

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

L.A., Appellant)

and)

U.S. POSTAL SERVICE, PROCESSING &)
DISTRIBUTION CENTER, Kearny, NJ,)
Employer)

**Docket No. 15-1213
Issued: April 27, 2016**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 6, 2015 appellant, through counsel, filed a timely appeal from a March 2, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether an overpayment of \$21,074.30 was created for the periods January 1 to June 20, 2010 and January 1 to December 31, 2011; and (2) whether OWCP properly found that appellant was at fault in creating the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 18, 2007 appellant, then a 30-year-old mail handler, filed an occupational disease or illness claim (Form CA-2) alleging that she had sustained injuries as a result of repetitive work in her federal employment. OWCP accepted the claim on October 20, 2008 for right shoulder adhesive capsulitis and “unspecified inflammatory spondylopathies.” Appellant received wage-loss compensation commencing August 11, 2007. She continued to submit wage-loss claims (Forms CA-7) through January 31, 2009 and was paid disability compensation. The CA-7 forms provided that a claimant must report all earnings from employment, including self-employment.

By letter dated February 27, 2009, OWCP advised appellant that she would receive wage-loss compensation on the periodic rolls every 28 days effective January 31, 2009. It advised her that she must immediately notify OWCP if she returned to work and that compensation would be terminated without notice if OWCP was notified of earnings equal to or higher than the \$921.89 a week, upon which the compensation rate was based. In addition, appellant was advised that she must report any other employment, including self-employment. On March 2, 2009 appellant indicated by signature that she agreed to be bound by the conditions set forth in the February 27, 2009 letter. On July 6, 2009 she was provided an EN1032 form, which requires a claimant to report all employment activity for the prior 15 months.²

Appellant returned to full-time light-duty work on June 20, 2010. She underwent right shoulder surgery on July 13, 2010 and filed a claim for recurrence of disability (Form CA-2a) claiming a recurrence of disability commencing on that date. Appellant also submitted claims for compensation (Forms CA-7) from July 13, 2010 and continuing. OWCP paid wage-loss compensation commencing July 13, 2010 until she was returned to the periodic rolls effective September 16, 2010.

OWCP referred appellant for a second opinion examination with Dr. David Rubinfeld, a Board-certified orthopedic surgeon, to determine her work capacity. In a report dated February 28, 2011, Dr. Rubinfeld opined that objective findings confirmed that the accepted conditions had resolved. He submitted an additional report dated June 10, 2011, finding that appellant’s employment-related condition had resolved by February 18, 2011.

By letter dated June 24, 2011, OWCP proposed to terminate compensation for wage-loss and medical benefits based on the medical evidence of record. In a decision dated August 3, 2011, it terminated compensation for wage-loss and medical benefits effective that date. OWCP found that the weight of the medical evidence was represented by Dr. Rubinfeld. Appellant requested a hearing before an OWCP hearing representative.

In a decision dated January 20, 2012, the hearing representative set aside the August 3, 2011 decision. She noted that appellant had a prior traumatic injury claim on June 17, 2006 which had been accepted for right shoulder rotator cuff tendinitis, but the statement of accepted facts had not provided information regarding this injury or her regular work duties. In addition, the hearing representative found there were relevant diagnostic tests that had not been provided

² There is no indication in the record that appellant completed an EN1032 form at that time.

to Dr. Rubinfeld. Appellant's compensation was retroactively reinstated from August 3, 2011 through March 1, 2012.³

On May 9, 2012 OWCP requested that appellant submit evidence regarding employment and earnings. Appellant submitted copies of tax forms, including IRS Form 1040, for the years 2009 to 2011. The tax forms reflected that for the year 2010 she had \$14,521.00 income as a child care provider, and for 2011 she had \$15,310.00 income as a child care provider. Appellant also submitted an EN1032 form, dated May 10, 2012, stating that she received intermittent earnings as a child care provider from January to December 2011 at \$1,210.00 per month.

OWCP received a statement from the Social Security Administration (SSA) dated July 10, 2012 which reported self-employment earnings of \$13,411.00 in 2010 and \$14,138.00 for the full year in 2011.

By decision dated June 14, 2013, OWCP found that appellant forfeited her compensation from January 1, 2010 to December 31, 2011 for failing to disclose self-employment earnings as required on the CA-7 forms and the periodic rolls letter. In a letter dated June 14, 2013, it also advised her of its preliminary determination that an overpayment of \$75,271.50 had been created. According to OWCP, this represented gross compensation for the entire period from January 1, 2010 to January 25, 2012.

Appellant requested a hearing, which was held on November 21, 2013. At the hearing, appellant's counsel indicated that appellant did not perform her child care business in the months following the July 2010 surgery. He indicated that for the time period claimed after the surgery in 2010, she was not capable of participating in a child care business.

On February 10, 2014 an OWCP hearing representative reversed the June 14, 2013 forfeiture decision. She found the evidence failed to establish that appellant had knowingly failed to report earnings as she had reported 2011 earnings as a child care provider on her May 10, 2012 EN1032 form. In addition, the hearing representative indicated that there was no evidence of earnings during the specific periods covered by the CA-7 forms, dated from August 16 until September 26, 2010 when she was again placed on the periodic rolls. This decision also effectively reversed the termination determination.

In a letter dated June 10, 2014, OWCP issued a new preliminary determination of an overpayment of \$21,173.92, based on actual earnings of \$13,411.00 in 2010 and \$14,138.00 in 2011. According to it, appellant was paid \$17,267.66 in wage-loss compensation from January 1 to June 20, 2010, but under the *Shadrick* formula, should have been paid only \$7,077.31, creating an overpayment of \$10,190.35 for this period.⁴

In addition, OWCP found that she had been paid \$37,817.64 in wage-loss compensation for the period January 1 to December 31, 2011, when the proper amount should have been

³ Appellant was incarcerated on March 2, 2012 for a nonemployment-related felony conviction and her compensation was accordingly suspended.

⁴ *Albert C. Shadrick*, 5 ECAB 379 (1953).

\$26,834.07 after offset for actual earnings creating an overpayment of \$10,983.57. Combining the 2011 overpayment of \$10,983.57 with the January 1 to June 20, 2010 overpayment of \$10,190.35, resulted in a total overpayment of \$21,173.92.

Appellant requested a prerecoupment hearing with an OWCP hearing representative, but subsequently changed it to a request for review of the written record. She submitted an overpayment recovery questionnaire (Form OWCP-20) dated June 23, 2014 with regard to her monthly income and expenses. In a November 21, 2014 letter, appellant's representative stated that the overpayment was apparently based on a wage-earning capacity determination and OWCP had not followed its procedures for a formal wage-earning capacity determination.

By decision dated March 2, 2015, the hearing representative revised the total amount of overpayment to \$21,074.30 for the periods January 1 to June 20, 2010 and January 1 to December 31, 2011. He indicated that appellant had reported no self-employment in 2010, but the SSA showed self-employment earnings of \$13,411.00. These earnings occurred during the period January 1 to June 30, 2011.

For 2010, the hearing representative found that the evidence showed that appellant was paid \$17,165.57 in gross compensation from January 1 to June 20, 2010 and, using the *Shadrick* formula, found that her average actual weekly earnings were \$549.63. After offsetting actual earnings, the hearing representative found that she should only have received \$7,077.31 in wage-loss compensation, creating an overpayment of \$10,088.26.⁵

For 2011, the hearing representative found that the evidence showed that appellant had self-employment earnings of \$14,138.00. OWCP based its overpayment calculations as if the earnings occurred evenly over 12 months. Appellant had been paid \$37,820.11 in gross compensation from January 1 to December 31, 2011.⁶ Using the *Shadrick* formula, the hearing representative calculated that she was entitled to \$26,834.07 in compensation after deducting, using the *Shadrick* formula, the average actual weekly earnings of \$271.88, creating an overpayment of \$10,986.04. The total overpayment was therefore found to be \$21,074.30 (\$10,088.26 + \$10,986.04). As to fault, the hearing representative found that appellant was aware, based on the language in Forms CA-7 and the Forms EN1032, that she needed to report any and all earnings, and that she had failed to report these earnings to OWCP at the time she earned this income. He found that she was at fault and therefore not entitled to waiver. As to repayment, the hearing representative found that appellant should pay \$350.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the

⁵ This number was slightly revised from the preliminary overpayment decision because of a calculation error on the amount of compensation paid by OWCP. The earlier amount was \$17,267.66, but was revised to \$17,165.57.

⁶ This number was also slightly revised from the preliminary overpayment decision because of a calculation error on the amount of compensation paid by OWCP. The earlier amount was \$37,817.64, but was revised to \$37,820.11.

performance of duty.⁷ FECA, however, also places limitations on an employee's right to receive compensation benefits. Section 8116 provides that, while an employee is receiving benefits, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁸

OWCP regulations further state that compensation for wage loss due to disability is available only for the period where an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁹ A claimant is not entitled to receive temporary total disability and actual earnings for the same period.¹⁰ An overpayment of compensation is created when a claimant has actual earnings, but continues to receive wage-loss compensation.¹¹ When a claimant has actual earnings that span a lengthy period of time (*e.g.* several months or more) the proper compensation should be determined by averaging the earnings for the entire period, determining the average pay rate, and applying the *Shadrick* formula (comparing the average pay rate for the entire period to the pay rate of the date-of-injury position in effect at the end of the period of actual earnings).¹² The wage-earning capacity in terms of percentage is determined by dividing the employee's earnings by the current pay rate of the job held at the time of injury. The computation in dollars is computed by multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity and the resulting dollar amount is subtracted from the pay rate for compensation purposes to obtain the loss of wage-earning capacity.¹³

ANALYSIS -- ISSUE 1

In the present case, OWCP found that an overpayment occurred during the periods January 1 to June 20, 2010 and January 1 to December 31, 2011. Appellant's representative indicated at the November 21, 2013 hearing that appellant had not worked as a child care provider in the months following her July 13, 2010 surgery. No evidence was presented that appellant had earnings in 2010 as a child care provider after her surgery in July 2010. The evidence from SSA establishes that she had self-employment earnings of \$13,411.00 in 2010 and \$14,138.00 in 2011.

As noted above, a claimant cannot receive compensation for total disability during a period in which she has actual earnings. Therefore, the compensation paid to appellant from

⁷ *Supra* note 1 at § 8102(a).

⁸ *Id.* at § 8116(a).

⁹ 20 C.F.R. § 10.500(a).

¹⁰ *J.L.*, Docket No. 14-0396 (issued May 19, 2014).

¹¹ *Id.*

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.3(b)(4) (June 2013).

¹³ *See supra* note 4; 20 C.F.R. § 10.403.

January 1 to June 20, 2010 must be offset to reflect her actual earnings.¹⁴ Similarly, for 2011 the compensation during this period must also be offset to reflect the actual earnings. Since appellant received wage-loss compensation from January 1 to June 20, 2010 and January 1 to December 31, 2011 without any offset for actual earnings, an overpayment of compensation was created.

The hearing representative applied the *Shadrick* formula¹⁵ with respect to the overpayment amount for each period. With respect to 2010, the hearing representative determined that the \$13,411.00 earned over 171 days or 24.4 weeks was equal to an average weekly pay rate of \$549.63 per week. The percentage of wage-earning capacity is calculated by dividing the actual earnings by the current pay rate for the date-of-injury position. The current pay rate for the date-of-injury position was \$924.27 per week. Dividing the actual earnings of \$549.63 by the current pay rate for the date-of-injury position in this case results in a wage-earning capacity of 59 percent. The wage-earning capacity in terms of dollars is found by multiplying the pay rate for compensation purposes¹⁶ by the percentage of wage-earning capacity. In this case, the pay rate for compensation purposes was \$921.89 as of August 11, 2007, the date disability began. Multiplying \$921.89 by the 59 percent wage-earning capacity is \$543.92 per week. The \$543.92 is subtracted from \$921.89, resulting in a loss of wage-earning capacity of \$377.97 per week. Based on a compensation rate of $\frac{3}{4}$ and any consumer price index (CPI) adjustments for that period, OWCP determined that appellant was entitled to \$7,077.31 for the period January 1 to June 20, 2010. The preliminary determination of overpayment contains an OWCP worksheet documenting its calculations.

The hearing representative found that appellant was paid \$17,165.57 in wage-loss compensation from January 1 to June 20, 2010. He explained that she had received \$18,350.81 in compensation from December 20, 2009 to June 20, 2010. The amount paid to appellant from December 20 to 31, 2009 was \$1,185.24. After subtracting this amount from \$18,350.81, the total compensation she had received during that period was \$17,165.57. Since appellant was entitled to only \$7,077.31, an overpayment of \$10,088.26 was created for the period January 1 to June 20, 2010.

With respect to 2011, the hearing representative determined that appellant had earnings of \$14,138.00 from January 1 to December 31, 2011, or \$271.88 average annual earnings per week. As noted above, the percentage of wage-earning capacity is calculated by dividing the actual earnings by the current pay rate for the date-of-injury position. The current pay rate for the date-of-injury position was \$924.27 per week. Dividing the actual earnings of \$271.88 by the current pay rate for the date-of-injury position of \$924.27 in this case results in a wage-earning capacity of 29 percent. The wage-earning capacity in terms of dollars is found by multiplying the pay rate for compensation purposes¹⁷ by the percentage of wage-earning

¹⁴ *Supra* note 5.

¹⁵ *Id.*

¹⁶ The pay rate for compensation purposes is the pay rate as of the date of injury, date disability began, or the time compensable disability recurs, if the recurrence begins more than six months after the employee returns to regular, full-time work. *See* 5 U.S.C. § 8101(4).

¹⁷ *Id.*

capacity. In this case, the pay rate for compensation purposes was \$921.89 as of August 11, 2007, the date disability began. Multiplying \$921.89 by the 29 percent wage-earning capacity is \$267.35 per week. The \$267.35 is subtracted from \$921.89, resulting in a loss of wage-earning capacity of \$654.54 per week. Based on the $\frac{3}{4}$ compensation rate, and any CPI adjustments for that period, OWCP found that appellant was entitled to \$26,834.07 for the period January 1 through December 31, 2011.

The hearing representative found that appellant had already been paid \$37,820.11 in compensation from January 1 to December 31, 2011. Since appellant was only to \$26,834.07 from January 1 to December 31, 2011, an overpayment of \$10,986.04 was created during this period. She has not contested the amount of the overpayment.

Combining the \$10,088.26 overpayment from January 1 to June 20, 2010 and the \$10,986.04 from January 1 to December 31, 2011, the Board finds that the evidence establishes an overpayment of \$21,074.30 was created in this case.

On appeal, appellant's representative reiterates the argument raised before the hearing representative regarding wage-earning capacity. He argues that the overpayment was generated as a result of a wage-earning capacity determination and that OWCP cannot terminate compensation without due process. However, the Board notes that the overpayment was not based on a termination of compensation, nor was it based on a formal wage-earning capacity determination. When a claimant has actual earnings OWCP may properly offset the compensation owed, using the established *Shadrick* formula, without making a formal wage-earning capacity determination.¹⁸ OWCP procedures note that when actual earnings do not fairly and reasonably represent wage-earning capacity, a formal decision is not issued, but compensation should be reduced to reflect earnings during those periods worked.¹⁹ In this case, the earnings were intermittent earnings as a child care provider and OWCP reasonably concluded they were not a sufficient basis for a formal wage-earning capacity determination. OWCP offset the earnings during periods worked in accord with FECA in this case.

Appellant also argues that the earnings in 2010 should not be based on only the 6-month period, but should be averaged over a 12-month period. However, appellant's counsel indicated at the November 21, 2013 hearing that she did not work as a child care provider after her surgery on July 13, 2010. OWCP properly determined that as appellant had either filed CA-7 forms or was on the periodic rolls for the period after June 20, 2010, and as she had failed to report any actual earnings during that time frame, OWCP properly determined that the earnings must have occurred in the period January to June 2010, prior to appellant's surgery.

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. § 8129(b) 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

¹⁸ See *supra* note 4. The Board noted that OWCP may offset earnings without making a formal wage-earning capacity determination.

¹⁹ *Supra* note 11 at Chapter 2.815.5(e) (June 2013).

adjustment or recovery would defeat the purpose of [FECA] or would be against equity and good conscience.”²⁰ A claimant who is at fault in creating the overpayment is not entitled to waiver.²¹ On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(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 should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”

ANALYSIS -- ISSUE 2

In the present case, the hearing representative found that appellant was at fault under the second standard noted above: failing to provide information she knew or should have known was material. The Board finds that appellant was at fault in the creation of this overpayment. Appellant should have known that she must provide information with respect to any earnings while receiving compensation. The February 27, 2009 letter she received from OWCP when she was placed on the periodic compensation rolls advised her that she must report any self-employment or other employment activity. On March 2, 2009 appellant acknowledged her obligation to immediately report earnings to OWCP and that failure to do so could result in an overpayment of compensation. She did not provide any information regarding earnings in 2010 and 2011 until the May 10, 2012 EN1032, well after having earned the additional income. Appellant did not notify OWCP of her child care earnings while she was working. The Board has found that OWCP may properly find her at fault for failure to provide material information.²² In addition, appellant had received all EN1032 forms and submitted CA-7 forms both before and after these periods which clearly advised her of the necessity to report any earnings while receiving compensation.

The Board finds that appellant failed to provide information regarding her self-employment earnings, from January 1 to June 20, 2010 and January 1 to December 31, 2011, that she knew or should have known was material. OWCP therefore properly found her at fault in creating the overpayment and not entitled to waiver of the overpayment in this case.²³

²⁰ 5 U.S.C. § 8129(b).

²¹ See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

²² *L.W.*, Docket No. 14-0196 (issued June 17, 2014).

²³ There is no indication that recovery of the overpayment was to be from continuing compensation. The record indicated that appellant had not received compensation for any period after March 1, 2012. The hearing representative noted that appellant was released from incarceration in January 2015, but there is no indication that she was receiving compensation at the time of the overpayment decision. The Board has jurisdiction over recovery of overpayments only if they are deducted from continuing compensation payments. See *Levon H. Knight*, 40 ECAB 658, 665 (1989).

CONCLUSION

The Board finds that OWCP properly determined that an overpayment of \$21,074.30 was created. The Board further finds that OWCP properly found that appellant was at fault and therefore not entitled to waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 2, 2015 is affirmed.

Issued: April 27, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board