

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

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**W.L., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Beaumont, CA, Employer**

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**Docket No. 12-320  
Issued: November 26, 2012**

*Appearances:*

*Toby Rubenstein, for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On November 28, 2011 appellant, through his representative, timely appealed the November 14, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which found an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether OWCP properly found that appellant received an overpayment of \$45,430.49 and (2) whether OWCP properly denied waiver of recovery.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> The record includes evidence received after the November 14, 2011 decision. As this evidence was not part of the record when the Branch of Hearings & Review issued its November 14, 2011 final overpayment decision, the Board is precluded from considering it for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

## **FACTUAL HISTORY**

On March 11, 1999 appellant, then a 40-year-old part-time casual/flexible carrier, was involved in an employment-related motor vehicle accident. OWCP accepted his claim for cervical strain, postconcussion syndrome, depressive disorder, bilateral sensorineural hearing loss, left knee medial meniscus tear and left ulnar nerve lesion. Appellant has not worked for the employing establishment since March 11, 1999.<sup>3</sup> After receiving continuation of pay, OWCP paid him wage-loss compensation beginning April 24, 1999. It placed appellant on the periodic compensation rolls effective January 2, 2000.

In a December 5, 2000 Form EN1032, appellant advised OWCP that he received an \$85,000.00 third-party settlement. In a January 4, 2002 Form EN1032, he advised OWCP that in 2001 he became a member of the board of the Beaumont -- Cherry Valley Water District (BCVWD). Appellant reportedly attended one to two board meetings a month and received a \$150.00 stipend for each meeting attended. He also reminded OWCP of the previously reported third-party settlement. OWCP took no immediate action with respect to either the third-party settlement or appellant's reported earnings.

On June 21, 2002 the employing establishment advised OWCP that appellant settled his third-party bodily injury claim on July 10, 2000 for \$85,000.00. As of July 14, 2002, OWCP suspended payment of wage-loss compensation. With respect to the third-party recovery, it prepared an August 15, 2002 statement of recovery (SOR) and determined that based on previous disbursements totaling \$28,062.62 appellant should refund \$15,434.44.<sup>4</sup> OWCP also calculated a third-party recovery surplus of \$8,137.38, and advised him that no additional benefits, either medical or wage-loss compensation, would be paid until the third-party surplus was exhausted. As of December 3, 2002, appellant had reimbursed OWCP a total of \$15,700.00.<sup>5</sup> After having exhausted the surplus, OWCP reinstated his wage-loss compensation effective March 23, 2003.<sup>6</sup>

Appellant regularly submitted Form EN1032 apprising OWCP of his continued involvement with the BCVWD board. In an October 8, 2006 Form EN1032, he advised OWCP that his BCVWD stipend increased to \$200.00 a meeting. Appellant last participated on the BCVWD board in November 2008. His October 30, 2009 Form EN1032 indicated that his term as a BCVWD board expired November 4, 2008 and he had been voted out of office. OWCP

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<sup>3</sup> The employing establishment relieved appellant of his duties effective April 23, 1999.

<sup>4</sup> The disbursements were ostensibly calculated through August 15, 2002. However, the SOR did not distinguish between amounts disbursed for medical benefits and/or wage-loss compensation.

<sup>5</sup> Appellant paid OWCP an additional \$265.56 in interest.

<sup>6</sup> Benefits were suspended for the period July 14, 2002 to March 22, 2003. Because the third-party surplus (\$8,137.38) was exhausted just prior to March 22, 2003, OWCP paid appellant \$213.80 and reinstated benefits effective March 23, 2003.

received itemized earnings statements from the Social Security Administration (SSA) covering calendar years 2001 to 2008.<sup>7</sup>

On June 14, 2010 OWCP issued a preliminary determination finding that appellant received an overpayment of compensation in the amount of \$32,425.00 for the period January 1, 2001 to December 31, 2008. It calculated the overpayment based on the total annual earnings reported by SSA for calendar years 2001 to 2008. Additionally, OWCP found appellant at fault in creating the overpayment because he knowingly accepted compensation he was not entitled to receive.

Appellant requested a prerecoupment hearing before the Branch of Hearings & Review. He argued that the stipend he received from BCVWD was not a salary or income, but was intended to defray various expenses associated with his attendance at meetings, which was akin to per diem payments provided various state and federal legislators. Appellant also challenged OWCP's method of calculating the amount of overpayment and its finding of fault. He also submitted an overpayment recovery questionnaire (Form OWCP-20).

By decision dated December 13, 2010, OWCP's hearing representative determined that the case was not in posture for decision. She found that OWCP improperly calculated the amount of the overpayment. The hearing representative explained that OWCP should have applied the *Shadrick*<sup>8</sup> formula in determining the appropriate offset for appellant's part-time employment during calendar years 2001 to 2008.

On April 4, 2011 OWCP issued a preliminary determination that appellant received an overpayment of \$48,986.42 for the period January 1, 2001 to December 31, 2008.<sup>9</sup> This time it did not find him at fault in creating the overpayment.

Appellant requested another prerecoupment hearing and he submitted a current OWCP-20. However, he did not provide information regarding his family's total monthly income.<sup>10</sup> A hearing was held on September 9, 2011. OWCP's hearing representative allowed appellant 30 days post hearing to submit additional information regarding total family income, expenses and assets.

In a November 14, 2011 decision, OWCP's hearing representative found that appellant received an overpayment of \$45,430.49 for the periods January 1, 2001 to July 13, 2002 and March 16, 2003 to December 31, 2008. She excluded the approximate eight-month period from 2002 to 2003 when OWCP suspended wage-loss compensation pending the exhaustion of his

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<sup>7</sup> The SSA earnings statements do not itemize earnings either monthly or quarterly, but instead identified appellant's total annual earnings from self-employment.

<sup>8</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(c), (d); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d)(1), (4) (October 2009).

<sup>9</sup> OWCP's hearing representative envisioned that applying *Shadrick* would be more advantageous to appellant, but in fact OWCP's application of the formula resulted in an even larger overpayment than previously calculated.

<sup>10</sup> OWCP paid appellant \$1,158.00 (net/gross) every 28 days. In a previous OWCP-20 dated July 2, 2010, appellant reported total monthly income of \$3,607.86. The latest OWCP-20 did not include his wife's income.

third-party recovery surplus. Although appellant was without fault in creating the overpayment, OWCP's hearing representative denied waiver of recovery because appellant did not adequately document his monthly income, expenses and assets. Under the Debt Collection Act, she found the overpayment due in full.<sup>11</sup>

### **LEGAL PRECEDENT**

Appellant is not entitled to receive wage-loss compensation for temporary total disability while gainfully employed. 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.<sup>12</sup> Under the circumstances, wage-loss compensation is reduced or offset by the employee's actual earnings pursuant to the *Shadrick* formula.<sup>13</sup>

### **ANALYSIS**

The Board finds that the case is not in posture for decision regarding the amount of the overpayment appellant received. In its April 4, 2011 preliminary determination, OWCP found an overpayment of benefits in the amount of \$48,986.42 for the period January 1, 2001 to December 31, 2008. OWCP's hearing representative subsequently found a \$45,430.49 overpayment for the periods January 1, 2001 to July 13, 2002 and March 16, 2003 to December 31, 2008. The decrease in the overpayment was because she properly excluded the approximate eight-month period beginning July 14, 2002 when OWCP suspended wage-loss compensation because appellant had yet to exhaust his third-party surplus. However, both OWCP and its hearing representative failed to take into account the \$15,700.00 appellant previously refunded to OWCP.<sup>14</sup> The August 15, 2002 SOR indicated that OWCP had already disbursed \$28,062.62 and that appellant should refund \$15,434.44. As of December 3, 2002, appellant repaid the full amount OWCP requested, plus interest. Because of the failure to account for the third-party recovery refund, the hearing representative's finding that appellant received a \$45,430.49 overpayment shall be set aside.

The Board further notes that the record does not document compensation payments disbursed for the period January 30, 2000 to June 15, 2002. The record documents payments through January 29, 2000 and iFECS provides a payment history dating back to June 16, 2002. There is no proof of payment for the approximate 29-month interim period. Worksheet calculations provided by OWCP represented that appellant received wage-loss compensation totaling \$11,866.90 in 2001, \$12,058.82 in 2002 and \$12,324.43 in 2003. The 2001 figure is not otherwise supported by the record and the 2002 to 2003 figures appears incorrect as OWCP included compensation it clearly did not pay during the eight-month suspension period beginning

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<sup>11</sup> See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300 (May 2004).

<sup>12</sup> *L.S.*, 59 ECAB 350, 352-53 (2008).

<sup>13</sup> *Id.*; see *supra* note 9.

<sup>14</sup> As previously noted, OWCP requested a refund of \$15,434.44. Appellant repaid the requested amount plus an additional \$265.56 in interest.

July 14, 2002. In view of the above, OWCP's overpayment worksheets are insufficient to establish the amount of wage-loss compensation paid for the period January 30, 2000 to June 15, 2002.

Appellant noted that he last served on the BCVWD board in November 2008 yet OWCP declared an overpayment of benefits through December 31, 2008. The SSA records OWCP relied upon provided end of year total earnings. In 2008, appellant had self-employment earnings totaling \$5,435.00. The SSA itemized statement of earnings did not provide a monthly or quarterly breakdown of earnings, therefore, there is insufficient evidence to support OWCP's finding of an overpayment for the month of December 2008.

### **CONCLUSION**

The case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 14, 2011 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: November 26, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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