

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EDDIE C. SHIPMAN and U.S. POSTAL SERVICE,  
POST OFFICE, Jacksonville, Fla.

*Docket No. 96-2157; Submitted on the Record;  
Issued September 10, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect his wage-earning capacity as a modified distribution clerk; (2) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,010.44 due to the lack of deduction for life insurance premiums; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office properly sought recovery of the overpayment by a salary offset.

The Office accepted appellant's claim for a permanent aggravation of scar tissue and calluses of his feet. On November 5, 1995 Dr. Robert Pohl, a Board-certified orthopedic surgeon, signed a job description of the modified distribution clerk position indicating that appellant could perform that work and it was within his physical restrictions. The restrictions were sitting 8 hours a day with intermittent walking, lifting, bending, climbing, standing and kneeling 4 hours per day, squatting and twisting two hours per day and no lifting over 40 pounds. The relevant medical evidence, a work capacity evaluation, Form OWCP-5C, from Dr. Pohl dated September 12, 1994 and a medical report from Dr. Michael S. Scharf, a Board-certified orthopedic surgeon, dated October 4, 1995 established that appellant could perform light work 8 hours a day, could walk 45 to 60 minutes at a time with the ability to get off his feet for 1 hour and stand 30 minutes at a time with resting of 5 to 10 minutes. The job was available as of June 24, 1995. Appellant accepted the job offer on November 14, 1995. Appellant was instructed to return to work on February 20, 1996 and returned to work on March 12, 1996.

By letter dated October 14, 1995, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$1,010.44 because appellant elected optional life insurance but no deductions were made from his compensation for the insurance premiums from May 5, 1991 through August 19, 1995. The total cost of appellant's life insurance for that time period was \$1,010.44. The Office found that appellant was without fault in the creation of the overpayment. The Office informed appellant that he could seek waiver of the overpayment and attached an overpayment recovery questionnaire concerning his financial circumstances to be completed for review.

By decision dated May 14, 1996, the Office found that appellant's weekly wages of \$720.80 as a modified distribution clerk fairly and reasonably represented his wage-earning capacity.

By decision dated May 30, 1996, the Office finalized the preliminary overpayment determination. The Office found that appellant was not entitled to waiver of the recovery of the overpayment as he had failed to respond to the overpayment notification or submit finalized information in support of a request for waiver. The Office sought recovery by offsetting the amount of the overpayment against appellant's wages.

The Board finds that the Office has met its burden of proof in establishing that the position of modified distribution clerk reasonably represented appellant's wage-earning capacity.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of proof of justifying a subsequent reduction in compensation benefits.<sup>1</sup>

Under section 8115(a) of Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity.<sup>2</sup>

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.<sup>3</sup>

The Office found that appellant's actual wages as a modified distribution clerk fairly and reasonably represented appellant's wage-earning capacity, and therefore relied on those wages in determining appellant's compensation. Appellant did not show that there was a material change in the nature and extent of his injury-related condition or that he was unable to perform the job of modified distribution clerk. The restrictions described by Dr. Pohl and Dr. Scharf in their reports dated September 12, 1994 and October 4, 1995 consisting of light sedentary work with limited standing and walking correspond to the physical requirements of the modified distribution clerk which included intermittent walking, lifting and bending four hours per day, squatting and twisting two hours per day and no lifting over 40 pounds. On November 5, 1995 Dr. Pohl signed his approval of the job for appellant and he returned to work on March 12, 1996. The Office therefore properly adjusted appellant's compensation to reflect his wage-earning capacity as a modified distribution clerk.

Regarding the issue of the overpayment, the Board finds that appellant received an overpayment in the amount of \$1,010.44 due to the lack of deduction for life insurance premiums.

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<sup>1</sup> *Louis P. McKenna*, 46 ECAB 328 (1994).

<sup>2</sup> *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1991), *petition for recon. denied*, Docket No. 92-118 (issued February 11, 1993); *see also* 5 U.S.C. § 8115(a).

<sup>3</sup> *Don J. Mazurek*, 46 ECAB 447 (1995).

The record shows that optional life insurance premiums in the amount of \$1,010.44 were not deducted from appellant's compensation from May 5, 1991 to August 19, 1995 even though appellant had elected to have life insurance coverage.

Under the Federal Employees Group Life Insurance (FEGLI) program, most civilian employees of the federal government are eligible to participate in basic life insurance one or more options.<sup>4</sup> The coverage for basic life is effective unless waived and premiums for basic and optional life coverage are withheld from the employee's pay. Under the FEGLI program, insurance remains in effect until canceled and premiums due are to be deducted from the injured employees compensation payments. The injured employee remains responsible for all insurance premiums. In this case, the record reveals, however, that premiums for appellant's life insurance were not deducted from his compensation payments. Thus, an overpayment was created in the amount of \$1,010.44 by the underdeduction of premiums for the insurance appellant elected.

The Board finds that the Office did not abuse its discretion in denying waiver of the overpayment after finding appellant was without fault in its creation.

In its October 14, 1995 preliminary determination, the Office advised appellant that he should submit the appropriate financial information to establish whether he was eligible for a waiver. Appellant did not submit any financial information. In a memorandum dated May 30, 1996, the Office stated that appellant had not responded to the overpayment letter CA2202 (*i.e.*, informing him of his right to submit financial information. The Office stated that it tried to schedule a telephone conference with appellant but he became verbally abusive and hung up on the Office representative. The Office stated that since appellant did not submit any information to establish his eligibility for a waiver, the record was insufficient to establish such entitlement and that it would try to recover the overpayment as an offset from appellant's postal salary.

The Act provides that, where an overpayment of compensation has been made, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.<sup>5</sup> The applicable regulation provides for "decreasing subsequent payments of compensation, having due regard to the probable extent of the 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>6</sup> The only exception to the Office's right to adjust later payments or to recover overpaid compensation is where an overpayment 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."<sup>7</sup>

In the present case, the Office determined that an overpayment in the amount of \$1,010.14 had occurred from May 5, 1991 through August 19, 1995 due to the underdeduction of life insurance premiums from his compensation payments. Although appellant was provided

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<sup>4</sup> See *James Lloyd Otte*, 48 ECAB \_\_\_\_ (Docket No. 95-672, issued February 14, 1997).

<sup>5</sup> 5 U.S.C. § 8128(a); see *William D. Emory*, 47 ECAB \_\_\_\_ (Docket No. 94-881, issued February 14, 1996).

<sup>6</sup> 20 C.F.R. § 10.321(a); see *Roger Seay*, 39 ECAB 441 (1988).

<sup>7</sup> 5 U.S.C. § 8129(a); see *William D. Emory*, *supra* note 5 .

with two opportunities, he submitted no financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act. Absent evidence documenting appellant's financial status, the Office cannot determine whether appellant is entitled to waiver and waiver cannot be granted.<sup>8</sup> Accordingly, the Office properly determined that appellant was not entitled to a waiver of the overpayment in this case.

Lastly, the Board notes that the Debt Collection Act of 1982<sup>9</sup> provides that debts owed to a federal agency may be collected by periodic offsets against the salary of a debtor who is employed by another federal agency. The recovery of such debts, however, are reviewable by the Office of Administrative Law Judges under 29 C.F.R. Part 18. For this reason, the Board does not have jurisdiction to review the discretionary authority of the Office with regard to the method of recovery provided under the Debt Collection Act as this involves an offset against the salary of a federal employee as opposed to a recovery made against continuing compensation benefits.<sup>10</sup>

The decisions of the Office of Workers' Compensation Programs dated May 30 and May 14, 1996 are hereby affirmed.

Dated, Washington, D.C.  
September 10, 1998

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>8</sup> *Richard S. Gumper*, 43 ECAB 811, 817 (1992).

<sup>9</sup> Debt Collection Act, 5 U.S.C. § 10.322(a).

<sup>10</sup> *Blaine E. Bedeger*, 48 ECAB \_\_\_\_ (Docket No. 95-1334, issued March 25, 1997).