

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT F. GOODHEART and U.S. POSTAL SERVICE,
POST OFFICE, Newark, NJ

*Docket No. 99-1872; Submitted on the Record;
Issued January 16, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant was not without fault in the creation of an overpayment of compensation in the amount of \$12,528.34 from February 1, 1994 through August 15, 1998; (2) whether the Office of Workers' Compensation Programs properly determined that repayment should be made by withholding \$325.00 from continuing compensation; and (3) whether the Office properly determined appellant's loss of wage-earning capacity effective August 31, 1998 based on his actual earnings as a city carrier (modified).

Appellant, a city carrier, sustained an injury while in the performance of duty on January 3, 1989 when he stepped in a hole and twisted his lower back. The Office accepted his claim for a lumbosacral strain. Appellant received compensation for temporary total disability on the periodic rolls. Appellant returned to work on August 31, 1998 as a city carrier (modified) for four hours per day.

In a decision dated September 25, 1998, the Office reduced appellant's compensation to the basic statutory rate (66 2/3 percent) effective February 1, 1994 as the previous day was the last day his dependent, a son born on February 1, 1976, was under 18 years of age. In a decision dated March 1, 1999, the Office found that appellant was not without fault in the creation of an overpayment of \$12,528.34 from February 1, 1994 through August 15, 1998 because he had no qualified dependents but accepted payments at the augmented rate, payments that he knew or should have been expected to know were incorrect. In a decision dated March 1, 1999, the Office determined that appellant was reemployed effective August 31, 1998 and that his actual earnings as a modified city carrier fairly and reasonably represented his wage-earning capacity. The Office reduced appellant's compensation benefits accordingly. In a decision dated April 26, 1999, the Office modified its earlier March 1, 1999 determination to reflect that recovery of the overpayment would be made by withholding \$325.00 from each continuing compensation payment.

The Board finds that appellant was not without fault in the creation of an overpayment of \$12,528.34 from February 1, 1994 through August 15, 1998.

In the present case, appellant does not dispute that he received an overpayment of compensation. As the Office's calculations pertaining to the amount of overpayment establish that appellant received augmented compensation payments for the period from February 1, 1994 through August 15, 1998, in the amount of \$12,528.34. The overpayment of \$12,528.34 occurred as appellant received augmented compensation for a dependent after his son, who was born on February 1, 1976, no longer qualified as a dependent. On CA-1032 forms signed and dated May 1, 1998, April 10, 1997, May 14, 1996, April 29, 1995 and April 29, 1994, which covered the previous 15 months, appellant listed his son as a dependent. The forms explained whom appellant could claim as a dependent, such as an unmarried child under 18 years of age, including an adopted child or stepchild, who was living with appellant; an unmarried child who was 18 or over, but who was incapable of self-support by reason of mental or physical disability; and an unmarried child under 23 years of age who is a full-time student and has not completed four years of schooling beyond the high school level.

On June 12, 1998 the Office requested additional information concerning appellant's son and his qualifications as a dependent. The Office advised appellant that compensation for his son could continue after his 18th birthday only if the dependent was unmarried and either incapable of self-support or a full-time student. The Office outlined the requirements to qualify a dependent who has reached the age of 18 to qualify as a student and enclosed the appropriate form. The Office further advised that compensation law prohibits the acceptance of compensation to which a beneficiary is not entitled.

By letter dated July 15, 1998, the Office noted that appellant did not respond to its June 12, 1998 letter. Appellant was provided with a copy of the June 12, 1998 letter and the Form CA-1615 and granted an additional 15 days to respond. The Office advised that if no response was received, it would be assumed that appellant does not have any eligible dependents and his compensation rate would be adjusted to the basic 66 and 2/3 percent statutory rate. No response was received.

On December 9, 1998 the Office issued a preliminary overpayment determination, finding appellant at fault in the matter of the creation of the overpayment. It was determined that the record did not show that appellant's dependant continued a full course of study after he turned 18 on February 1, 1994 and that compensation had been paid at the erroneous augmented rate from February 1, 1994 through August 15, 1998 resulting in an overpayment of \$12,528.34. The Office enclosed an overpayment recovery questionnaire Form OWCP-20. When appellant did not respond, the Office finalized its determination in a decision dated March 1, 1999.

Section 8129 of the Federal Employees' Compensation Act provides that the Office may not adjust later compensation or recover an overpayment unless an "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."¹ Thus, before the Office

¹ 5 U.S.C. § 8129(b).

may recover an overpayment of compensation, it must determine whether the individual is not without fault.

Section 10.433(a) of the implementing federal regulations provides the following:

“OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which he or she should have known to be incorrect.”²

The record in this case establishes that the Office advised appellant as to whom he could and could not claim as a dependent. This is evident not only from the various CA-1032 forms appellant completed but also from the June 12 and July 15, 1998 requests for additional information. The Office made it clear that appellant was to return any uncashed compensation checks if he had no eligible dependents. This evidence supports the Office’s finding that appellant was not without in the matter of the overpayment that arose because he accepted payments that he knew or should have been expected to know were incorrect. As appellant was not without fault in the creation of the overpayment, he is not eligible for waiver of the overpayment.

The Board further finds that the method for recovering the overpayment in this case was proper.

In the present case, the record indicates that appellant was in receipt of continuing compensation benefits for loss of wage-earning capacity. With regard to the amount to be withheld from appellant’s continuing compensation payments to recover the amount of the overpayment, 20 C.F.R. § 10.441(a) provides that 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 other relevant factors so as to minimize any resulting hardship upon the individual. In its March 1, 1999 decision, the Office had advised that as appellant did not complete Form OWCP-20 there

² 20 C.F.R. § 10.433 (1999).

was no evidence that appellant could not repay the amount owed. It stated that the sum of \$300.00 would be withheld from his continuing compensation effective March 28, 1999 and continuing until the overpayment was absorbed. On April 26, 1999 the Office indicated that it received appellant's completed Form OWCP-20 dated January 2, 1999. The Office modified its March 1, 1999 decision to reflect that a \$325.00 monthly deduction would commence effective April 25, 1999 to repay the overpayment of compensation. The Office properly noted that appellant's ordinary and necessary living expenses totaled \$2,143.00 and were not substantiated. The Office properly calculated appellant's weekly salary of \$361.00 for 4 hours a day provided a monthly income of \$1,564.00.³ The Office further calculated that, as appellant received \$977.00 in compensation every 28 days and, as 13 compensation checks are received, his monthly compensation from the periodic rolls equates to \$1,058.00. This resulted in a total monthly income of \$2,622.00. Appellant's monthly expenses subtracted from his total monthly income yield a positive cash flow of \$479.00 per month. The Office noted that a deduction of the rate of \$300.00 per periodic roll check (which equated to \$325.00 per month) resulted in a positive resource base of \$154.00 per month. As the factors of section 10.441(a) had been considered and resulted in a determination that \$325.00 should be withheld from subsequent payments of compensation until the overpayments were absorbed, the amount to be withheld from appellant's continuing compensation payments to recover the amount of overpayment is affirmed.

The Board finds that the Office improperly determined appellant's loss of wage-earning capacity based on actual wages as a modified city carrier.

Section 8115(a) of the Act⁴ provides: "In determining compensation for partial disability ... the wage-earning capacity of an employee is determined by [his] actual earnings if [his] actual earnings fairly and reasonably represent [his] wage-earning capacity...." Actual wages are the preferred measure of wage-earning capacity, but only if they fairly and reasonably represent such capacity. The Board has explained that this view constitutes a natural extension of the general principle of workers' compensation law that wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions, rather than in an artificial setting such as a make-shift position or other position at retained pay not necessarily reflective of true wage-earning capacity.⁵

The Office's procedure manual provides:

"When an employee cannot return to the date[-]of[-]injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, the CE [claims examiner] must determine whether the earnings in the alternative employment fairly and reasonably represent the

³ The weekly salary times 52 weeks per year divided by 12 months per year yields the monthly salary.

⁴ 5 U.S.C. § 8115(a).

⁵ *Michael E. Moravec*, 46 ECAB 492 (1995).

employee's WEC [wage-earning capacity]. Following is an outline of actions to be taken by the CE when a partially disabled claimant returns to alternative work:

“a. *Factors Considered.* To determine whether the claimant's work fairly and reasonably represents his or her WEC, the CE should consider whether the kind of appointment and tour of duty (see FECA PM 2-900.3⁶) 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.

“... [T]he 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)....”⁷

In the present case, appellant was working full time as a city carrier at the time of his January 3, 1989 employment injury. Due to residuals of his employment injury, he was unable to return to work in this position. Beginning August 31, 1998, appellant was reemployed by the employing establishment as a city carrier modified, a position whose physical requirements did not exceed his work tolerance limitations. However, this position was a part-time position affording appellant employment for four hours per day and the tour of duty is not equivalent to the full-time position that appellant held on the date of his employment injury. It is the Office's burden to show that earnings in a part-time position fairly and reasonably represent appellant's wage-earning capacity.⁸ In this case, the Office has not fully explained how the part-time city carrier modified position is appropriate for a wage-earning capacity determination when appellant was a full-time city carrier on the date of injury. The Office, under its procedure manual, erroneously determined that this part-time position “fairly and reasonably” represented appellant's wage-earning capacity.⁹

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.3 (December 1995) lists five kinds of tours of duty: full time, part time, intermittent, seasonal and on call.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

⁸ See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.15e (December 1995) provides that in such circumstances compensation may be reduced to reflect actual earnings during the period of the earnings only.

The decisions of the Office of Workers' Compensation Programs dated April 26, 1999 and September 25, 1998 are hereby affirmed. The decision dated March 1, 1999, adjusting appellant's compensation based on a loss of wage-earning capacity in a part-time city carrier modified position, is reversed.

Dated, Washington, DC
January 16, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member