

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICHARD W. HAMMOND and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Ogden, Utah

*Docket No. 96-780; Submitted on the Record;  
Issued August 21, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly calculated appellant's wage-earning capacity effective February 5, 1995; (2) whether the Office properly determined that appellant received a \$592.24 overpayment of compensation; (3) whether the Office abused its discretion by refusing to waive recovery of the overpayment; and (4) whether the Office properly required repayment of the overpayment by deducting \$50.00 from appellant's compensation payments every month.

The Board has duly reviewed the case record and finds that the Office properly calculated appellant's wage-earning capacity effective February 5, 1995.

The Office's federal regulations at section 10.303<sup>1</sup> codify the Board's case law promulgated in the cases of *Albert C. Shadrick*<sup>2</sup> and *Johnny A. Muro*,<sup>3</sup> to accommodate the statutory amendments to section 8101(4) of the Federal Employees' Compensation Act. The regulations define three basic terms which are used in formulating an employee's entitlement to compensation based on his or her wage-earning capacity. These terms are: (1) "Pay Rate for Compensation Purposes"; (2) "Current Pay Rate"; and (3) "Earnings." As defined in section 8101(4), "Pay Rate for Compensation Purposes" is the greater of the employee's pay as of the date of injury, the date disability begins or the date of recurrence of disability if more than six months after returning to work.<sup>4</sup> "Current Pay Rate" is defined as the current, or updated, salary or pay rate for the job the employee held at the time of injury.<sup>5</sup> "Earnings" is defined as the

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<sup>1</sup> 20 C.F.R. § 10.303.

<sup>2</sup> 5 ECAB 376 (1953).

<sup>3</sup> 17 ECAB 537 (1966).

<sup>4</sup> See 5 U.S.C. § 8101(4); see also 20 C.F.R. § 10.5(a)(20).

<sup>5</sup> See 20 C.F.R. § 10.303(b).

employee's actual earnings, or the salary or pay rate of the job selected as representative of his or her wage-earning capacity.<sup>6</sup>

In the present case, the Office accepted that appellant sustained left carpal tunnel syndrome and left shoulder tendinitis and began paying disability compensation effective beginning May 14, 1992. By decision dated February 23, 1995, the Office made a wage-earning capacity determination and adjusted appellant's compensation effective February 5, 1995 and, by decisions dated May 15 and December 12, 1995, the Office affirmed its February 23, 1995 decision.<sup>7</sup>

Appellant's disability began on May 14, 1992 and his "Pay Rate for Compensation Purposes" would be fixed as of that date. On May 14, 1992 appellant worked at the Grade 12, Step 2 level and earned \$41,451.00 per year or \$797.13 per week. At the time the Office's wage-earning capacity determination became effective on February 5, 1995 the "Current Pay Rate" for the GS-12, Step 3 level was \$45,484.00 per year or \$874.69 per week. On February 5, 1995 appellant's "Earnings" were \$48,326.00 per year or \$370.56 per week. The Board notes that the Office properly applied these figures to the *Shadrick* formula in order to calculate the adjustment in appellant's wage-earning capacity effective February 5, 1995.

Appellant has argued that his compensation should be paid at a higher level because he was promoted to the GS-12, Step 4 level on August 9, 1992. However, this promotion occurred after appellant's pay rate was fixed on May 14, 1992, the date disability began, and appellant's pay rate would be based on his earnings at the GS-12, Step 3 level rather than the GS-12, Step 4 level. The Board has held that such step increases are not compensable in that they merely arise due to subsequent increases in the current pay rate for the date-of-injury position.<sup>8</sup>

The Board further finds that the Office properly determined that appellant received a \$592.24 overpayment of compensation.

In the present case, appellant received a \$592.24 overpayment because he received \$32,286.39 in compensation between May 14, 1992 and February 28, 1994 but was only entitled to receive \$31,694.15 during this period.<sup>9</sup> Appellant received the higher amount of compensation because his pay rate was based on his salary at the GS-12, Step 4 level. As noted above, appellant was entitled to receive compensation for loss of wage-earning capacity which was based on his salary at the GS-12, Step 3 level rather than the GS-12, Step 4 level. Therefore, the Office properly determined that appellant received a \$592.24 overpayment.

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

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<sup>6</sup> *Id.*

<sup>7</sup> The wage-earning capacity determination was made after appellant's attending physician indicated that he could work only 16 hours per week.

<sup>8</sup> See *Domenick Pezzetti*, 45 ECAB 787, 790 (1994).

<sup>9</sup> By decision dated October 13, 1995, the Office finalized its preliminary determination of February 10, 1995.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.<sup>10</sup> These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] 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 this subchapter or would be against equity and good conscience."<sup>11</sup> Since the Office found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment 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 10.322 and 10.323, respectively, of the Code of Federal Regulations. Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).<sup>12</sup> Section 10.323 provides, generally, that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with "severe financial hardship" determined by using the same criteria set forth in section 10.322; or (2) the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.<sup>13</sup>

Although appellant was found to be without fault in the matter of the overpayment, he nevertheless bears responsibility for providing the requisite information to support waiver of the overpayment. In this regard, section 10.324 of Title 20 of the Code of Federal Regulations provides:

"In requesting waiver of an overpayment, the overpaid individual has the responsibility for providing the financial information described in section 10.322 as well as additional information as the Office may require to make a decision

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<sup>10</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>11</sup> 5 U.S.C. § 8129(b).

<sup>12</sup> 20 C.F.R. § 10.322(a). Section 10.322 defines the terms "income," "expenses" and "assets." 20 C.F.R. § 10.322(b), (c) and (d). For waiver under the "defeat the purpose of the Act" standard, a claimant must show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base; see *George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986). An individual is deemed to need substantially all of his current income to meet ordinary and necessary living expenses if his monthly income does not exceed monthly expenses by more than \$50.00; see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1) (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991); 20 C.F.R. § 10.323.

<sup>13</sup> 20 C.F.R. § 10.323.

with regard to the waiver of an overpayment of compensation. Failure to furnish the information within 30 days of the request shall result in the denial of waiver and no further requests for waiver shall be entertained by the Office until such time as the requested information is furnished.”<sup>14</sup>

In the present case, appellant has failed to meet his responsibility for providing the requisite information to support waiver of the overpayment. The Office advised appellant regarding this responsibility, but appellant failed to submit the requested financial information. Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has failed to submit financial information showing that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base. Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has failed to submit financial information showing that he would experience severe financial hardship in attempting to repay the debt and has failed to submit evidence showing that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.<sup>15</sup>

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, he has failed to show that the Office abused its discretion by refusing to waive recovery of the overpayment.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$50.00 from appellant’s compensation payments every month.

Section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual.”<sup>16</sup>

The record supports that, in requiring repayment of the overpayment by deducting \$50.00 from appellant’s compensation payments every month, the Office took into consideration the factors set forth in section 10.321 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting \$50.00 from appellant’s compensation payments every month.

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<sup>14</sup> 20 C.F.R. § 10.324; *see John B. Moore*, 41 ECAB 804, 813-14 (1990).

<sup>15</sup> *See William J. Murphy*, 41 ECAB 569, 571-72 (1989).

<sup>16</sup> 20 C.F.R. § 10.321(a). *See Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

The decisions of the Office of Workers' Compensation Programs dated December 12, October 13, May 15 and February 23, 1995 are affirmed.

Dated, Washington, D.C.  
August 21, 1998

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member