

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

S.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Omaha, NE, Employer**

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**Docket No. 07-306
Issued: October 19, 2007**

Appearances:
Dirk V. Block, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 1, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 4, 2006 which found that an overpayment was created in the amount of \$4,416.40, for which appellant was at fault. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment in this case.¹

ISSUE

The issue is whether the Office properly found that appellant received an overpayment of compensation from October 2, 2005 to March 18, 2006.

¹ Subsequent to appellant's November 1, 2006 filing of an appeal with the Board, the Office issued a November 28, 2006 decision terminating appellant's wage-loss benefits effective November 28, 2006 on the grounds that suitable work was refused. As this decision on a separate matter was issued by the Office after the instant appeal was filed, the Board has no jurisdiction over whether the Office properly terminated appellant's compensation effective November 28, 2006.

FACTUAL HISTORY

On August 26, 1999 appellant, then a 38-year-old letter carrier, filed an occupational disease claim alleging that she had been harassed by a male coworker, John Hawkins, since December 1995. She first became aware of her work-related stress in January 1996. Appellant stopped work on August 12, 1999. The Office accepted her claim for post-traumatic stress disorder.

In a December 3, 2001 letter, the Office advised appellant that she was being placed on the periodic rolls and noted her responsibility to return to work. In the attached EN1049-1196 form, the Office advised appellant: When you return to work or obtain new employment, notify this Office right away. If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation even if you already notified us of your return to work. By signature dated December 12, 2001, appellant certified that she understood the conditions outlined in the EN1049 form, which entitled her to compensation. She certified her understanding that failure on her part to comply with such conditions could result in termination of benefits and liability for resulting overpayments. Appellant began receiving compensation on the periodic rolls. She submitted completed EN1032-0494 forms for entitlement to compensation. Appellant also submitted pay records which indicated that, as of August 4, 2003, she worked part time, 18 hours per week, at \$10.00 per hour as a bookkeeper.

By decision dated February 20, 2004, the Office issued a formal wage-earning capacity determination effective February 22, 2004 based on her actual earnings as a bookkeeper. In a loss of wage-earning capacity worksheet, the Office determined that appellant's weekly pay rate when disability began was \$727.51, effective September 13, 1999, and the current pay rate of her job and step when injured was \$860.63, effective January 13, 2003. The Office noted that appellant was capable of earning \$426.00 or 49 percent, her wage-earning capacity. The Office noted that the wage-earning capacity loss was \$371.04 per week and the compensation rate was 75 percent of this amount or \$278.28. The Office concluded that net compensation would continue every four weeks in the amount of \$1,193.00.

By decision dated September 15, 2005, the Office terminated appellant's benefits effective October 1, 2005. However, in a January 17, 2006 decision, an Office hearing representative reversed the September 15, 2005 termination decision and reinstated appellant's benefits.

On February 18, 2006 appellant submitted a Form CA-7 claim for compensation which showed that her actual earnings had increased. She advised that as of October 1, 2005 she earned \$4,047.00 as a bookkeeper for Gateway Collision Center at a \$10.65 hourly rate or approximately \$200.00 weekly actual earnings and \$4,750.00 as an officer for Ace Hardware at a weekly rate of \$250.00. Appellant additionally noted that she earned \$132.00 from November 29 to December 5, 2005 and \$50.00 from January 27, 2005 as a self-employed bookkeeper. In a March 28, 2006 EN1032-0494 form, she notified the Office of the above employment.

In a letter dated May 4, 2006, the Office advised appellant of a preliminary determination that an overpayment of compensation totaling \$4,416.40 was created during the period October 2, 2005 to March 18, 2006. The Office found that her actual weekly earnings of \$213.00 for Gateway Collision and \$250.00 for Ace Hardware equaled total weekly earnings of \$463.00. It also noted that appellant's earnings of \$132.00 for the period November 29 to December 5, 2005 and \$50.00 on January 27, 2005 covered the period October 1 to February 15, 2005, which had 138 calendar days. It found that appellant's \$182.00 total earnings for that period multiplied by 7 and divided by 138 calendar days equaled \$9.23 average per week. For the period October 1 to February 15, 2005, appellant earned a total of \$472.23 per week (\$463.00 plus \$9.23). For the period October 2, 2005 to February 15, 2006, the Office noted that appellant was paid \$9,379.61 but should have been paid \$5,768.68, which resulted in an overpayment of \$3,610.93. For the period February 16 to March 18, 2006, the Office paid appellant \$2,169.47 but should have paid \$1,360.00, which resulted in an overpayment of \$805.47. Thus, the Office found a total overpayment of \$4,416.40 (\$3,610.93 plus \$805.47) for the period October 2, 2005 to March 18, 2006. The Office made the preliminary finding that appellant was at fault in the creation of the overpayment as she knew or reasonably should have known that she was not entitled to compensation for total disability at the same time she was earning wages working part time. The Office advised appellant of her procedural rights and requested that she complete an overpayment recovery questionnaire. The letter was addressed to both appellant and her attorney of record. Neither appellant nor her attorney responded.

By decision dated August 4, 2006, the Office finalized the \$4,416.40 overpayment determination and the finding of fault as appellant had not provided information to refute the amount of the overpayment or the finding of fault. The Office also directed recovery by withholding \$122.68 from appellant's continuing compensation payments effective August 6, 2006.

LEGAL PRECEDENT

Office procedures, in addressing actions on reports of earnings, indicate that any overpayment in a case involving actual earnings should be declared only after the issue of injury-related disability is determined or a loss of wage-earning capacity has been established and benefits reduced.²

Once the wage-earning capacity of an injured employee has been 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.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.812.11.

³ *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000).

⁴ *Stanley B. Plotkin, id.*

An increase in pay, by itself, is not sufficient evidence that there has been a change in an employee's capacity to earn wages.⁵ Without a showing of additional qualifications obtained by appellant, it is improper to make a new loss of wage-earning capacity determination based on increased earnings.⁶

ANALYSIS

Appellant started working part time in August 2003. By decision dated February 20, 2004, the Office determined that appellant's actual earnings as a part-time bookkeeper fairly and reasonably represented her wage-earning capacity effective February 22, 2004. The record reflects that appellant has been in receipt of compensation since February 22, 2004. Appellant subsequently submitted evidence of increased actual earnings for the period October 2, 2005 to March 18, 2006 and the Office issued its August 4, 2006 decision finding an overpayment of compensation based on her increased earnings. However, as noted above, Office procedures contemplate the finding of an overpayment only after injury-related disability or a loss of wage-earning capacity is considered.⁷

In this case appellant had an established wage-earning capacity. Pursuant to its procedures, the Office failed to modify its February 20, 2004 wage-earning capacity decision prior to declaring an overpayment involving actual earnings⁸ or explain why consideration of modification was not warranted. As previously noted, an increase in pay by itself is not sufficient evidence that there has been a change in an employee's capacity to earn wages.⁹ The Board has held that 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 earning substantially more in the job for which he or she was rated.¹⁰ Prior to such a modification, however, the Office is required to determine the duration, exact pay, duties and responsibilities of the current 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.¹¹

Furthermore, the procedures contemplate that once the Office learns of actual earnings that span several months or more, the compensation entitlement should be determined by averaging the earnings for the entire period, determining the average pay rate, and applying the

⁵ *Marie A. Gonzales*, 55 ECAB 395, 399 (2004).

⁶ *See Willard N. Chuey*, 34 ECAB 1018 (1983).

⁷ *See supra* note 2.

⁸ *Id.*

⁹ *Marie A. Gonzales*, *supra* note 5.

¹⁰ *Billy R. Beasley*, 45 ECAB 244 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c) (June 1996).

¹¹ *See Billy R. Beasley, id.*; Federal (FECA) Procedure Manual, *id.* at Chapter 2.814.11(d).

Shadrick formula.¹² This was not done in the present case. The Office made no comparison between appellant's actual earnings to the current pay for the job which she was rated.¹³

CONCLUSION

The Office has not established that appellant received an overpayment of compensation from October 2, 2005 to March 18, 2006.¹⁴

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 4, 2006 is reversed.

Issued: October 19, 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

¹² See Federal (FECA) Procedural Manual at Chapter 2.814.7(d)(4).

¹³ See *id.* at 2.814.7(c) and 2.814.7(d) (July 1997) (these provisions contemplate that, in calculating entitlement to compensation where there are actual earnings, the *Shadrick* formula will be utilized regardless of whether a wage-earning capacity decision is warranted).

¹⁴ On appeal, appellant alleged that her due process rights were violated as neither she nor her attorney received a copy of the preliminary decision of May 4, 2006. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course. *Shakeer Davis*, 52 ECAB 448 (2001). In this case, the Office mailed a copy of the preliminary decision of May 4, 2006 to both appellant and her attorney at their address of record. No evidence has been presented to rebut the presumption of receipt. Thus, it is presumed that the preliminary decision reached both appellant and her attorney.