

On September 12, 2000 appellant, then a 45-year-old flat sorter operator, sustained injury to his left shoulder, arm and hand while lifting a tub of flats in the performance of duty. On

February 12, 2001 the Office accepted appellant's claim for thoracic strain and herniated disc at C5-6 and C6-7.

Appellant filed a claim for wage-loss compensation from December 16, 2000 to May 4, 2001. He indicated that he worked outside his federal job. On June 19, 2001 appellant stated that he wrote contracts outside his federal employment as a Texas realtor on February 6, 16 and June 6, 2001. On July 11, 2001 the Office entered appellant on the periodic rolls at the augmented compensation rate based on one or more dependants and on a weekly pay rate of \$797.77 per week. An accompanying Form EN1049 informed appellant that he must submit information regarding other employment to the Office at once including the pay rate, the date he returned to work and the name of the employer including any wages from self-employment in order to minimize the possibility of an overpayment. The Form EN1049 stated: "Each payment shows the period for which payment is made. If you have worked for any portion of this period return the payment to this Office, even if you have already advised the Office that you are working." Appellant filed an additional claim for compensation covering the period June 2 to 29, 2001 and stated that he did not work outside his federal employment. He requested compensation from May 5 to June 1, 2001 on June 19, 2001.

On November 26, 2001 appellant completed an EN1032 form, noting that he was not married and claimed no dependants. He stated that he had earnings from self-employment on June 6 and October 2001. Appellant stated that he was a realtor and sold houses receiving a percentage of the sale price as a commission. He reported earnings of \$14,000.00.

The employing establishment submitted a July 16, 2002 investigative memorandum and reported that appellant worked as realtor beginning in 1996. Appellant's employer, Dale Reel, submitted a statement that appellant earned \$6,201.00 in real estate commissions in 2000, earned \$16,793.90 in 2001 and earned \$1,676.25 in 2002.

The Office issued a preliminary overpayment finding on November 6, 2002 in the amount of \$7,582.19.¹

Appellant completed an EN1032 form on November 14, 2002 and stated that he was self-employed and had earnings of \$2,000.00. He accepted a modified job offer on December 13, 2002. By decision dated August 15, 2003, the Office found that appellant's actual earnings as a modified flat sorter machine clerk of \$209.70 per week fairly and reasonable represented his wage-earning capacity effective December 16, 2002.

The Office completed an overpayment work sheet and noted that appellant received compensation in the amount of \$41,120.10 from July 1, 2001 to July 5, 2002. The Office calculated that, based on appellant's sporadic actual earnings of \$18,470.15, he had actual earnings of \$231.35 per week for the 79-week period January 1, 2001 to July 2, 2002. Appellant was entitled to receive \$29,812.02 in compensation from July 1, 2001 to July 5, 2002 based on his actual earnings of \$231.35 per week. He therefore received an overpayment in the amount of \$11,308.08. The Office found that appellant received compensation at the augmented rate of 3/4

¹ The Office has not issued a final decision addressing this alleged overpayment and the Board will not address this issue on appeal. 20 C.F.R. § 501.2(c).

from July 6 to November 2, 2002 rather than the statutory 2/3 rate, as he claimed no dependants and therefore received an overpayment in the amount of \$570.45.

The Office issued a preliminary determination of overpayment on July 27, 2004. It found that appellant received an overpayment in the amount of \$11,878.53 for the period July 1, 2001 through November 2, 2002. The Office found that appellant was at fault in the creation of the overpayment. The Office stated: "Receipt of this additional income was not reported to this Office in a timely manner in order that we may offset your workers' compensation benefits from this Office; and you received compensation paid at a higher rate than you should have known was incorrect." In a memorandum to file dated July 27, 2004, the Office noted that appellant knew he was not entitled to the entire amount of compensation for the period January 1, 2001 to November 2, 2002 due to the need of timely reporting additional income for offset. Therefore, he accepted payments that he knew or should have known to be incorrect. The Office listed the overpayment amount as \$7,582.19.

Appellant requested a preoverpayment hearing on the issue of fault on August 18, 2004. On September 13, 2004 he responded to the Office's preliminary determination of overpayment and questioned the amount of the overpayment. Appellant advised that he did not receive continuous compensation from January 1, 2001 to November 2, 2002. He stated that he was unaware that he was inappropriately receiving compensation at the augmented rate. Appellant requested waiver of the overpayment and alleged that he could not afford to repay the amount. He submitted financial information and a completed overpayment recovery questionnaire.

By decision dated June 1, 2006, the hearing representative found that appellant had received an overpayment from January 1, 2001 to November 2, 2002 and that he was at fault in the creation of the overpayment. Appellant appealed this decision to the Board. By Order Remanding Case dated March 23, 2007, the Board remanded the case for the Office to reassemble the record as the transcript of the oral hearing was not of record.²

The record currently contains the transcript of the oral hearing which took place on March 22, 2005. Appellant described his employment injury and stated that he began working eight hours a day in February 2004. He stated that he did not actively solicit real estate business and merely completed contracts during the period covered by the overpayment.

By decision dated June 25, 2007, the hearing representative found that appellant was at fault in the creation of the overpayment as he was aware that he was not entitled to the full amount of compensation while receiving income from another source and that he should have been paid at the statutory 2/3 compensation rate instead of the augmented compensation rate for the period July 2 to November 2, 2002. She noted that the overpayment was \$11,308.08 for the period January 1, 2001 to July 5, 2002 and \$570.45 for the period July 6 to November 2, 2002. The hearing representative determined that appellant should repay the overpayment at the rate of

² Docket No. 06-2022 (issued March 23, 2007).

\$300.00 per month.³ She found that the dates of the overpayment were from January 1, 2001 to November 2, 2002.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁴ 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. A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period."⁵ Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁶

Under sections 8110(a)(1) and 8101(17) of the Act, an employee is entitled to compensation at the augmented rate of 3/4 of his weekly pay if he has one or more dependents.⁷ If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation he was entitled to receive at the statutory 2/3 compensation rate and the augmented 3/4 rate constitutes an overpayment of compensation.⁸

ANALYSIS -- ISSUE 1

The record establishes that appellant received an overpayment of compensation in the amount of \$11,308.08 for the period July 1, 2001 to July 5, 2002 and an overpayment in the amount of \$570.45 for the period July 6 to November 2, 2002. Neither the Office nor the hearing representative submitted any support for the finding that the overpayment covered the period January 1, 2001 to November 2, 2002. The overpayment recovery work sheets completed by the Office provide that the period of the overpayment was from July 1, 2001 to July 5, 2002 and from July 6 to November 2, 2002.

Appellant had actual earnings during a period for which he received wage loss for total disability. When an employee has earnings from employment, he is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁹ Under these

³ The Board notes that it does not have jurisdiction to review the Office's finding that the overpayment would be recovered in payments of \$300.00 per month. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

⁴ 5 U.S.C. §§ 8101-8193, 8102(a).

⁵ 5 U.S.C. § 8116(a).

⁶ *Danney E. Haley*, 56 ECAB 393, 400 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

⁷ 5 U.S.C. §§ 8110(a)(1) and 8101(17); 20 C.F.R. § 10.405.

⁸ *Diana L. Booth*, 52 ECAB 370 (2001) (the Board held that as the claimant received compensation at the augmented rate for certain periods, even though she had no dependents, she received an overpayment of compensation).

⁹ *L.S.*, 59 ECAB ____ (Docket No. 07-1961, issued February 14, 2008); *Daniel Renard*, 51 ECAB 466 (2000); 20 C.F.R. § 10.403(c).

circumstances, the Office offsets actual earnings pursuant to the *Shadrick* formula. If a reduction of benefits based upon actual earnings is not accompanied by a determination that the earnings “fairly and reasonably” represent the employee’s wage-earning capacity, an informal reduction of benefits utilizing the *Shadrick* formula is proper rather than a formal loss of wage-earning capacity determination. The Office did not find that appellant’s actual earnings as a realtor fairly and reasonably represented his wage-earning capacity. Therefore, it properly provided an informal determination of the amount owed based on his actual earnings using the *Shadrick* formula.¹⁰

In determining the amount of the overpayment, the Office found that appellant’s actual earnings from January 1 to July 2, 2002 were \$18,470.15 or \$231.35 per week. Using the *Shadrick* formula, the Office found that he was entitled to compensation during this period based on his actual earnings in the amount of \$29,812.02. The Office subtracted the amount of compensation owed, \$29,812.02 from the amount of compensation received \$41,120.10, to find an overpayment of \$11,308.08. Appellant has not submitted any evidence to show that he did not receive this overpayment of compensation or contested the amount of the overpayment. The Board finds that he received an overpayment of compensation in the amount of \$11,308.08 for the period July 1, 2001 to July 5, 2002.

In regard to the overpayment of \$570.45 for the period July 6 to November 2, 2002, the record establishes that the Office entered appellant on the periodic rolls at the augmented 3/4 rate. Because appellant had no dependants and was entitled to compensation at the statutory 2/3 rate. The difference between the amount he received in augmented compensation and the amount that he was entitled to at the basic rate for the period July 6 to November 2, 2002 is \$570.45. The evidence establishes that appellant received this overpayment of compensation. The Board finds that he received an overpayment of compensation in the amount of \$570.45 for the period July 6 to November 2, 2002.

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 of would be against equity and good conscience.”

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, which may affect entitlement to or the amount of benefits. 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

¹⁰ 5 U.S.C. § 8106(a); *see id.*

¹¹ 5 U.S.C. § 8129(b).

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).¹²

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.¹³

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayments under the third standard listed above. The record establishes that the Office informed appellant that he was receiving compensation at the augmented rate based on one or more dependents on July 11, 2001. Appellant completed a EN1032 form on November 26, 2001 and indicated that he did not have any dependents. These documents establish that he knew or should have known that he was not entitled to receive compensation at the augmented rate and was therefore not without fault in the creation of the \$570.45 overpayment of compensation.

Appellant has also complied with the Office's request for information regarding his outside earnings on his initial CA-7 and on Forms EN1032 dated November 26, 2001 and November 14, 2002. This establishes that he was aware that he was required to report outside earnings to the Office. The Form EN1049 clearly explained that appellant should return any payment that covered a period during which he worked, including self-employment. Based on the evidence of record, he knew or should have know that he was not entitled to the entire amount of the compensation payments that he received from the Office during the period which he also had outside earnings. The evidence establishes that appellant was at fault in the creation of the overpayment totaling \$11,878.53. He is not entitled to waiver of the overpayment.¹⁴

With respect to recovery of the overpayments in compensation, the Board's jurisdiction is limited to reviewing cases where the Office seeks recovery from continuing compensation benefits under the Act. As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.¹⁵

CONCLUSION

The Board finds that the Office properly determined that appellant was at fault in the creation of overpayments totaling \$11,878.53 for the period July 1, 2001 to July 5, 2002 and from July 6 to November 2, 2002.

¹² 20 C.F.R. § 10.433(a).

¹³ *Id.* at § 10.433(b).

¹⁴ *E.V.*, 59 ECAB ____ (Docket No. 07-1733, issued December 11, 2007).

¹⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2007 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: May 5, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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