

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EARL D. LONG and U.S. POSTAL SERVICE,
POST OFFICE, Columbia, S.C.

*Docket No. 96-2434; Submitted on the Record;
Issued July 14, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant forfeited his right to monetary compensation from June 3, 1988 through May 25, 1989; if so, (2) whether appellant was without fault in the creation of the resulting overpayment; (3) whether appellant was denied due process when he issued a check to repay the debt; (4) whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation based on his capacity to earn wages in the constructed position of Construction Worker I (laborer); and (5) whether the Office abused its discretion in denying waiver of the overpayment that occurred from January 18, 1992 through August 20, 1994.

In a decision dated May 29, 1996 and finalized on June 4, 1996, an Office hearing representative found that appellant, who was injured working as a T-6 window service technician for the federal government, forfeited his right to compensation from June 3, 1988 to May 25, 1989 because he knowingly omitted and understated his earnings from a dock and deck building enterprise; that he was with fault in the creation of the resulting overpayment because he made an incorrect statement as to a material fact which he knew or should have known to be incorrect; that the Office was justified in collecting the balance of the overpayment after credits for court-ordered restitution and money paid to the Department of Justice; that any error in collecting the balance of the overpayment prior to the precoupment hearing was harmless as appellant voluntarily repaid the balance; that the factual and medical evidence supported a retroactive determination of appellant's wage-earning capacity in the constructed position of Construction Worker I (laborer); that appellant was without fault in the creation of the overpayment that occurred when the Office underdeducted basic life insurance premiums from January 18, 1992 through August 20, 1994; and that appellant was not entitled to waiver of this \$396.46 overpayment because he was entitled to a lump-sum payment of \$3,000.39 as a result of the retroactive determination of his wage-earning capacity.

The essential facts of this case, which are not in dispute,¹ are set forth in the hearing representative's May 29, 1996 decision and are hereby incorporated by reference.

The Board finds that appellant forfeited his right to monetary compensation from June 3, 1988 through May 25, 1989.

Section 8106(b) of the Federal Employees' Compensation Act provides in pertinent part:

"An employee who --

- (1) fails to make an affidavit or report when required; or
- (2) knowingly omits or understates any part of his earnings;

"forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section."²

On appeal, appellant acknowledges that he underreported his earnings from self-employment on forms he was required to file with the Office covering the period June 3, 1988 through May 25, 1989. Further, appellant was convicted on three counts of "knowingly and willfully" making false, fictitious and fraudulent material statements and representations, in that he stated and represented on the forms in question that he had earned a certain amount of income from a deck and dock building enterprise, woodworking hobby or self-employment, whereas in truth and in fact, as appellant then and there well knew, he had income in excess of the stated amount from such activity, in violation of 18 U.S.C. § 1001. This evidence establishes the element of intent under 5 U.S.C. § 8106(b)(2). Accordingly, as appellant knowingly understated his earnings, he forfeited his right to compensation with respect to the periods for which the affidavits or reports were required, or from June 3, 1988 through May 25, 1989.

The Board also finds that appellant was with fault in the creation of the resulting overpayment.

Section 8129 of the Act provides that when an overpayment has been made to an individual under the Act because of an error of fact or law, adjustment shall be made by decreasing later payments to which the individual is entitled. Adjustment or recovery may not be made, however, when an 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

¹ Appellant disputes the hearing representative's statement that the report of the impartial medical specialist establishes that he is capable of gainful employment.

² 5 U.S.C. § 8106(b).

equity and good conscience.³ Thus, if the individual is with fault, the Office must decrease later payments to which the individual is entitled or recover the overpayment.⁴

Section 10.320 of the implementing federal regulations provides the following:

“In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition. An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”

The Office found appellant to be with fault in the creation of the overpayment because he made an incorrect statement as to a material fact that he knew or should have known to be incorrect. It is established that appellant made incorrect statements on the forms in question and that he knew these statements to be incorrect. This alone is insufficient to establish fault under the first criterion above. The evidence must also establish that appellant made an incorrect statement as to a material fact.

Appellant argues on appeal that the underreporting of earnings in concurrent dissimilar employment is immaterial because such earnings cannot be used to reduce compensation.⁵ Although it is true that the Office may not determine appellant’s wage-earning capacity from actual earnings in concurrent dissimilar employment, the question under section 10.320(b)(1) of the federal regulations is whether appellant made an incorrect statement as to a fact that was material to the creation of the overpayment. This is a broader issue than appellant frames on appeal. Overpayments may arise by various means, including a retroactive determination of wage-earning capacity, forfeiture, a failure to deduct premiums for health benefits or basic life insurance, or a change in the claimant’s entitlement to augmented compensation. Appellant’s argument that his underreporting is immaterial to the determination of his wage-earning capacity ignores the fact that the overpayment in this case arose not from a determination of wage-earning capacity but from forfeiture, and that what may be immaterial to the one may nonetheless be material to the other.

³ *Id.* at § 8129.

⁴ *See, e.g., Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

⁵ *See, e.g., Irwin E. Goldman*, 23 ECAB 6, 10 (1971), *petition for recon. denied*, 23 ECAB 46 (1971).

Appellant forfeited his right to monetary compensation for the period in question because he knowingly omitted or understated his earnings. Section 8106(b)(2) of the Act makes no exception for earnings in concurrent dissimilar employment. Whether full disclosure would have affected his entitlement to monetary compensation benefits is itself immaterial to the finding of forfeiture. When appellant knowingly understated his earnings, he forfeited his right to monetary compensation and caused the resulting overpayment from June 3, 1988 through May 25, 1989. The Board finds, therefore, that appellant's earnings in concurrent dissimilar employment were material to the finding of forfeiture and to the creation of the resulting overpayment, and that appellant was with fault in the creation of the overpayment because he made incorrect statements as to a material fact that he knew or should have known to be incorrect.

The Board also finds that appellant was afforded due process.

As the Board noted above, section 8129 of the Act provides that when an overpayment has been made to an individual under the Act because of an error of fact or law, adjustment shall be made by decreasing later payments to which the individual is entitled. Section 8106(b)(2) also provides that compensation forfeited under that subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129, unless recovery is waived. Pursuant to its statutory mandate, the Office was justified in collecting the balance of the overpayment after appropriate credits for restitution and other costs.

On appeal, appellant argues that he was denied due process. The Office issued a preliminary decision on December 4, 1992 in the matter of the overpayment arising from forfeiture. This preliminary decision notified appellant of the fact and amount of the overpayment and the basis of its finding of fault. The preliminary decision also notified appellant of his right to submit evidence and argument and of his right to request a precoupment hearing before a hearing representative of the Branch of Hearings and Review on the issues of fact and amount of overpayment, fault and waiver. The Office provided the address of the Branch of Hearings and Review and advised that a failure to reply within 30 days of the date of the preliminary decision would result in a final decision on the basis of information currently on file.

On January 4, 1993 the Office issued a final decision with appeal rights. It later discovered, however, that appellant had requested an oral hearing on December 29, 1992. The case was found to be not in posture for a hearing in reference to the overpayment as there was an outstanding medical issue requiring further development and a final decision. Appellant wanted a decision on the medical issue so that he could have one hearing on both issues. Upon receipt of additional medical evidence, the Office issued its final decision on appellant's wage-earning capacity on August 31, 1993.

Following inquiries from appellant and his attorney, a hearing was scheduled for February 2, 1996. Appellant submitted a pretrial brief detailing his arguments. He appeared and testified at the hearing and submitted a number of exhibits. In a decision dated May 29, 1996, the Office hearing representative found that appellant had forfeited his right to compensation from June 3, 1988 to May 25, 1989 because he knowingly omitted and understated his earnings

from a dock and deck building enterprise. The Office finalized its preliminary determination of fault in the resulting overpayment, finding that appellant made an incorrect statement as to a material fact which he knew or should have known to be incorrect.

Pursuant to *Califano v. Yamasaki*, 422 U.S. 682 (1979), the Office has established procedures for handling overpayment cases under 5 U.S.C. § 8129, pertaining to the recovery of overpayments. The Director of the Office has determined that the holding of the Supreme Court in *Califano v. Yamasaki* is applicable to the recovery of overpayments under the Act and requires an opportunity for a prerecoupment hearing.⁶ Accordingly, federal regulations provide that before adjusting future payments or otherwise seeking to recover an overpayment, the Office shall provide the individual with written notice of, among other things, the individual's right to request a prerecoupment hearing within 30 days of the date of written notice of the overpayment for the purpose of challenging the fact or amount of the overpayment, the preliminary finding of fault, or for the purpose of requesting waiver.⁷ Additional evidence must be submitted, or a prerecoupment hearing requested, within 30 days of the Office's written notice to the individual. Failure to exercise the right to a prerecoupment hearing within 30 days of the date of notice of overpayment shall constitute a waiver of that right.⁸ If additional written evidence is not submitted, or a hearing requested, within the 30-day period, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action.⁹

Citing *Billie C. Rae*,¹⁰ appellant argues that initiating the collection of the overpayment prior to a final decision by the Board (sic) denied him due process of law. *Billie C. Rae* does not stand for this proposition. In that case, the Board found that, to ensure due process, the Office is required to issue both a preliminary and final decision in all overpayment cases, including those in which overpayment occurred due to forfeiture. In the present case, the Office issued both a preliminary and final decision in the matter.

Appellant's complaint centers on the events of October 13, 1993. On that date the Office held a conference call with appellant for the purpose of allowing him an opportunity to express his views on how the balance of the overpayment resulting from forfeiture should be recovered. Appellant arranged with the Office to deduct anything he owed from the accrued compensation that the Office owed him: "[Appellant] asked if the first check due him for the period from August 21, 1991 to the present would cover the overpayment. I advised him that it probably would. He advised me to go ahead and deduct the full amount from the initial payment." On October 15, 1993 the Office advised appellant accordingly. The Office made this initial payment, but due to a computer error it did not deduct the overpayment from compensation due. The Office therefore requested that appellant issue a check for the full amount of the

⁶ *Fred A. Cooper, Jr.*, 44 ECAB 498 (1993) (noting that the right to a prerecoupment hearing does not arise under the provisions of 5 U.S.C. § 8124(b)).

⁷ 20 C.F.R. § 10.321(d)(4).

⁸ *Id.* at § 10.321(e).

⁹ *Id.* at § 10.321(h).

¹⁰ 44 ECAB 604 (1993).

overpayment. Appellant issued such a check on November 8, 1993. A few days later, on November 12, 1993, he inquired about the status of his hearing in reference to the overpayment resulting from forfeiture. On October 27, 1994 appellant's representative also inquired about the status of the hearing.

It is apparent from the record that appellant voluntarily arranged with the Office to deduct the balance of the overpayment from accrued compensation to relieve himself of the indebtedness. Further, when that arrangement fell through because of a computer error, appellant voluntarily submitted a check to the Office for the entire amount. That he undertook to repay the debt prior to the hearing in the matter is no evidence that he was denied notice and an opportunity to be heard. Even with the debt repaid, appellant submitted written arguments and exhibits to the Office, appeared and testified at a hearing before an Office hearing representative, and has exercised his right to appeal to this Board, which has duly considered appellant's arguments and has reviewed the Office's final decision on the issues of forfeiture and fault. Appellant had an opportunity to be heard. Having voluntarily repaid the Office, he may not now change his position to the Office's detriment and assert that the repayment denied him due process. Any error in the Office's placement of a conference call to allow appellant an opportunity to express his views on the collection of the balance of this overpayment is harmless error under the circumstances. The Board will affirm the Office's May 29, 1996 decision on the issue of repayment and due process.

The Board also finds that the Office properly adjusted appellant's compensation based on his capacity to earn wages in the constructed position of Construction Worker I (laborer).

The Office initially found that the medical and factual evidence clearly supported that appellant was capable of performing self-employment activities consisting of fence and dock building, woodworking and construction. In a formal decision dated August 31, 1993, the Office found that appellant had been self-employed as a "construction worker/dock builder" since June 12, 1988 with average earnings of \$318.29 per week and that this position fairly and reasonably represented his wage-earning capacity. The Office adjusted appellant's compensation effective June 12, 1988 to reflect the difference between his pay rate as determined for compensation purposes and his ability to earn wages in his self-employment as a construction worker/dock builder.

It is well established, however, that earnings from dissimilar private employment cannot be considered evidence of a capacity to earn wages in the employment in which the claimant worked at the time of injury.¹¹ The Office subsequently recognized that it was precluded from adjusting appellant's compensation based on his actual earnings as a "construction worker/dock builder" because such employment was concurrent and dissimilar to that of window service technician, the federal position he held at the time of injury.

In a decision dated May 29, 1996, the Office found that it was appropriate to make a constructed loss of wage-earning capacity determination based upon the selected position of Construction Worker I (laborer). Noting that the rationalized report of the impartial medical

¹¹ *Irwin E. Goldman*, 23 ECAB 6, 10 (1971), *petition for recon. denied*, 23 ECAB 46 (1971).

specialist had established that appellant was capable of gainful employment, and that the Office rehabilitation specialist had determined that the selected position of Construction Worker I (laborer) was reasonably available and that appellant was qualified to perform such a position, the Office found that the selected position fairly and reasonably represented appellant's wage-earning capacity. The Office adjusted appellant's compensation accordingly and made its determination retroactive to August 21, 1991.

Section 8115(a) of the Act provides that if actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to a number of itemized factors, including the employee's usual employment and his qualifications for other employment.¹² It was appropriate for the Office to determine appellant's wage-earning capacity under section 8115(a) with due regard to his abilities and qualifications demonstrated by his concurrent dissimilar employment as a construction worker/dock builder.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications, and the availability of suitable employment.¹³ When the Office makes a medical determination of partial disability and of the specific work restrictions, it should refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities in light of his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹⁴

The Office followed these standardized procedures and properly adjusted appellant's compensation based on his capacity to earn wages in the constructed position of Construction Worker I (laborer). Accordingly, the Board will affirm the Office's May 29, 1996 decision on the issue of wage-earning capacity.

The Board also finds that the Office abused its discretion in denying waiver of the overpayment that occurred from January 18, 1992 through August 20, 1994.

In its May 29, 1996 decision, the Office found that an overpayment of \$396.46 occurred because an administrative error caused an underdeduction of basic life insurance premiums from January 18, 1992 through August 20, 1994. Having found that appellant was not with fault in the creation of this overpayment, the Office properly considered whether he was entitled to

¹² 5 U.S.C. § 8115(a).

¹³ *Id.*

¹⁴ *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

waiver of recovery.¹⁵ The Office noted that adjustment or recovery may not be made if it would defeat the purpose of the Act, that is, to provide at least a subsistence of income for beneficiaries. The test, the Office stated, was whether the individual has an income or financial resources sufficient for more than ordinary needs, or is largely or solely dependent upon current benefit payments for the necessities of life. The Office added that an individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).

Although it noted that appellant's monthly expenditures exceeded monthly income by \$674.00, the Office found that adjustment or recovery would not defeat the purpose of the Act because appellant was entitled to a lump-sum payment of \$3,000.39 as a result of its retroactive determination of wage-earning capacity. The Office gave no further reasoning than this. The May 29, 1996 decision did not explain how such a lump sum would provide at least a subsistence of income in appellant's financial circumstances or leave him with income or financial resources sufficient for more than ordinary needs. Indeed, when the overpayment is deducted from this lump sum, the balance would allow appellant to meet monthly expenditures for a period of less than four months, after which monthly expenditures would again exceed monthly income by \$674.00.

Section 10.321(a) of Title 20 of the Code of Federal Regulations provides as follows:

“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 other relevant factors so as to minimize any resulting hardship upon such individual.”¹⁶

The only factor the Office appeared to consider in its May 29, 1996 decision was that appellant would receive a lump sum of \$3,000.39. The Office did not show how deducting the whole of the overpayment from compensation retroactively due appellant would minimize any resulting hardship where monthly expenditures exceed monthly income by \$674.00. On appeal the Office cites the case of *Robert Atchinson*,¹⁷ in which the Board affirmed the deduction of an overpayment from compensation retroactively due the claimant. In that case, however, monthly income exceeded monthly expenses by \$280.96, and this was prior to an examination of which the claimed expenses could be allowed. Given the excess income already present, the Office reasoned, it was more than apparent that full recovery of the \$2,515.00 debt in that case could be

¹⁵ 20 C.F.R. § 10.320(b). 20 U.S.C. § 10.320(a) provides: “Although the Office may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Office seeks to recover the overpayment from liability for repayment if such individual is not without fault.”

¹⁶ 20 C.F.R. § 10.321(a).

¹⁷ 41 ECAB 83 (1989).

made from the \$10,234.10 in compensation due without an adverse impact on the claimant's ability to meet ordinary and necessary living expenses.¹⁸

This reasoning does not support the Office's finding in the present case, where appellant has no excess monthly income available for debt repayment. Because the Office failed to explain how, under these circumstances, a deduction from compensation retroactively due would not adversely impact appellant's ability to meet ordinary and necessary living expenses or would minimize any resulting hardship, the Board finds that the Office abused its discretion in denying waiver. The Board will set aside the Office's May 29, 1996 decision on the issue of waiver of the overpayment that occurred from January 18, 1992 through August 20, 1994 and will remand the case for a proper exercise of discretion.

The May 29, 1996 decision of the Office of Workers' Compensation Programs is set aside on the issue of waiver of the overpayment that occurred from January 18, 1992 through August 20, 1994 and is otherwise affirmed. The case is remanded for further action consistent with this opinion.

Dated, Washington, D.C.
July 14, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁸ *Id.* at 87.