

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORETTA MARENO and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION HOSPITAL, Sepulveda, CA

*Docket No. 98-2509; Submitted on the Record;
Issued July 11, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity as of October 9, 1990; (2) whether the Office properly found that an overpayment of \$27,409.20 was created during the period October 9, 1990 to December 6, 1997; and (3) whether the Office properly found appellant at fault in creating the overpayment.

In the present case, the Office accepted that appellant, a staff nurse, sustained a lumbosacral strain and permanent aggravation of degenerative lumbar disc disease in the performance of duty on May 1, 1987. Appellant returned to light duty and then filed a claim for injury on May 24, 1990. The Office accepted the claim for a low back strain. The record indicates that appellant was offered a permanent light-duty position as an addiction therapist and she returned to work on October 9, 1990.

By decision dated March 16, 1993, the Office determined that the light-duty position fairly and reasonably represented her wage-earning capacity and her compensation was reduced to reflect her wage-earning capacity. In a decision dated November 28, 1997, the Office modified the wage-earning capacity determination finding that after the March 16, 1993 decision, the employing establishment had "retroactively reinstated your grade and step such that you have no loss of wage-earning capacity."

In a decision dated June 29, 1998, the Office finalized a preliminary determination that an overpayment of \$27,409.20 had been created because appellant received compensation and full pay from the employing establishment during the period October 9, 1990 to December 6, 1997. The Office also finalized a preliminary determination that appellant was at fault in creating the overpayment and, therefore, was not entitled to waiver.

The Board has reviewed the record and finds that the Office has not established that appellant had no loss of wage-earning capacity as of October 9, 1990.

The Board notes that appellant has requested a review of the overpayment decision in this case since the underlying issues of fact of and amount of overpayment are based on the Office's determination as to appellant's wage-earning capacity commencing October 9, 1990, the Board will address the findings in the November 28, 1997 Office decision.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.² In this case, the Office has found that the original determination was erroneous.

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,³ has been codified at 20 C.F.R. § 10.303. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate.⁴

The Office initially issued a wage-earning capacity determination on March 16, 1993. In determining the current (as of October 9, 1990) pay rate of the date of injury (May 1, 1987) position, the Office included night differential and Sunday premium pay. With respect to actual earnings, the employing establishment indicated that the position was \$42,839.00 per year, under the retained pay provisions. The Office divided the current pay rate by the actual earnings for a 91 percent wage-earning capacity.

In a letter dated October 16, 1997, the employing establishment advised the Office that appellant had received an Equal Employment Opportunity (EEO) decision on October 7, 1995, which required "reinstatement to the position of Staff Nurse (Admission Nurse) GS-11, [step] 7 retroactive to October 9, 1990 with all attendant back pay and benefits." Based on this brief information, the Office concluded that appellant had no loss of wage-earning capacity, since a GS-11, step 7 is a higher salary than the May 1, 1987 position, a GS-11, step 6 position.

The Board notes that the case record does not contain details of the EEO decision or any evidence from the employing establishment that clarifies the meaning of "all attendant back pay and benefits." It is not clear whether night differential, Sunday premium, or other relevant pay issues were contemplated by the EEO decision. The employing establishment did not provide detailed information with respect to the wages paid to appellant after October 9, 1990. Before the Office can make a wage-earning capacity determination and apply the *Shadrick* formula, it must have sufficient evidence to compare the current pay rate for the May 1, 1987 position on October 9, 1990, with the actual earnings as of October 9, 1990. This is especially important in a complicated case such as this one, involving retained pay and retroactive back pay issues. The

¹ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

² *Id.*

³ 5 ECAB 376 (1953).

⁴ "Any convenient date may be chosen by the Office for making the comparison as long as the two wage rates are in effect on the date used for comparison." 20 C.F.R. § 10.303(b).

record is not clear what specific action the employing establishment has taken, as a result of the EEO decision with respect to appellant's pay on and after October 9, 1990. The Board finds that there is not sufficient probative evidence of record to establish that the original application of the *Shadrick* formula was incorrect.

It is, as noted above, the Office's burden to modify the March 16, 1993 wage-earning capacity determination. The Office has not met their burden to establish that the original determination was erroneous.

Based on the above finding, the Office has not established an overpayment of compensation for the period October 9, 1990 to December 6, 1997. The Office must first establish that the wage-earning capacity determination was, in fact, erroneous. It is also noted that the issue of fault was not properly developed. The Office found that appellant had accepted payments that she knew or should have been expected to know were incorrect,⁵ without properly addressing specific payments received.⁶

The decisions of the Office of Workers' Compensation Programs dated June 29, 1998 and November 28, 1997 are reversed.

Dated, Washington, D.C.
July 11, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁵ See 20 C.F.R. § 10.320(b).

⁶ For example, the Office issued a payment on March 12, 1993 for 10,558.84, covering the period October 9, 1990 to February 28, 1993. A memorandum of telephone call dated March 24, 1993 indicates that the Office advised appellant that this payment represented compensation for loss of wage-earning capacity. The finding of fault in this case makes no attempt to explain why appellant knew or should have known, when she accepted the payment, that it was incorrect.