

The issues are: (1) whether the Office properly determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity; (2) whether appellant has more than 28 percent right arm permanent impairment; (3) whether the Office properly determined an overpayment was created in the amount of \$1,678.09; and (4) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

The Office accepted that appellant sustained the following injuries in the performance of duty on January 2, 2004: right acromioclavicular sprain/strain, right shoulder articular cartilage disorder, right shoulder villonodular synovitis and other affections of shoulder region. Appellant underwent right shoulder arthroscopic surgery on September 16, 2004.

The Office paid appellant compensation for wage loss from January 3 to 10 and February 8 to March 6, 2004. Appellant stopped working on March 21, 2004 and began receiving compensation for temporary total disability. The compensation payments from February 8 to March 6, 2004, deducted health benefit premiums under Code 112 commencing April 4, 2004. The record contains a Federal Employees' Health Benefits (FEHB) history report indicating appellant had changed his health benefit enrollment from Code 112 (family basic) to Code 105 (family standard coverage) as of November 24, 2003. As of May 14, 2006, the Office began deducting health benefit premiums based on Code 105.

By letter dated December 14, 2006, the Office advised appellant of a preliminary determination that an overpayment of \$1,678.09 was created from February 8, 2004 to May 13, 2006 due to improper deduction of health benefit premiums. It made a preliminary finding that appellant was at fault in creating the overpayment. The Office noted that the preliminary finding of fault could be overturned based on new evidence or argument and appellant was asked to complete an enclosed overpayment recovery questionnaire (Form OWCP-20) so that the Office could properly consider issues of fault, waiver and recovery. On January 22, 2007 it received an incomplete OWCP-20 with "N/A [not applicable]" written in response to information regarding income and expenses. The record contains an overpayment worksheet indicating that during the specified period the Office deducted \$5,072.43 in health benefit premiums for Code 112, while it should have deducted \$6,750.52 for coverage under Code 105.

Appellant was provided with vocational rehabilitation services through a rehabilitation counselor. Rehabilitation action reports (Form OWCP-44) indicated that he returned to work on January 22, 2007 as a security guard. An OWCP-44 dated February 2, 2007 reported that appellant was earning \$15.00 per hour at 36 to 40 hours per week, with additional hours available. By letter dated March 2, 2007, the Office advised him that it would reduce his compensation based on his actual earnings and issue a formal decision after he had worked for 60 days.

By decision dated March 23, 2007, the Office reduced appellant's compensation pursuant to 5 U.S.C. § 8115 based on his actual earnings at \$600.00 per week as a security officer. The Office indicated that appellant's net compensation would be \$44.80 every 28 days. According to the record, appellant elected to receive retirement benefits in preference to Federal Employees' Compensation Act benefits as of March 18, 2007.

With respect to his permanent impairment, appellant submitted a February 13, 2007 report from Dr. Jacob Tauber, an orthopedic surgeon, who noted in a June 13, 2006 report that he had found nine percent impairment to the right arm for weakness in the axillary nerve under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Dr. Tauber indicated that appellant had an additional impairment for shoulder loss of range of motion, based

on the following results in degrees: 116 flexion, 36 extension, 40 adduction, 111 abduction, 68 internal rotation and 63 external rotation. He concluded that appellant had a total 17 percent right arm impairment, combining the weakness and loss of range of motion impairments.

By report dated May 27, 2007, an Office medical adviser reviewed the medical evidence of record. He agreed that the loss of range of motion impairment was nine percent of the right arm. The medical adviser applied Table 16-35 of the A.M.A., *Guides* and found a six percent impairment for abduction strength deficit and an additional six percent for medial and lateral rotation strength deficit. He also found a 10 percent right arm impairment based on C6 and C7 nerve root impairment. The medical adviser concluded that combining 12 percent for weakness, 10 percent for cervical radiculopathy and 9 percent for loss of range of motion resulted in 28 percent right arm impairment.

In a decision dated June 13, 2007, the Office issued a schedule award for a 28 percent right arm permanent impairment. The period of the award was 87.36 weeks commencing March 18, 2007.

A prerecoupment hearing before an Office hearing representative was held on May 23, 2007. By decision dated August 9, 2007, the Office hearing representative affirmed that an overpayment of \$1,678.09 was created. On the issue of fault, the hearing representative found that appellant was not at fault in creating the overpayment. The hearing representative denied waiver of the overpayment, noting that appellant had not completed the overpayment recovery questionnaire. The hearing representative found recovery of the overpayment was not against equity and good conscience, nor would it defeat the purpose of the Federal Employees' Compensation Act.

LEGAL PRECEDENT -- ISSUE 1

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.¹ 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.²

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,³ has been codified at 20 C.F.R. § 10.403. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate.⁴

¹ 5 U.S.C. § 8115(a).

² *Dennis E. Maddy*, 47 ECAB 259 (1995).

³ 5 ECAB 376 (1953).

⁴ 20 C.F.R. § 10.403(d).

ANALYSIS -- ISSUE 1

Appellant returned to work as a security officer on January 22, 2007. The employment was secured through vocational rehabilitation services, establishing appellant had the proper vocational and educational background for such a position. Wages actually earned are generally considered the best measure of wage-earning capacity, and in this case there is no evidence showing that the actual earnings do not fairly and reasonably represent wage-earning capacity.

The evidence from the rehabilitation counselor indicated that appellant was earning \$15.00 per hour and was working full time. The Office found that appellant was capable of earning \$600.00 per week (\$15.00 per hour at 40 hours per week) and compared this with the current salary for the date-of-injury position of \$628.60. Compensation was then calculated in accordance with the *Shadrick* formula, applying a wage-earning capacity of 95 percent of the pay rate when injured.

The Board finds that the Office properly determined that appellant's actual earnings fairly and reasonably represent his wage-earning capacity. Appellant's compensation was properly reduced in accordance with 5 U.S.C. § 8115 and 20 C.F.R. § 10.403.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁵ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶

ANALYSIS -- ISSUE 2

The schedule award for the right arm was based on the report of Dr. Tauber and the review by the Office medical adviser. With respect to range of motion in the shoulder, the applicable figures in the A.M.A., *Guides* are 16-40 through 16-46. Flexion of 116 degrees is 4 percent impairment, with 1 percent impairment for 36 degrees of extension.⁷ For shoulder abduction, 111 degrees is 3 percent arm impairment, and 68 degrees of internal rotation is 1 percent impairment.⁸ The remainder of the range of motion results, do not provide a ratable arm impairment. Based on the evidence from Dr. Tauber, appellant has nine percent arm impairment for loss of range of motion.

⁵ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁶ A. George Lampo, 45 ECAB 441 (1994).

⁷ A.M.A., *Guides* 476, Figure 16-40.

⁸ *Id.* at 477, 479, Figures 16-43 and 16-46.

As to strength deficit, the Office medical adviser noted the results of manual muscle testing reported by Dr. Tauber. Table 16-35 provides arm impairments for strength deficit based on manual muscle testing of individual units of motion.⁹ The medical adviser gave the maximum impairments of 6 percent for abduction deficit, 3 percent for internal rotation and 3 percent for external rotation, resulting in 12 percent impairment for strength deficit.

The Office medical adviser also utilized Tables 15-17 and 15-15, for sensory deficit or pain affecting the arm from the C6 and C7 nerve roots. The maximum impairment for C6 nerve root is eight percent and the maximum for C7 is five percent.¹⁰ The impairments were graded at 80 percent of the maximum, resulting in 10 percent arm impairment.

The impairments from loss of range of motion, strength deficit and pain were then combined using the Combined Values Chart.¹¹ Combining 12 and 10 is 21 percent impairment, and combining 21 and 9 is 28 percent arm impairment. The Board finds that the Office medical properly applied the A.M.A., *Guides* to the findings of Dr. Tauber in this case. There is no evidence appellant has more than 28 percent permanent impairment to the right arm.

The number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). The maximum number of weeks of compensation for the arm is 312 weeks, and therefore appellant was entitled to 28 percent of 312, or 87.36 weeks. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.¹² In this case, the Office medical adviser concluded that the date of maximum medical improvement was February 13, 2007, the date of the examination by Dr. Tauber. The Office began the award on March 18, 2007, the date appellant elected retirement benefits. This determination is not adverse to appellant, as the schedule award would therefore not be reduced by the compensation for wage loss paid prior to March 18, 2007.

LEGAL PRECEDENT -- ISSUE 3

The regulations of the Office of Personnel Management (OPM), which administers the FEHB Program, provides guidelines for the registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(b)(1) provides: “An employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment for every pay period during which the enrollment continues. In each pay period for which health benefits withholdings or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs an indebtedness due to the United States in the amount of the proper employee withholding required for that pay period.”

⁹ *Id.* at 510, Table 16-35.

¹⁰ *Id.* at 424, Table 15-17.

¹¹ *Id.* at 604, Combined Values Chart.

¹² *Albert Valverde*, 36 ECAB 233, 237 (1984).

In addition, 5 C.F.R. § 890.502(d) provides: “An agency that withholds less than or none of the proper health benefits contributions from an individual’s pay, annuity or compensation must submit an amount equal to the sum of the uncollected deductions and any applicable agency contributions required under section 8906 of the title, 5 United States Code, to OPM for deposit in the Employees Health Benefits Fund.” When the Office deducts less than the proper health benefit premium for the coverage selected, an overpayment of compensation is created.¹³

ANALYSIS -- ISSUE 3

The Office deducted health benefit premiums based on Code 112, for basic family coverage, for the period February 8 to March 6, 2004, and April 4, 2004 to May 13, 2006. The record establishes that, prior to receipt of compensation for wage loss, appellant had selected Code 105, family standard coverage. The Office was obligated to deduct the appropriate health benefit premiums for Code 105. An overpayment worksheet documented that for the selected period the Office had deducted \$5,072.43 in premiums, while it should have deducted \$6,750.52 based on Code 105. Accordingly, an overpayment of \$1,678.09 was created.

LEGAL PRECEDENT -- ISSUE 4

Section 8129(b) of the Act¹⁴ 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 equity and good conscience.”¹⁵ Since the Office found appellant to be without fault in the creation of the 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 to 10.437 of Title 20 of the Code of Federal 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.¹⁶ For waiver under the “defeat the purpose of the Act” standard, appellant must show that he needs

¹³ See *John Skarbek*, 53 ECAB 630 (2002).

¹⁴ 5 U.S.C. §§ 8101 *et seq.*

¹⁵ 5 U.S.C. § 8129(b).

¹⁶ 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).

substantially all of his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the resource base.¹⁷

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) the individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.

ANALYSIS -- ISSUE 4

The hearing representative found that appellant was not at fault in creating the overpayment, and therefore the issue of waiver was considered. A proper consideration of whether recovery of the overpayment would “defeat the purpose of the Act” or be “against equity and good conscience” requires an examination of relevant financial information concerning income, expenses and assets. Appellant had an opportunity to submit relevant financial information through the Form OWCP-20 overpayment recovery questionnaire. The December 14, 2006 preliminary determination of overpayment, even though it found appellant to be at fault, noted that the Office could overturn the preliminary finding of fault and enclosed an OWCP-20. The Office advised appellant that he must complete the OWCP-20 so that the Office could properly consider the issues of fault, waiver and recovery. Appellant returned an incomplete OWCP-20 with no relevant financial information.

The Office’s regulations provide: “[t]he individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office].”¹⁸ In addition, as noted by the Office in its December 14, 2006 preliminary determination, failure to submit the requested information “shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”¹⁹ The Board finds appellant did not submit the requested information and the Office properly denied waiver of the overpayment.

CONCLUSION

The Office properly determined that appellant’s actual earnings fairly and reasonably represented his wage-earning capacity. The evidence does not establish that appellant has more than 28 percent permanent impairment to his right arm. With respect to an overpayment, the Office properly determined an overpayment of \$1,678.09 was created and properly denied waiver of the overpayment.

¹⁷ See *Robert E. Wenzholz*, 38 ECAB 311 (1986).

¹⁸ 20 C.F.R. § 10.438(a).

¹⁹ 20 C.F.R. § 10.438(b).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 9, June 13 and March 23, 2007 are affirmed.

Issued: May 15, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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