

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID J. JACOBS and DEPARTMENT OF THE NAVY,
NAVAL STATION, Brooklyn, NY

*Docket No. 98-1934; Submitted on the Record;
Issued June 8, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$2,422.00 and, if so, whether appellant was without fault in the matter of this overpayment; and (2) whether appellant received an overpayment of compensation in the amount of \$1,424.64 and, if so, whether the Office of Workers' Compensation Programs properly refused to waive recovery of this overpayment of compensation and properly set the rate of recovery as \$25.00 from each of appellant's continuing compensation payments.

On June 1, 1990 appellant, then a 33-year-old supervisory facility management specialist, filed a claim for injuries to his neck, shoulder, head, left arm, buttocks, low back and right wrist sustained on May 29, 1990 in a motor vehicle accident. The Office accepted that he sustained a laceration and contusion of the left hand, a lumbosacral strain and a cervical sprain. Appellant received continuation of pay from May 30 to July 13, 1990, followed by compensation for temporary total disability until his return to work on July 9, 1991.

Appellant again stopped work on August 26, 1992; the Office accepted his claim for a recurrence of disability and resumed payment of compensation for temporary total disability. By decision dated May 31, 1996, the Office reduced appellant's compensation effective June 23, 1996 on the basis that he had a wage-earning capacity based on his ability to perform the position of case manager.

On December 13, 1997 the Office issued a preliminary determination that appellant had received an overpayment in the amount of \$2,422.00 which arose because the Office did not reduce appellant's compensation pursuant to its May 31, 1996 decision until January 4, 1997. The Office preliminarily found that appellant was at fault in the matter of this overpayment, for the reason that he accepted payments he knew or should have known were incorrect.

On December 13, 1997 the Office issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$1,424.64 which arose because the

Office deducted the incorrect amount for health benefit premiums from October 10, 1995 to January 4, 1997. The Office preliminarily found that appellant was without fault in the matter of this overpayment of compensation and requested that he submit financial information to allow the Office to determine if recovery of this overpayment of compensation should be waived. He submitted such information.

By decision dated March 2, 1998, the Office found that appellant received an overpayment in the amount of \$2,422.00 which arose because the Office did not reduce appellant's compensation pursuant to its May 31, 1996 decision until January 4, 1997. The Office found that appellant was at fault in the matter of this overpayment, for the reason that he accepted payments he knew or should have known were incorrect. The Office instituted recovery of this overpayment by deducting \$50.00 from each of appellant's continuing compensation payments beginning March 28, 1996.

By decision dated March 2, 1998, the Office found that appellant had received an overpayment of compensation in the amount of \$1,424.64 which arose because the Office deducted the incorrect amount for health benefit premiums from October 10, 1995 to January 4, 1997. The Office found that appellant was without fault in the matter of this overpayment of compensation, but refused to waive recovery of this overpayment of compensation on the basis that appellant's monthly income exceeded his monthly expenses. The Office instituted recovery of this overpayment by deducting \$25.00 from each of appellant's continuing compensation payments beginning March 28, 1996.

The Board finds that the Office has not established that appellant received an overpayment of compensation in the amount of \$2,422.00.

In reviewing an overpayment decision, the Board must first determine whether an overpayment of compensation in fact occurred by examining the underlying decision of the Office.¹ The Office's finding that appellant received an overpayment of compensation because of its delay in reducing appellant's compensation pursuant to a May 31, 1996 determination of appellant's loss of wage-earning capacity necessitates that the Board review the Office's May 31, 1996 decision.²

The Board finds that the Office did not properly determine appellant's loss of wage-earning capacity in its May 31, 1996 decision. Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³ Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity, in the absence of actual earnings, is determined with due regard to the nature of the employee's injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment

¹ *Russell E. Wageneck*, 46 ECAB 653 (1995); *Armando Barbosa*, 36 ECAB 474 (1985).

² *Samuel J. Russo*, 28 ECAB 43 (1976).

³ *Bettye F. Wade*, 37 ECAB 556 (1986).

and other factors or circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.⁴

In the present case, the Office accepted that appellant sustained a lumbosacral strain, among other conditions, in his May 29, 1990 motor vehicle accident. The Office had the burden of proof to reduce appellant's compensation effective June 23, 1996. The Office's May 31, 1996 decision properly determined that the selected position of case manager, which is sedentary, was within the work tolerance limitations set forth in a November 14, 1994 report by Dr. Hubert S. Pearlman, a Board-certified orthopedic surgeon acting as an impartial medical specialist, specifically the lifting limitation of 10 pounds. The position is also appropriate to appellant's education and experience, as only 30 days to 3 months of vocational preparation are required, the position is similar to the one appellant held at the employing establishment and, according to an Office rehabilitation specialist, on-the-job training will satisfy the vocational preparation requirement.

The Office, however, did not establish that the position of case manager was available in appellant's commuting area.⁵ He lives in Brooklyn, New York and the commuting area the Office used was New York City. Appellant presented medical evidence from his attending physician, Dr. Ernesto Lee, an orthopedic surgeon, that he was unable to use public transportation to commute to a job. In a report dated March 20, 1996, Dr. Lee explained: "The unpredictable jerky movements of the train will cause multiple spasms, especially combined with standing for long duration of time, sitting on hard surfaces that lack proper back support, climbing up and down stairs during transfers in his commute. All of these compounded elements place undue stress on [appellant's] back, particularly the lumbar region. These factors force [his] limited range of motion to be jolted repeatedly beyond its capacity."

In its May 31, 1996 decision, the Office stated that Dr. Lee's March 20, 1996 report "fails to provide new objective findings to counter the medical restrictions set forth by Dr. Pearlman, which does not include restrictions on the use of public transportation." This, however, is an inadequate explanation, since there is no indication that Dr. Pearlman was aware that the Office contemplated that appellant would commute to New York City or that his attending physician stated he was unable to do so.⁶ Because the Office has not established that the position of case manager is reasonably available in appellant's commuting area, it has not met its burden of proof to reduce his compensation and the overpayment resulting from the delay in implementing this reduction, in the amount of \$2,422.00, is not established.

⁴ 5 U.S.C. § 8115(a); *Pope D. Cox*, 39 ECAB 143 (1988).

⁵ See *Albert L. Poe*, 37 ECAB 684 (1986). (The Board held that the job selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area in which the employee lives).

⁶ *Keith Hanselman*, 42 ECAB 680 (1991) (The Board found that absence of a restriction on driving in the reports of appellant's attending physician an inadequate explanation for the Office's determination that appellant could commute 80 miles daily, in light of the absence of any evidence that this physician was aware that the Office contemplated that appellant would do this much driving to and from work). See *Harold S. McGough*, 36 ECAB 332 (1984) (The Board found that the Office had not established that a position 43 miles from the employee's residence was within his commuting area, given his visual and physical limitation which impaired his ability to travel).

The Board finds that appellant received an overpayment in the amount of \$1,424.64. This overpayment arose because appellant changed his health benefits plan from an individual plan to a family plan but the Office did not increase his deductions for the family plan with higher premiums until January 4, 1997. The Office's calculations support the existence and amount of this overpayment of compensation and appellant does not dispute the existence or amount of this overpayment of compensation.

The Board further finds that the Office properly refused to waive recovery of this overpayment of compensation.

Section 8129(b) of the Act provides that recovery of an overpayment "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 this subchapter or would be against equity and good conscience."⁷ Section 10.322(a) of the Office's regulations⁸ provides that 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. Recovery will defeat the purpose of the Act to the extent: (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. This base includes all of the claimant's assets not exempted from recoupment.

In the present case, the Office determined that appellant was without fault in the matter of the overpayment in the amount of \$1,424.64. Appellant submitted financial information showing monthly expenses for food, mortgage payments, utilities, home maintenance, child support and regular charitable contributions in the total amount of \$2,202.00. The Office did not disallow any of these expenses. He listed monthly income of \$2,198.12, consisting of his payment by the Office of \$2,019.12 and a payment of other benefits under another program in the amount of \$179.00.

As pointed out by the Office in its March 2, 1998 decision, the amount of appellant's compensation payment increased to \$2,055.90 on February 1, 1998. As also noted by the Office in this decision, compensation payments are made by the Office every four weeks, not monthly, so that appellant receives 13 checks in the amount of \$2,055.90 per year, which amounts to an additional \$171.00 per month.⁹ As the amount of appellant's monthly income -- \$2,405.90 -- exceeds the amount of his monthly expenses -- \$2,202.00 -- by over \$200.00, the Office did not abuse its discretion by refusing to waive recovery of appellant's overpayment of compensation in the amount of \$1,424.64.

⁷ 5 U.S.C. § 8129(b).

⁸ 20 C.F.R. § 10.322(a).

⁹ The actual amount of difference, calculated by multiplying \$2,055.90 by 13, dividing by 12 and subtracting \$2,055.90, is slightly higher: \$171.32.

The Board further finds that the Office properly set the rate of recovery as \$25.00 from each of appellant's continuing compensation payments. After noting the amount by which appellant's income exceeded his expenses, the Office concluded that appellant would not suffer severe financial hardship due to recovery of the overpayment in the amount of \$1,424.64 at the rate of \$25.00 from each continuing compensation payment. This complies with the Office's regulation, that requires that the Office give "due regard" to the probable extent of future compensation payments, the financial circumstances of the individual and any other relevant factors so as to minimize any resulting hardship.¹⁰

The decision of the Office of Workers' Compensation Programs dated March 2, 1998 finding an overpayment in the amount of \$2,422.00 is reversed. The decision of the Office dated March 2, 1998 finding an overpayment of compensation in the amount of \$1,424.64 is affirmed in all respects.

Dated, Washington, D.C.
June 8, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

¹⁰ 20 C.F.R. § 10.314(a).