

by a motor vehicle while walking to deliver her route. The Office accepted her claim for left occipital skull fracture on December 5, 2001. Appellant initially returned to light-duty work four hours a day on December 28, 2001.

In a report dated December 15, 2003, Dr. Farid Manshadi, appellant's attending physician Board-certified in physical medicine and rehabilitation, opined that appellant could work six hours a day with a lifting restriction of 27 pounds, carry of 25 pounds and pushing and pulling of 30 and 32 pounds respectively. He found that appellant could work with her arms overhead, bend and stoop only occasionally. Appellant returned to work on May 24, 2002 working light duty six hours a day.¹

In an informational letter dated July 22, 2004,² the Office reduced appellant's compensation benefits effective July 11, 2004 based on her actual earnings as an office worker six hours a day with earnings of \$576.90 per week. The Office found that appellant's weekly pay rate was \$769.20, that her adjusted earning capacity was \$384.60 and that her loss in earning capacity was \$384.60. The Office concluded that appellant's weekly compensation rate was \$256.40 and that her net compensation every four weeks was \$1,042.00.

The employing establishment objected to appellant's compensation rate on March 30, 2005 and indicated that she was currently earning \$576.90 per week rather than \$384.60. The employing establishment noted that appellant's hourly pay rate when injured was \$19.23 per hour. On July 11, 2004 the employing establishment reported, "Pay rate of a level 1 step G letter carrier on July 11, 2004 \$20.45. Actual pay rate for clm [claimant] on July 11, 2004 \$43,561[.00]/y[ea]r level 1 step J." Appellant's actual yearly pay rate on July 11, 2004 results in a weekly salary of \$837.71³ and an hourly pay rate of \$20.94.

The Office determined that appellant received compensation in the amount of \$11,555.75 for the period July 11, 2004 through May 14, 2005. The Office further found that appellant's weekly pay rate when injured was \$769.31⁴ and that the current weekly pay rate on July 11, 2004 for her date-of-injury position was \$818.00.⁵ The Office found that appellant was earning \$628.20⁶ on July 11, 2004 and that she had 77 percent earning capacity of \$592.37 and wage loss of \$176.94 on that date. The Office determined that appellant was entitled to 2/3 of her weekly

¹ The Board notes that beginning April 20, 2002 through the calculation of the overpayment beginning July 11, 2004, the Office underpaid appellant based on a date-of injury pay rate of \$769.20 per week rather than \$769.31 she was actually earning.

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

³ The Federal Employees' Compensation Act provides that weekly pay rate is equivalent to 1/52 of annual pay rate. 5 U.S.C. §§ 8101-8193, 8114(c).

⁴ The employing establishment indicated that on October 25, 2001 appellant's annual salary was \$40,004.00 or \$731.31 per week.

⁵ The Office reached this amount by multiplying \$20.45 hourly rate by 40 hours a week.

⁶ The Office reached this amount by multiplying \$20.94 by 30 hours a week.

pay loss or \$117.96 and compensation every four weeks of \$508.00. The Office determined that appellant was entitled to receive \$5,446.53 for the period July 11, 2004 through May 14, 2005 and that she had received an overpayment in the amount of \$6,109.22.

On June 13, 2005 the Office issued a preliminary determination of overpayment finding that appellant had received an overpayment in the amount of \$6,109.22 for the period July 11, 2004 through May 14, 2005 as the Office paid compensation based on her actual earnings of four hours per day when she should have been paid based on actual earnings of six hours a day. The Office found that appellant was not at fault in the creation of the overpayment. The Office noted that it had used incorrect wage information when placing her on the periodic rolls. The record reflects that the Office did not provide appellant with an overpayment recovery questionnaire or a form requesting financial information.

Appellant requested an oral hearing on July 7, 2005. She agreed that she had received an overpayment but disagreed as to the amount of the overpayment. Appellant alleged that, as she was paid for four hours a week and was only entitled to be paid for two hours a week, her overpayment should equal one half of the total amount paid or \$5,777.88. She reported that she currently had savings of \$20,000.00 and an emergency fund of \$3,000.00. Appellant indicated that she paid rent of \$385.00 per month and received \$350.00 per month from her ex-husband's retirement. She indicated that her thrift savings plan was worth \$53,000.00. Appellant indicated that supporting financial documents were enclosed. She provided the amount of her thrift savings plan, pension benefit, retirement portfolio insurance payment and checking account.

Appellant testified at the oral hearing on July 27, 2006 regarding the fact, amount and repayment of the overpayment. She stated that she could repay the overpayment, but this would be a hardship. The hearing representative requested that appellant provide an itemized list of expenses and income and stated that he would review the record to determine whether she had been provided with the appropriate Form 20. Appellant stated that her expenses were \$1,350.00 per month and that she could repay the entire amount of the overpayment. She further stated that she did not feel that she should have to repay the overpayment as she felt the money was hers when she was receiving it and had she known that she was not entitled to the amount she was receiving, she "probably" would not have allocated her funds as she did.

On April 18, 2006 appellant accepted a light-duty position as a modified carrier earning \$47,724.00 per year. The position required lifting up to 20 pounds, sitting, standing and walking six hours a day with restricted bending. Appellant was required to push and pull up to 40 pounds. By decision dated August 14, 2006, the Office found that appellant's modified carrier position earning \$688.20 per week effective April 29, 2006 fairly and reasonably represented her wage-earning capacity. The Office reduced appellant's compensation effective August 6, 2006.

By decision dated September 22, 2006, the hearing representative found that appellant had received an overpayment in the amount of \$6,109.12. He noted that the Office concluded that appellant had been paid based on four hours a day when she was entitled to receive compensation for two hours a day as she had actual earnings for six hours a day. The hearing representative reported the Office calculations of the overpayment and concluded that these calculations were correct. He found that appellant was not at fault in the creation of the overpayment. The hearing representative reviewed the financial information submitted by

appellant and noted that she failed to complete the necessary Form 20 to enable the Office to determine an appropriate payment schedule or entitlement waiver of the overpayment. The hearing representative concluded that appellant should repay the overpayment in its entirety.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Act⁷ 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. Section 8106(a) provides in pertinent part as follows:

“If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to $66 \frac{2}{3}$ 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.”⁸

The Act further provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.⁹ Section 8129(a) of the Act provides that when an overpayment has been made to an employee because of an error of fact or law, adjustment shall be made by decreasing later payments to which she is entitled.¹⁰

ANALYSIS -- ISSUE 1

The Office properly found that appellant had returned to work by July 11, 2004 working six hours a day in a limited-duty position. She was entitled to compensation for two hours a day. During the period July 11, 2004 through May 14, 2005, the Office paid appellant compensation for four hours a day. Appellant was entitled to receive \$5,446.53 for 10 hours of compensation per week during the period July 11, 2004 through May 14, 2005. She received compensation in the amount of \$11,555.75 for this period and therefore received an overpayment of compensation in the amount of \$6,109.22. The Board will affirm the fact and the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act¹¹ provides: “Adjustment 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

⁷ 5 U.S.C. §§ 8101-8193, 8102(a).

⁸ 5 U.S.C. § 8106(a).

⁹ 5 U.S.C. § 8116(a).

¹⁰ 5 U.S.C. § 8129(a).

¹¹ 5 U.S.C. §§ 8101-8193, § 8129(b).

equity and good conscience.”¹² If a claimant is without fault in the creation of an overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 through 10.437 of the Office’s regulations.

According to section 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current, ordinary and necessary living expenses, and, also, if the beneficiary’s assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.¹³ For waiver under the defeat the purpose of the Act standard, an appellant must meet the two pronged test and show that she both needs substantially all of her current income to meet current ordinary and necessary living expenses,¹⁴ and that her assets do not exceed the resource base.¹⁵ The burden is on the claimant to show that the expenses are reasonable and needed for a legitimate purpose.

In order to establish that recovery of an overpayment would be against equity and good conscience, an overpaid individual must either establish that she would experience a severe financial hardship in attempting to repay the debt¹⁶ or overpaid individual could also establish that in reliance on such payment or on notice that such payments would be made, she gave up a valuable right or changed her position for the worse.¹⁷ If the claimant is not entitled to waiver under the “defeat the purpose of the Act” clause the “against equity and good conscience” clause must be considered by the Office in the written decision.¹⁸

ANALYSIS -- ISSUE 2

The Office determined that appellant was without fault in the creation of the overpayment. The Office may only collect the overpayment if such collection would not defeat the purpose of the Act or be against equity and good conscience. When the preliminary finding of overpayment was issued, the Office stated that a Form 20, overpayment recovery

¹² 5 U.S.C. § 8129(b).

¹³ Office procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

¹⁴ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

¹⁵ *W.F.*, 57 ECAB ___ (Docket No. 06-769, issued August 11, 2006).

¹⁶ 20 C.F.R. § 10.437(a).

¹⁷ 20 C.F.R. § 10.437(b).

¹⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b) (May 2004).

questionnaire, was enclosed. However, there is no such form in the record before the Board. The hearing representative advised appellant that she should submit this form and indicated that he would review the record to ensure that such a form was made available to appellant. The hearing representative did not provide appellant with the Form 20 and did not indicate that he found that the Office had properly provided her with such a form. As the Office failed to provide appellant with the necessary form, the Board finds that appellant's failure to complete this form cannot be the basis for denial of waiver of the overpayment.¹⁹ Appellant provided some financial information in support of her request for waiver; however, the hearing representative did not inform her of the inadequacy of her submission until the September 22, 2006 decision. In the September 22, 2006 decision, the hearing representative failed to evaluate the financial information submitted by appellant and did not offer any reasoning for denying waiver other than the absence of the completed form. He did not explain why waiver was denied under either the "defeat the purpose of the Act" or "equity and good conscience" standards. The Board finds that the Office abused its discretion by failing to provide appellant with the necessary forms to support her allegations that she was entitled to waiver. Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to submit sufficient financial evidence to establish that she is entitled to waiver, the Office shares the responsibility in developing the evidence to see that justice is done.²⁰

LEGAL PRECEDENT -- ISSUE 3

The general test for determining loss of wage-earning capacity is whether the injury-related residuals prevent the employee from performing the kind of work he or she was doing when injured. When the medical evidence establishes that the residuals of an employment injury prevent the employee from continuing in his or her employment, the employee is entitled to compensation for any resulting loss of wage-earning capacity.²¹

Section 8115(a) of the Act²² provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonable represent the wage-earning capacity. 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.²³

The Office's procedure manual states that when an employee cannot return to the date-of-injury job because of disability due to work-related injury of disease, but does return to

¹⁹ *Richard F. Williams*, 55 ECAB 343, 346-47 (2004); *Clayton W. Kline*, 54 ECAB 521, 523 (2003); *James P. Bailey*, 53 ECAB 494 (2002); *Leon Thomas*, 52 ECAB 202 (2001); *But see Ralph P. Beachum, Sr.*, 55 ECAB 442, 448 (2004).

²⁰ As the Office did not provide appellant with the appropriate forms and address the issue of waiver, the issue of recovery is not in posture for a decision.

²¹ *Elsie L. Price*, 54 ECAB 734 (2003).

²² 5 U.S.C. §§ 8101-8193, § 8115(a).

²³ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

alternative employment, the claims examiner must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.²⁴ The procedure manual provides in relevant part as follows:

"Factors Considered. To determine whether the claimant's work fairly and reasonably represents his or her wage-earning capacity, the claims examiner should consider whether the kind of appointment and tour of duty ... are at least equivalent to those of the job held on the date of injury. Unless they are, the [claims examiner] may not consider the work suitable."²⁵

The formula for determining loss of wage-earning capacity based on actual earnings,²⁶ which was developed in *Albert C. Shadrick*,²⁷ has been codified by regulation at 20 C.F.R. § 10.403.²⁸ Subsection (d) of this regulation provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.²⁹

ANALYSIS -- ISSUE 3

Appellant's physician released her to return to light-duty work six hours a day on February 9, 2004. Appellant accepted a light-duty position as a modified carrier on April 18, 2006. The Office found that appellant's actual earnings fairly and reasonably represented her wage-earning capacity by decision dated August 14, 2006 and reduced her compensation benefits to reflect her earnings in this position. She has not objected to the selection of this position as representing her wage-earning capacity. There is no evidence that the position is make-shift and that the appointment and tour of duty are similar to appellant's date-of-injury position. The Board finds that the Office met its burden of proof in showing that appellant's actual earnings fairly and reasonably represented her wage-earning capacity.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$6,109.22 and that she was not at fault in the creation of the overpayment. The case is remanded to the Office to provide appellant with the appropriate form to adequately submit her financial information in order that waiver can be considered. After this and such other development, the Office should issue an appropriate merit decision. The Board further finds that

²⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

²⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (July 1997).

²⁶ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

²⁷ 5 ECAB 376 (1953).

²⁸ 20 C.F.R. § 10.403.

²⁹ 20 C.F.R. § 10.403(d).

the position of modified carrier fairly and reasonably represents appellant's wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2006 decision of the Office of Workers' Compensation Programs is affirmed. The September 22, 2006 decision is affirmed in part and remanded for further development consistent with this decision of the Board.

Issued: June 25, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board