

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA KAY KOPER and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Washington, DC

*Docket No. 98-1616; Submitted on the Record;
Issued July 5, 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 earnings fairly and reasonably represented her loss of wage-earning capacity; (2) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$29,340.57 for the period May 1, 1995 to May 11, 1996; (3) whether the Office abused its discretion by denying waiver of the overpayment; and (4) whether the Office properly required repayment of the overpayment by withholding \$500.00 every four weeks from her continuing compensation.

On April 26, 1975 appellant, then a 20-year-old GS-4 computer aide, sustained an employment-related peripheral tear of the right medial meniscus resulting in development of severe traumatic degenerative arthritis. She underwent arthroscopic surgery on a number of occasions and, sustained a number of recurrences of disability, all of which were accepted by the Office. On September 26, 1994 she sustained a recurrence of disability when she underwent a further surgical procedure. She returned to work on May 1, 1995 for four hours per day and was paid wage-loss compensation for four hours per day based on her actual pay rate on September 27, 1994.

By decision dated June 20, 1996, the Office determined that appellant had no loss of wage-earning capacity on the grounds that she had been reemployed on May 1, 1995 for four hours per day as a computer programmer analyst for the employing establishment at an annual salary of \$23,846.00 for half-time employment. The Office found that this position fairly and reasonably represented her wage-earning capacity. In an attached work sheet, the Office applied the *Shadrick* formula,¹ and noted that appellant's current weekly pay rate for the date-of-injury position was \$339.17 and noted that her current actual weekly earnings were \$458.58. The

¹ See *Albert C. Shadrick*, 5 ECAB 376 (1953).

Office then determined that her loss of wage-earning capacity was zero percent and, therefore, she was not entitled to wage-loss compensation beginning May 1, 1995.

On July 1, 1996 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$29,340.57, which arose because she was not entitled to compensation as she had no loss of wage-earning capacity beginning May 1, 1995. The Office found that she was without fault in the creation of the overpayment. On July 15 and 26, 1996 appellant requested a hearing of both the June 20, 1996 Office decision and the July 1, 1996 preliminary overpayment determination.²

At the hearing held on July 29, 1997, appellant's counsel argued that she was entitled to wage-loss compensation based on the pay rate in effect at the time of the recurrence of disability and, as such, no overpayment in compensation was created. Counsel further argued that the amount of the overpayment was improper, stating that appellant had received compensation in the amount of \$18,063.02 for the period May 1, 1995 through May 11, 1996. Appellant submitted a list of payments received and an overpayment questionnaire.

By decision dated January 21, 1998, an Office hearing representative affirmed the June 20, 1996 decision finding that appellant had a zero loss of wage-earning capacity. The hearing representative also finalized the July 1, 1997 decision, finding that appellant received an overpayment of compensation in the amount of \$29,340.57 for the period May 1, 1995 to May 11, 1996, that she was without fault in the creation of the overpayment, that she was not entitled to waiver and that \$500.00 would be withheld each payment period from her continuing compensation. The instant appeal follows.

Initially, the Board finds that the Office properly computed appellant's loss of wage-earning capacity.

Pursuant to section 8115(a) of the Federal Employees' Compensation Act,³ 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 they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁴ In the present case, appellant had actual earnings as a computer programmer analyst of \$23,846.00 per year beginning May 1, 1995. 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 had actual earnings for a period of

² The record indicates that appellant sustained a recurrence of disability on August 20, 1996 and was returned to the periodic rolls.

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Gregory A. Compton*, 45 ECAB 154 (1993).

many years⁵ and she did not submit any evidence to establish that her actual earnings did not fairly and reasonably represent her wage-earning capacity.

Office regulations at section 10.303⁶ codify the Board's case law promulgated in the case of *Albert C. Shadrick*⁷ to accommodate the statutory amendments to section 8101(4) of the Act.⁸ The regulations define three basic terms which are used in formulating an employee's entitlement to compensation based on his or her wage-earning capacity. These terms are: (1) "Pay Rate for Compensation Purposes"; (2) "Current Pay Rate"; and (3) "Earnings." "Pay Rate for Compensation Purposes" is, as defined in section 8101(4), the greater of the employee's pay as of the date of injury, the date disability begins or the date of recurrence of disability if more than six months after returning to work. "Current Pay Rate" is defined as the current, or updated, salary or pay rate for the job the employee held at the time of injury. "Earnings" is defined as the employee's actual earnings, or the salary or pay rate of the job selected as representative of his or her wage-earning capacity.⁹

On appeal appellant contends that as she should receive compensation based on her earning capacity on May 1, 1995.¹⁰ However, the job held on the actual date of injury is the basis for determining wage-earning capacity. In this case, the Office properly utilized the principles set forth in *Shadrick*¹¹ to determine that appellant had a zero loss of wage-earning capacity. An employee's wage-earning capacity is obtained by dividing the pay rate of the selected position (or actual wages)by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes, as defined at 20 C.F.R. § 10.5(a)(20), by the percentage of wage-earning capacity and subtracting the result from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity.¹² The Office properly followed this procedure in this case. The Board, therefore, concludes that the Office properly determined appellant's wage-earning capacity, based upon her actual earnings.

The Board further finds that the Office properly determined that appellant received an overpayment of compensation for the period May 1, 1995 to May 11, 1996.

⁵ The record indicates that appellant initially returned to work August 25, 1975 and sustained intermittent periods of disability thereafter.

⁶ 20 C.F.R. § 10.303(b).

⁷ *Albert C. Shadrick*, *supra* note 1.

⁸ 5 U.S.C. § 8101(4).

⁹ *Supra* note 7.

¹⁰ *Id.*

¹¹ *Id.*

¹² 10.303(b).

Initially, the Board finds that, as appellant had zero loss of wage-earning capacity for the period May 1, 1995 to May 11, 1996, she was not entitled to wage-loss compensation. The record indicates that for this period she received wage-loss compensation from the Office. An overpayment in compensation was, therefore, created. Office computer printouts, however, establish that for the period May 1, 1995 to May 11, 1996,¹³ appellant received wage-loss compensation in the amount of \$18,063.02. The Board, therefore, finds that the correct amount of overpayment is \$18,063.02.

The Board further finds that, while appellant was not at fault in the creation of the overpayment, she is not entitled to waiver.

Section 8129(a) of the Act¹⁴ provides that, where an overpayment of compensation has been made “because of an error of fact or law’ adjustments shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustments 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.”¹⁵

With respect to whether recovery of the overpayment would be against equity and good conscience, section 10.323(b) of the Office’s regulations¹⁶ provides:

“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 her position for the worse.... 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 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.”

The evidence in this case does not show that appellant relinquished a valuable right or changed her position for the worse in reliance on the overpayment.

¹³ It appears that the Office included the period January 1 through April 30, 1995 in calculating the amount of the overpayment.

¹⁴ 5 U.S.C. § 8129(a).

¹⁵ 5 U.S.C. § 8129(b).

¹⁶ 20 C.F.R. § 10.323(b).

Section 10.322(a) of the Office's regulations¹⁷ provides that recovery of an overpayment would 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. Recovery will defeat the purpose of the Act 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 or \$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. This base includes all of the claimant's assets not exempted from recoupment. Section 10.322(d) states:

“*Assets*—cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and the like; and (2) *Nonliquid Assets*—the fair market value of property such as a camper, second home, extra automobile, jewelry, etc. Assets for these purposes shall not include the value of household furnishings, wearing apparel, family automobile, burial plot or prepaid burial contract, a home which the person maintains as the primary family domicile, or income producing property if the income from such property has been included in comparing income and expenses.”

Appellant's financial records provided to the Office establish that she had assets worth greater than \$37,000.00.¹⁸ The Office, therefore, did not abuse its discretion by refusing to waive the overpayment of compensation.

The Board also finds that the Office properly required repayment by withholding \$500.00 from appellant's continuing compensation every four weeks.

Section 10.321(a)¹⁹ provides that, if an overpayment of compensation has been made to one entitled to future 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 any other relevant factors, so as to minimize any resulting hardship upon such individual.” In establishing the initial collection strategy, the Office must weigh the individual's income, ordinary and necessary expenses and assets in a manner similar to the waiver considerations above.²⁰

At the time of the January 21, 1998 decision, appellant received \$2,788.06 in compensation every four weeks. On the overpayment questionnaire she submitted to the Office, appellant listed her monthly income as \$7,776.00 with expenses totaling \$6,753.00 which would indicate that she had at least \$1,000.00 in monthly household income above her monthly

¹⁷ 20 C.F.R. § 10.322(a).

¹⁸ *Id.*

¹⁹ 20 C.F.R. § 10.321(a).

²⁰ Federal (FECA) Procedure Manual, Chapter 6.0200.4.d(1)(a).

expenses. The Board finds that the Office gave due regard to appellant's financial circumstances in determining the rate of repayment in this case and, thus, did not abuse its discretion under the standard noted above in determining that repayment of the overpayment could be accomplished by withholding \$500.00 every four weeks from appellant's compensation.

The decision of the Office of Workers' Compensation Programs dated January 21, 1998 is hereby affirmed regarding appellant's wage-earning capacity and that she received an overpayment of compensation that is not subject to waiver and regarding repayment of the overpayment. The decision dated January 21, 1998 is hereby modified to reflect that the amount of the overpayment is \$18,063.02.

Dated, Washington, D.C.
July 5, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member