U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHRISTINE P. BURGESS and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Bay Pines, Fla.

Docket No. 97-1799; Submitted on the Record;
Issued July 7, 1999

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had actual earnings of $174.22 per week as a tour escort, which fairly and reasonably represented her wage-earning capacity; (2) whether appellant received an overpayment of $35,540.38; and (3) whether the Office abused its discretion in denying waiver of the overpayment.

This case has been before the Board on prior appeal.[1] In the prior decision, the Board noted that while appellant had received Office disability wage-loss benefits for temporary total disability since March 13, 1978, she had escorted tours for AAA Travel intermittently from November 19, 1978 until November 8, 1985. The Board found that appellant had "earnings" pursuant to 20 C.F.R. § 10.125(c) and 5 U.S.C. § 8106 which were required to be reported to the Office, as she received reimbursed expenses and "other advantages received in kind as part of the wages or remuneration." The Board also found that appellant could not be subject to the forfeiture provision of 5 U.S.C. § 8106(b) because appellant did not "knowingly" fail to report her earnings and employment. On February 6, 1992 the Board, therefore, reversed the Office's June 30, 1989 forfeiture and overpayment determination.

By preliminary decision dated June 16, 1992, the Office found that an overpayment of compensation had occurred in the amount of $35,540.38 because appellant had earnings in kind. In a memorandum accompanying the preliminary determination, the Office stated that appellant's "earnings" as a tour guide had an approximate value of $61,500.00 during the period (November 19, 1978 to January 27, 1982 and from April 8, 1983 to August 18, 1985), which equaled earnings of $174.22 per week. Appellant thereafter requested a prerecoupment hearing before an Office hearing representative. By decision dated March 30, 1995, the Office hearing representative remanded the case to the Office. The Office hearing representative found that the

[1] 43 ECAB 449 (1992).

Office's June 16, 1992 retroactive overpayment determination was a *de facto* determination that appellant was not totally, but partially disabled and that she had a wage-earning capacity based on actual earnings. The hearing representative remanded the case to the Office for a retroactive loss of wage-earning capacity determination, based upon appellant's actual earnings, in conformance with the *Shadrick*,[2] formula.

In a letter to appellant dated May 3, 1995, the Office advised appellant that she had received an overpayment of compensation in the amount of $35,540.38 because she worked as a tour guide/travel agent during the periods from November 19, 1978 through January 27, 1982 and from April 8, 1983 through August 18, 1985, while in receipt of compensation for total disability. The Office also advised that it had been determined that she had the capacity to earn wages at the rate of $174.22 per week and that based on the *Shadrick* formula, appellant's wage-earning capacity was $125.42. Appellant was advised that if she disagreed with the method used to determine her wage-earning capacity, she should write to the Office within 30 days.

By decision dated July 28, 1995, the Office found that appellant had been reemployed as a Travel Guide at AAA Travel with wages of $174.22 per week, effective November 19, 1978. The Office also determined that this position fairly and reasonably represented her wage-earning capacity. In a preliminary decision dated July 28, 1995, the Office found that appellant had received an overpayment of compensation in the amount of $35,540.38 because she received total disability compensation, when she was only entitled to compensation based on loss of wage-earning capacity during the periods November 19, 1978 through January 27, 1982 and April 8, 1983 through August 18, 1985. The Office also advised that appellant was not at fault in the matter of the overpayment. Appellant requested a hearing.

By decision dated January 23, 1997, an Office hearing representative affirmed the decision of the Office dated July 28, 1995. The Office hearing representative found that appellant's actual earnings in her position with AAA Travel between 1978 and 1985 fairly and reasonably represented her wage-earning capacity. The hearing representative agreed with the Office's determination of appellant's loss of wage-earning capacity and with the calculation of overpayment in the amount of $35,540.38. The hearing representative also found that while appellant was not at fault in the creation of the overpayment, waiver was not warranted in this case. The hearing representative exercised her discretion and determined that waiver of the overpayment would not defeat the purpose of the Federal Employees' Compensation Act, or be against equity and good conscience.

The Board finds that the Office properly determined that appellant had actual earnings of $174.22 per week as a tour escort, which fairly and reasonably represented her wage-earning capacity.

[2] *Albert C. Shadrick*, 5 ECAB 376 (1953).

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 justifying a subsequent reduction of compensation benefits.[3]

Pursuant to section 8115(a) of the Act,[4] in determining compensation for partial disability, wage-earning capacity is determined by the actual wages received by an employee, if the earnings fairly and reasonably represent his wage-earning capacity. The Board has previously explained that 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.[5] In the prior appeal, the Board determined that appellant did have "earnings" pursuant to the Act in the form of reimbursed expenses and "other advantages received in kind as part of the wages or remuneration." Appellant's earnings as defined by 20 C.F.R. § 10.125(c) and 5 U.S.C. § 8106 also constitute her actual earnings for purposes of 5 U.S.C. § 8115(a). While the Act contemplates that actual earnings will not be used to determine wage-earning capacity if they do not fairly and reasonably represent wage-earning capacity, in the present case, appellant has not submitted any evidence to establish that her earnings as a tour escort did not fairly and reasonably represent her wage-earning capacity. The Office, therefore, properly determined appellant's wage-earning capacity, based upon her actual earnings, rather than on a constructed position.

The Board finds that the Office properly determined that appellant had earnings of $174.22 per week as a tour escort. A memorandum of record dated November 8, 1985, (cited by the Board on prior appeal) prepared by a Compliance Officer of the Florida Wage and Hour Division, states that expenses paid on behalf of appellant from November 19, 1978 to November 8, 1985 by AAA tours totalled $61,500.00. This memorandum is supported by detailed ledger records indicating the dates of appellant's tours, the cost of the tours, appellant's paid meals, appellant's paid expenses and other miscellaneous expenses paid on appellant's behalf. The Office utilized this calculation of appellant's quarters, reimbursed expenses and advantages in kind, to determine the amount of her earnings, $61,500.00. The Board finds that the ledger records provide a detailed and complete summary of the value of appellant's quarters, reimbursements and advantages in kind and constitutes valid documentation of appellant's earnings.

The Office then divided the amount of appellant's "earnings" by the number of weeks during the period in question and obtained $174.22 as the average weekly pay rate. The Office thereafter used the *Shadrick* formula to determine appellant's weekly wage-earning capacity.

[3] *Gregory A. Compton*, 45 ECAB 154 (1993).

[4] 5 U.S.C. § 8115 (a).

[5] *See Compton, supra* note 3.

This method of calculating the average weekly pay rate and weekly wage-earning capacity for actual earnings spanning a lengthy period of time is outlined in the Office procedure manual. The procedure manual states:

> "Where the Office learns of actual earnings that span a lengthy period of time (*e.g.*, several months or more), the compensation entitlement 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 job in effect at the end of the period of actual earnings)."[6]

The Office, therefore, properly determined that based upon appellant's earnings, her weekly pay rate was $174.22 and that utilizing the *Shadrick* formula, appellant's weekly wage-earning capacity was $125.42.

The Board also finds that the Office properly determined that appellant received an overpayment of $35,540.38.

During the time period in question, the record indicates that appellant received wage-loss benefits totaling $86,682.31. As appellant had a wage-earning capacity of $125.42 a week, appellant should only have received $51,141.93 in wage-loss compensation. The Office completed Forms CA-25 properly computing the overpayment to be $35,540.38.

The Board also finds that the Office did not abuse its discretion in denying waiver of the overpayment.

Section 8129(a) of the Act[7] provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Section 8129(b)[8] describes the only exception to the Office's right to adjust later payments or to recover overpaid compensation:

> "Adjustment or recovery by the United States may not be made when incorrect payment had 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."

In the present case, the Office determined that appellant was without fault in the creation of the overpayment. The Office, therefore, proceeded to evaluate whether recovery of the

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity,* Chapter 2.814.7(4) (June 1996).

[7] 5 U.S.C. § 8129(a).

[8] 5 U.S.C. § 8129(b).

overpayment would defeat the purpose of the Act or would be against equity and good conscience.

Regulations which codify the guidelines for determining whether adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience are respectively set forth in sections 10.322 and 10.323 of Title 20 of the Code of Federal Regulations.

Section 10.322(a) of Title 20 of the Code of Federal Regulations provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the over-paid beneficiary of income and resources needed for ordinary and necessary living expenses. The regulation further provides:

"Recovery would defeat the purpose of the Act if--

> (1) The individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and
>
> (2) The individual's assets do not exceed the resource base of $3,000.00 for an individual and $5,000.00 for an individual with a spouse or one dependent...."[9]

The Board has previously noted that both conditions in (a) and (b) above must be met to defeat the purpose of the Act.[10] In the present case, appellant submitted an income/expense statement, in which she noted that she had cash on hand in the amount of $500.00 and stocks/bonds in the amount of $15,000.00. The Office properly determined that appellant had assets which exceeded $15,000.00 and that, therefore, recovery of the overpayment would not defeat the purpose of the Act.

Section 10.323(b) of Title 20 of the Code of Federal Regulations provides that recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse.[11] In making such a decision, the individual's present ability to repay the overpayment is not considered. To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely on reliance on the payments or on the notice of payment. To establish that the individual's position has changed for the

[9] 20 C.F.R. § 10.322.

[10] *See Gail M. Roe*, 47 ECAB 268 (1995).

[11] 20 C.F.R. § 10.323(b).

worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss.[12]

In the present case, appellant has alleged that she relied on the assurance that she could assume the position with AAA Travel and concurrently receive wage-loss benefits. Appellant has not alleged, however, that she detrimentally relied on the receipt of compensation benefits, to relinquish a valuable right or to change her position for the worse. In the present case, appellant has not relinquished a valuable right or changed her position for the worse. Appellant's wage-loss benefits were modified to reflect her actual earnings, but appellant has not sustained a loss and has not changed her position for the worse due to detrimental reliance because appellant's compensation benefits were only offset by her wage-earning capacity, as reflected by her actual earnings. Appellant did not lose income due to detrimental reliance.

Appellant may not have chosen to engage in the tour escort activity had she known that the value of such was to be offset as earnings. While in the case of *Stanley K. Hendler*,[13] the Board found that appellant may have detrimentally relied upon a schedule award overpayment to finance a trip to primarily benefit his three children, in the present case, the benefit of the trips in question accrued only to appellant. Unlike appellant in *Hendler*, who may have sustained a loss; appellant, herself, received the full benefit of the travel and has not sustained any loss or changed her position for the worse in the present case. The Board, therefore, finds that the Office did not abuse its discretion in denying waiver of the overpayment in this case.

The decision of the Office of Workers' Compensation Programs dated January 23, 1997 is hereby affirmed.

Dated, Washington, D.C.
July 7, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[12] *Stanley K. Hendler*, 44 ECAB 698 (1993).

[13] *Id.*