of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the May 15, 2002 decision of the Office of Workers' Compensation Programs is affirmed on the issue of fact of overpayment and is otherwise set aside. The case is remanded for further action consistent with this opinion.

Issued: March 8, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member