

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

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**MARIE A. GONZALES, Appellant**

**and**

**DEPARTMENT OF JUSTICE, EXECUTIVE  
OFFICE FOR UNITED STATES ATTORNEYS,  
Las Cruces, NM, Employer**

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**Docket No. 03-1808  
Issued: March 18, 2004**

*Appearances:*  
*Marie A. Gonzales, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On July 7, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated May 28, 2003, finalizing an overpayment of compensation. Also within the Board's jurisdiction is an April 24, 2003 loss of wage-earning capacity decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether the Office met its burden of proof in modifying its determination of appellant's loss of wage-earning capacity based on her reemployment as a juvenile probation officer on July 23, 2001; (2) whether the Office correctly determined that there was a \$10,691.65 overpayment of compensation; (3) whether appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery; and (4) whether the Office properly required recovery of the overpayment by withholding \$200.00 a month from appellant's continuing compensation benefits.

### **FACTUAL HISTORY**

On April 29, 1996 appellant, then a 33-year-old legal secretary, filed an occupational disease claim alleging that she sustained bilateral carpal tunnel syndrome beginning on May 1, 1995 due to her typing duties. On July 8, 1996 the Office accepted appellant's claim for bilateral carpal tunnel syndrome. Effective February 2, 1997 appellant was placed on the periodic compensation rolls to receive wage-loss compensation for temporary total disability at the weekly rate of \$504.83. Appellant participated in the Office's rehabilitation program and obtained employment as a case manager at the Dona Ana County Teen Court with weekly wages of \$320.00 effective October 12, 1999.

By letter dated November 10, 1999, the Office advised appellant that it would reduce her compensation effective October 12, 1999 based on her employment as a case manager with weekly wages of \$320.00.<sup>1</sup> The Office advised appellant to contact the Office immediately if she received an increase in pay and that failure to do so could result in an overpayment of compensation.

On February 8, 2000 appellant submitted a completed Office Form EN1032 (report of income for the previous 15 months) indicating that she was employed as an administrative assistant and case manager for the Dona Ana County Teen Court from October through December 1999 with hourly wages of \$8.00.

By decision dated March 17, 2000, the Office advised appellant that her reemployment as a case worker with weekly wages of \$320.00 constituted suitable work based on her training, education, work experience and physical restrictions. The Office determined that appellant's loss of wage-earning capacity was \$212.03 and her compensation amount was \$655.32 each four weeks.<sup>2</sup>

In an undated letter received by the Office on April 9, 2002, a manager at the Maricopa County, Arizona, Juvenile Probation Department advised that appellant began working as a juvenile probation officer on July 23, 2001 at the hourly rate of \$12.90, or \$516.00 a week.

On April 12, 2002 the Office received from appellant a completed March 30, 2002 questionnaire in which she indicated that she was employed as a juvenile probation officer for the Maricopa County, Arizona, Juvenile Probation Department with wages of \$12.90 per hour.

By decision dated April 24, 2003, the Office reduced appellant's compensation effective April 20, 2003 based on her employment on July 23, 2001 as a juvenile probation officer with weekly wages of \$516.00. The Office noted that appellant's new weekly wages, \$516.00, were at least 25 percent more than her previous wages of \$320.00. Appellant's new loss of wage-earning capacity was \$70.68 and her new compensation amount was \$239.08 each four weeks.

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<sup>1</sup> The Office's subsequent development of the claim treats this as a wage-earning capacity decision.

<sup>2</sup> See 5 U.S.C. §§ 8106, 8115.

On April 24, 2003 the Office advised appellant of its preliminary finding that a \$10,691.65 overpayment of compensation had been created in her case because her earnings had increased since the Office's March 17, 2000 loss of wage-earning capacity decision. The Office found that appellant's increased earnings, beginning with her job as a juvenile probation officer on July 23, 2001, exceeded 25 percent of the prior loss of wage-earning capacity decision amount on March 17, 2000 and an adjustment made retroactive to 2001 resulted in an overpayment of compensation in the amount of \$10,691.65. The Office noted that appellant had received \$15,993.82 in compensation for the period July 23, 2001 through April 19, 2003 but was only entitled to \$5,302.17 in compensation. The Office also made a preliminary finding that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or should have known were incorrect. The Office advised appellant that she could request a telephone conference, a final decision based on the written evidence, or a hearing within 30 days of the date of the letter if she disagreed with the fact that the overpayment occurred, the amount of the overpayment, the finding of fault, or if she sought waiver of recovery of the overpayment, along with supporting financial documents and a completed overpayment recovery questionnaire (Form OWCP-20).

On May 10, 2003 appellant submitted an overpayment recovery questionnaire and requested a telephone conference. She indicated that she had \$2,329.00 in monthly income, in addition to her compensation from the Office. Appellant indicated that she had \$2,744.00 in monthly expenses. She listed \$20.00 in a checking account, \$400.00 in a savings account, and \$3,000.00 in personal property. Appellant requested a telephone conference on the issues of fault and possible waiver of recovery of the overpayment.

By decision dated May 28, 2003, the Office finalized its determination that an overpayment in the amount of \$10,691.65 had been created because appellant's earnings had increased as of July 23, 2001, subsequent to the Office's November 10, 1999 loss of wage-earning capacity decision, and that she was at fault in the creation of the overpayment because she accepted payments that she knew or should have known were incorrect. The Office advised that the overpayment would be recovered by withholding \$200.00 each four weeks from appellant's continuing compensation.<sup>3</sup> The Office noted that telephone calls to appellant were attempted in response to her request for a telephone conference but there was no response to the calls.

### **LEGAL PRECEDENT -- ISSUE 1**

In *Ronald M. Yokota*, the Board stated:

"Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings. 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

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<sup>3</sup> The Office noted that, in response to its April 24, 2003 letter, appellant submitted a completed overpayment recovery questionnaire and requested a telephone conference. The Office stated that the telephone calls were attempted but there was no response from appellant to the calls. On appeal appellant indicates that she did not receive any telephone calls from the Office.

been retrained or otherwise vocationally rehabilitated, or the original determination was in fact erroneous. The burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job determined to represent his earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the *capacity* to earn and not on actual wages lost."<sup>4</sup> (Emphasis in the original.)

The Office's procedure manual provides guidelines as to the modification of loss of wage-earning capacity:

"c. *Increased Earnings*. It may be appropriate to modify the rating on the grounds that the claimant has been vocationally rehabilitated if one of the following two circumstances applies:

- (1) *The claimant is earning substantially more* in the job for which he or she was rated....
- (2) *The claimant is employed in a new job (i.e., different from the job for which he or she was rated) which pays at least 25 percent more than the current pay of the job for which the claimant was rated.*

"d. *[Claims Examiner] Actions*. If these earnings have continued for at least 60 days, the CE [claims examiner] should:

- (1) *Determine the duration, exact pay, duties* and responsibilities of the current job.
- (2) *Determine whether the claimant* underwent training or vocational preparation to earn the current salary.
- (3) *Assess whether the actual job* differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated.

"e. *If the results of this investigation* establish that the claimant is rehabilitated ..., or if the evidence shows that the claimant was retrained for a different job, compensation may be redetermined using the *Shadrick* formula...."<sup>5</sup> (Emphasis in the original.)

### **ANALYSIS -- ISSUE 1**

In this case, the Office determined that appellant's pay had increased and modified the 1999 loss of wage-earning capacity determination to reflect her actual earnings as a juvenile probation officer. The stated basis for the modification of the loss of wage-earning capacity determination was that appellant's earnings as a juvenile probation officer were more than 25

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<sup>4</sup> 33 ECAB 1629 (1982); *see also* Lawrence M. Nelson, 39 ECAB 788 (1988).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 – Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c)-(e) (June 1996, July 1997).

percent greater than her earnings as a case manager on which the original loss of wage-earning capacity determination was based.

An increase in pay, by itself, is not sufficient evidence that there has been a change in an employee's capacity to earn wages.<sup>6</sup> As the Board stated in *Willard N. Chuey*<sup>7</sup>, "[w]ithout a showing of additional qualifications obtained by appellant through retraining, it [is] improper to make a new loss of wage-earning capacity determination based on increased earnings."<sup>8</sup> As noted above, it may be appropriate to modify a claimant's wage-earning capacity determination on the grounds that the claimant is vocationally rehabilitated if the claimant is employed in a job different from the one the claimant was rated in, which pays at least 25 percent more than the current pay of the job the claimant was rated in, and these earnings continued for at least 60 days.<sup>9</sup> Prior to such modification, however, the Office is required to determine the duration, exact pay, duties and responsibilities of the new job; determine whether the claimant underwent training or vocational preparation to earn the current salary; and assess whether the actual job differs significantly in duties, responsibilities or technical expertise from the job at which the claimant was rated.<sup>10</sup>

In this case, the Office determined that appellant's pay had increased but did not demonstrate that appellant underwent any training or vocational preparation to earn her current salary as a juvenile probation officer. The case record does not contain sufficient information to permit a determination of whether appellant has been retrained or otherwise rehabilitated so as to permit the use of the juvenile probation officer to modify her wage-earning capacity.<sup>11</sup> Only after all the factors have been examined can the Office properly determine whether appellant has been retrained or otherwise vocationally rehabilitated such that a modification of her loss of wage-earning capacity was warranted.<sup>12</sup>

### **CONCLUSION**

As noted above, it is the Office's burden to establish that appellant has been vocationally rehabilitated. Since the Office failed to follow accepted procedures and adequately address the relevant factors, the Board finds that the Office failed to meet its burden of proof in this case. For this reason, the Office did not meet its burden of proof to modify appellant's 1999 wage-earning capacity determination.<sup>13</sup>

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<sup>6</sup> *Penny L. Baggett*, 50 ECAB 559 (1999); *Odessa C. Moore*, 46 ECAB 681 (1995).

<sup>7</sup> *Willard N. Chuey*, 34 ECAB 1018 (1983).

<sup>8</sup> *Id.*

<sup>9</sup> Federal (FECA) Procedure Manual, *supra* note 4.

<sup>10</sup> *Id.*

<sup>11</sup> *Odessa C. Moore*, *supra* note 5.

<sup>12</sup> *Id.*

<sup>13</sup> In light of the Board's resolution of the first issue, the remaining issues in this case are moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 28 and April 24, 2003 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: March 18, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member