

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NAYSRU LY and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Santa Ana, CA

*Docket No. 98-957; Submitted on the Record;
Issued April 18, 2000*

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 determined appellant's wage-earning capacity as of November 17, 1990; (2) whether the Office properly determined that an overpayment of \$15,767.30 was created; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office properly required repayment by deducting appellant's continuing compensation payments.

In the present case, the Office accepted that appellant sustained herniated cervical discs, lumbosacral strain, left carpal tunnel syndrome and left cervical radicular syndrome in the performance of duty. By decision dated March 13, 1996, the Office determined that appellant's wage-earning capacity was represented by the six-hour per day position she had been performing since November 17, 1990. By decision dated September 4, 1997, an Office hearing representative affirmed the wage-earning capacity determination and finalized a preliminary determination that an overpayment of \$15,767.30 had been created, that appellant was not eligible for waiver of the overpayment and repayment should be made from appellant's continuing compensation.

The Board has reviewed the record and finds that the Office improperly made a formal wage-earning capacity determination based upon appellant's part-time work.

Under section 8115(a) of the 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 wage-earning capacity.¹ Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not

¹ 5 U.S.C. § 8115(a).

fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.²

The Office's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

"a. Factors considered. To determine whether the claimant's work fairly and reasonably represents his or her WEC [wage-earning capacity], the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2-0900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.

"For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:

- (1) The job is part-time (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
- (2) The job is seasonal in an area where year-round employment is available....
- (3) The job is temporary where the claimant's previous job was permanent."³

In this case, the record indicates that appellant filed a recurrence of disability claim commencing October 15, 1990, and returned to work at six hours per day as of November 17, 1990. Appellant apparently continued to work at six hours a day until 1997.⁴ The Office has issued several decisions finding that the position fairly and reasonably represented appellant's wage-earning capacity; the March 13, 1996 decision was affirmed by the hearing representative in the September 4, 1997 decision on appeal in this case. The Office has not, however, explained why a formal wage-earning capacity determination is appropriate, in view of the above provision in the Office's procedure manual. The clear language in the procedure manual indicates that a part-time position may not be appropriate for a formal wage-earning capacity unless the claimant was a part-time worker at the time of injury. There is no indication that appellant was a part-time worker on the date of injury and the Office has failed to address the issue of whether a part-time position is appropriate for a wage-earning capacity

² *Dennis E. Maddy*, 47 ECAB 259 (1995).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

⁴ At a June 10, 1997 hearing before an Office hearing representative, the testimony indicated that appellant had stopped working some months prior to the hearing.

determination. Accordingly, the Board finds that the wage-earning capacity determination must be reversed.

With respect to the underlying overpayment issue, the Board notes that appellant's entitlement to compensation during the periods that she worked is calculated in the same manner as a formal wage-earning capacity determination; that is, through application of the *Shadrick* formula.⁵ The difference in the two situations is that the formal wage-earning capacity determination continues to apply until either the Office or the claimant submits sufficient evidence to warrant modification, whereas in this case the *Shadrick* calculations apply only to periods that appellant actually worked.

The Board further finds that the overpayment of compensation of \$15,767.30 was created in this case.

In this case, the Office declared an overpayment during the period October 16, 1990 through March 2, 1996. Since appellant worked part time during this period, her entitlement to compensation, as noted above, is calculated using the *Shadrick* formula.⁶ The initial step is to compare appellant's earnings on November 17, 1990, when she returned to work, with the updated pay rate of the date-of-injury position on that date. In this case, the Office used as earnings \$508.22 per week and \$561.15 as the updated pay rate, which is in accord with the evidence of record. The Office then multiplies the resulting percentage (91%) by the monthly pay on the date of recurrence, in this case \$651.40 per week, subtracts this amount from the updated pay rate and multiplies the result by 75 to calculate the amount of compensation. In this case, the Office did make a careful analysis of the appropriate numbers based on the evidence of record and the Board finds that the *Shadrick* formula was properly applied in this case.

Although a review of the compensation payments made to appellant during the period October 15, 1990 to March 2, 1996 indicates that at times she was overpaid and at times underpaid, the overall overpayment calculation is relatively straightforward. The Office first determines what appellant should have been paid during this period, based upon *Shadrick* and then compares this amount with the amount actually paid during this period. Using the proper compensation owed appellant every four weeks, the Office determined that appellant should have received \$15,000.90 in compensation from October 16, 1990 to March 2, 1996. The record contains a complete list of the actual compensation paid during this period and this totals \$30,768.20. The Board accordingly finds that an overpayment of \$15,767.30 was created.

The Board further finds that the Office did not properly deny waiver of the overpayment.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d) (December 1993), provides that for part-time work the formula developed in *Albert C. Shadrick*, 5 ECAB 376 (1953) is applied.

⁶ The *Shadrick* formula is codified at 20 C.F.R. § 10.303.

Section 8129(b) of the Act⁷ 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 adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”⁸ Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery 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, respectively, in sections 10.322 and 10.323 of Title 20 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).⁹ Section 10.323 provides 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 20 C.F.R. § 10.322; or the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed her position for the worse.

The Office hearing representative denied waiver on the grounds that appellant had income in excess of expenses and, therefore, waiver was not appropriate. The hearing representative determined that appellant had \$7,083.00 in monthly income and 6,630.00 in monthly expenses. With respect to income, the hearing representative included \$1,800.00 in monthly earnings for appellant and \$1,900.00 in earnings for her spouse. The record indicates, as noted above, that appellant was not working at that time.¹⁰ The Office cannot rely on the possibility of future earnings in a waiver determination.¹¹ Moreover, inclusion of the spouse’s income is only appropriate if the spouse was living in the household both at the time the overpayment was created, as well as currently.¹² No findings were made regarding the husband’s status during the period of the overpayment.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8129(b).

⁹ To establish that recovery would defeat the purpose of the Act, appellant must show both that he needs substantially all his income to meet ordinary and necessary living expenses, and that his assets do not exceed the established resource base; see *Robert E. Wenholz*, 38 ECAB 311 (1986).

¹⁰ The testimony indicated that appellant’s physician had recommended that she work during the day, while the employing establishment required work at night.

¹¹ See *Connie L. Potratz-Hasson*, 42 ECAB 359 (1991).

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(2) (September 1994).

Accordingly, the Board cannot find that the probative evidence of record establishes that appellant had income in excess of expenses. It is also noted that, while a previous overpayment questionnaire indicated joint checking account assets that may have been in excess of the resource base, the overpayment questionnaire relied on by the hearing representative did not show any assets in excess of the resource base. In the absence of sufficient evidence that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience, the Board finds that the Office improperly denied waiver in this case.¹³

The decision of the Office of Workers' Compensation Programs dated September 4, 1997 is reversed with respect to wage-earning capacity, affirmed with respect to fact of and amount of overpayment and reversed with respect to waiver of the overpayment.

Dated, Washington, D.C.
April 18, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

¹³ In view of the Board's holding on the waiver issue, it will not address the rate of repayment issue.