

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGARET R. SCHMIDT and U.S. POSTAL SERVICE,
POST OFFICE, Washington, D.C.

*Docket No. 98-798; Submitted on the Record;
Issued January 6, 2000*

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's actual wages as a modified clerk fairly and reasonably represented her wage-earning capacity effective December 9, 1996; (2) whether the Office properly determined that there was a \$3,092.97 overpayment of compensation for the period of December 9, 1996 to March 1, 1997; (3) whether the Office properly denied waiver of recovery of the overpayment; and (4) whether the Office properly withheld \$150.00 every four weeks from appellant's continuing compensation to recover the overpayment.

On February 27, 1991 appellant, then a 38-year-old distribution clerk, filed an occupational disease claim, alleging weakness in both hands, arms and wrists, of which she first became aware August 16, 1990 and realized was causally related to factors of her federal employment on January 19, 1991. Appellant stopped work on January 29, 1991. The Office accepted appellant's claim for aggravation of polymyalgia rheumatica and fibromyalgia.

Appellant returned to light-duty work for four hours a day on December 9, 1996 as a modified clerk. In a decision dated March 19, 1997, the Office determined that appellant had been reemployed as a modified clerk effective December 9, 1996. The Office found that this position fairly and reasonably represented appellant's wage-earning capacity and was suitable for her accepted medical condition. The Office reduced appellant's compensation to reflect her actual earnings of \$340.47 per week as a modified clerk.

In a letter dated May 12, 1997, the Office advised appellant that it had made a preliminary determination that she had received a \$3,092.97 overpayment compensation as she continued to receive compensation for temporary total disability after her return to work on December 9, 1996. The Office determined that appellant was not at fault in the creation of the overpayment. The Office sent appellant an overpayment questionnaire and advised her to submit additional evidence or argument if she disagreed with the preliminary determination. Appellant requested waiver of recovery of the overpayment to be based on a review of the written record

and submitted a completed financial questionnaire together with supporting documentation. In a decision dated November 12, 1997, the Office denied waiver of recovery of the overpayment on the grounds that appellant's monthly income exceeded her monthly expenses by \$1,339.39 and, therefore, recovery would not defeat the purpose of the Federal Employees' Compensation Act. The Office then determined that \$150.00 per month should be deducted from appellant's wage-loss compensation until the overpayment had been recovered.

The Board has duly reviewed the entire case record on appeal and finds that the Office properly determined that appellant's actual earnings as a modified clerk fairly and reasonably represented her wage-earning capacity.

Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or modification of compensation. 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 or 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.¹ Section 8115(a) of the Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.² Generally wages earned are the best measure of 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.³ After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity, application of the principles set forth in the *Alfred C. Shadrick*⁴ decision will result in the percentage of the employee's loss of wage-earning capacity.⁵

In the present case, appellant returned to work part time on December 9, 1996. Under the Office procedure manual, after appellant has been working 60 days, the Office will make a determination as to whether her actual earnings fairly and reasonably represent her wage-earning capacity.⁶ Office procedures specifically direct a claims examiner to consider factors such as part-time sporadic, seasonal, or temporary work, when determining whether the position fairly and

¹ See generally 5 U.S.C. § 8115(a), *The Law of Workers' Compensation* § 57.22 (1989); see also *Betty F. Wade*, 37 ECAB 556 (1986).

² 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

³ *Hubert F. Myatt*, 32 ECAB 1994 (1981).

⁴ 5 ECAB 376 (1953).

⁵ See *Hattie Drummond*, 39 ECAB 904 (1988); *Shadrick*, *supra* note 4.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814(7)(c) (December 1993).

reasonably represents a claimant's wage-earning capacity.⁷ There is no indication that the part-time light-duty position appellant was performing did not fairly and reasonably represent her wage-earning capacity. In this case, the Office determined that appellant's earnings fairly and reasonably represented her wage-earning capacity and there is no contrary evidence of record. Therefore, the position of modified clerk fairly and reasonably represented appellant's wage-earning capacity.

The formula for determining the loss of wage-earning capacity based on actual earnings, developed in the *Shadrick* decision, has been codified at 20 C.F.R. § 10.303. The Office first calculates the employee's wage-earning capacity in terms of a percentage by dividing her actual earnings by her current date-of-injury pay rate. In this case, the Office properly used appellant's actual earnings of \$340.47 per week and a current pay rate for her date-of-injury job of \$642.46 per week to determine that she had a 53 percent wage-earning capacity. The Office then multiplied the pay rate at the time of the injury, \$574.94, by the 53 percent the wage-earning capacity percentage. The resulting figure of \$304.71 is subtracted from appellant's date-of-injury pay rate and appellant's loss of wage-earning capacity is \$270.23. The Office multiplied this amount by the appropriate compensation rate and applicable cost-of-living adjustments were added. The Board finds that the Office properly determined that appellant's actual earnings fairly and reasonably represented her wage-earning capacity and the Office properly reduced appellant's compensation in accordance with the *Shadrick* formula.

The Board also finds that the Office properly determined that there was a \$3,092.97 overpayment of compensation for the period of December 9, 1996 to March 1, 1997.

The Office determined that there was an overpayment of compensation due to appellant's acceptance of compensation checks for temporary total disability after she returned to work on December 9, 1996 to March 1, 1997. The Office further determined that appellant was not at fault in the creation of the overpayment of the compensation. Appellant does not dispute that she received compensation for temporary total disability after she returned to work for the period of December 9, 1996 to March 1, 1997. The Board, therefore, finds that an overpayment in the amount of \$3,092.97 was created.

However, the Board further finds that the case is not in posture for decision on the issues related to waiver of the overpayment.

Section 8129 of the Act⁸ provides that an overpayment of compensation must be recovered unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter [Act] or would be against equity and good conscience."⁹ Thus, the fact that appellant is without fault in creating

⁷ Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993).

⁸ 5 U.S.C. §§ 8101-8193.

⁹ 5 U.S.C. § 8129.

the overpayment of compensation does not, under the Act, automatically preclude the Office from recovering all or part of the overpayment.¹⁰ The Office must exercise its discretion to determine whether waiver is warranted under either the “defeat the purposes of the Act” or the “against equity and good conscience” standards¹¹ pursuant to the guidelines set forth in sections 10.322 and 10.323 of the regulations.¹²

Section 10.322 of the regulations¹³ provides in pertinent part:

“(a) Recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery will defeat the purpose of this subchapter to the extent that:

- (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 or \$5,000.00 for an individual with a spouse or one dependent, plus \$600.00 for each additional dependent....”

The terms “income,” “expenses,” and “assets” are defined in section 10.322(b), (c) and (d).¹⁴ For waiver to “defeat the purpose of the Act” standard, appellant must show both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the applicable resource base.¹⁵

Section 10.323 of the regulations¹⁶ provides in pertinent part:

“(a) Recovery of an overpayment is considered to be ‘against equity and good conscience’ when an individual presently or formerly entitled to benefits would experience severe financial hardship in attempting to repay the debt. The criteria to be applied in determining severe financial hardship are the same as in section 10.322.

¹⁰ *George E. Dabdoub*, 39 ECAB 929 (1988).

¹¹ *See William J. Murphy*, 40 ECAB 569 (1989); *James M. Albers*, 36 ECAB 340 (1984).

¹² 20 C.F.R. §§ 10.322-23.

¹³ 20 C.F.R. § 10.322

¹⁴ *Id.*

¹⁵ *See George E. Dabdoub*, *supra* note 10; *Robert E. Wenholz*, 38 ECAB 311 (1986).

¹⁶ 20 C.F.R. § 10.323.

“(b) 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. In making such a decision, the individual’s present ability to repay the overpayment is not considered....”

The Office found that recovery of the overpayment would not defeat the Act nor be against equity or good conscience. The Office determined that appellant had a monthly income of \$3,011.05 and monthly expenses of \$1,671.66 and, therefore, concluded that her income exceeded her expenses by \$1,339.39. The Office accepted appellant’s calculation of her expenses for food, clothing, automobile payment, credit and bank cards, GE Select and noncovered medical expenses.¹⁷ However, it reduced her expenses for mortgage payments and automobile insurance. Appellant indicated that her mortgage payments were \$1,037.23 per month. In a letter dated July 7, 1997, the Office requested verification of appellant’s mortgage payment, asserting that the loan was assigned to appellant’s father, John Schmidt and, therefore, the Office needed to verify that she was making mortgage payments. In response, appellant reported that her mortgage loan was a joint account, submitted a statement with her name on it which indicated that her payments were \$1,037.23 per month and submitted several checks from her account for the mortgage. The Office noted that the submitted checks totaled \$10,387.29 and covered a period from March 1994 to May 1997, 39 months. The Office divided the sum of the checks by 39 to find that appellant had a monthly mortgage expense of \$266.34. This was not proper. The Office requested verification of appellant’s liability for the mortgage loan and appellant submitted the same by providing mortgage statements in her name and some checks. As the Office did not request proof of payment for any specific period of time, it should not have presumed that the documentation submitted constituted all of appellant’s mortgage payments during the period of March 1994 to May 1997. If the Office needs additional verification of appellant’s mortgage obligation, it must request specific information for a specific time period. In addition, the Office reported that appellant’s auto insurance documentation showed 8 monthly payments at \$116.00 per month. A review of appellant’s auto insurance statements reveals that she was responsible for a total yearly premium of \$1,203.00, made a down payment of \$301.00 and then was responsible for 8 monthly payments of \$116.00. Thus, the Office improperly reduced appellant’s monthly auto insurance expense.¹⁸ Consequently, this case must be remanded to the Office for recalculation of appellant’s monthly household expenses and to determine whether waiver of recovery of the overpayment is appropriate.¹⁹

¹⁷ Appellant also indicated that her utilities were approximately \$500.00 per month. After requesting addition information, the Office listed appellant’s utility expenses as follows: Electric -- \$126.65, Gas -- \$189.21, Telephone -- \$82.89 and Water -- \$77.00.

¹⁸ The Board notes that appellant’s estimate of \$105.00 per month is also incorrect based on the information provided.

¹⁹ See *Linda D. Lane*, 46 ECAB 727 (1995).

The decision of the Office of Workers' Compensation Programs dated March 17, 1997 is hereby affirmed. The decision of the Office dated November 12, 1997 is affirmed in part and set aside with respect to whether waiver of recovery of the overpayment was properly denied. The case is remanded for such further development as the Office deems necessary to be followed by a *de novo* decision on the issue of waiver of the overpayment.

Dated, Washington, D.C.
January 6, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member