U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLIFFORD LANCASTER and DEPARTMENT OF DEFENSE, Columbus, OH

Docket No. 00-612; Submitted on the Record;
Issued June 6, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity effective January 31, 1999; (2) whether the Office properly determined that appellant received an overpayment in the amount of $2,630.14; and (3) whether the Office properly determined that appellant was at fault with respect to the overpayment so that it was not subject to waiver.

On January 13, 1997 appellant, then a 53-year-old meat cutter, sustained bronchial asthma in the course of employment as a result of continuous exposure to cold temperatures. The Office accepted appellant's claim for bronchial asthma.

On December 11, 1997 the Office provided appellant with a CA-1049 form letter which stated:

> "In order to avoid an overpayment of compensation NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the [Office] that you are working."

By letter dated May 19, 1998, the Office advised appellant that while he searched for employment as a dispatcher, security guard or shopping investigator, he would receive 90 days of assistance from the Office to help him meet his goal and at the end of the 90-day period, his compensation would be reduced based on the wage-earning capacity of $14,560.00 or $12,480.00 per year.[1]

[1] The Office did not explain the basis for the wage-earning capacity calculations. A vocational rehabilitation file was opened for appellant on January 6, 1998.

By an undated and unsigned periodic rolls payment (Form CA-25), the Office rehabilitation specialist informed the Office that appellant had returned to work on October 1, 1998.[2]

In a February 9, 1999 letter, the private employer informed the rehabilitation specialist and the Office that appellant was laid off on December 28, 1998.

In a computer generated computation log dated February 19, 1999, the payment history reflected that appellant received compensation checks in the following amounts: September 13 to October 10, 1998 for $1,719.00; October 11 to November 7, 1998 for $1,719.00; November 8 to December 5, 1998 for $1,719.00; and December 6 to January 2, 1999 for $1,719.00.

In a March 16, 1999 loss of wage-earning capacity (LWEC) decision, the Office informed appellant that they were adjusting his compensation effective January 31, 1999 because the medical evidence showed that he was no longer totally disabled for work and that his compensation would be adjusted based upon the difference of his compensation rate and wage-earning capacity. The Office found that appellant could perform the duties of the selected position of "floor estimator" and noted the Department of Transportation's (DOT's) job description and physical requirements.[3]

In a memorandum dated April 6, 1999, appellant's private employer indicated that appellant worked for him as a day laborer from October 5 to December 28, 1998 until he was laid off due to lack of work. The employer noted that appellant earned $240.00 per week while employed.

By letter dated May 5, 1999, the Office made a preliminary determination that an overpayment of compensation had occurred in appellant's case in the amount of $2,777.56. The Office stated that the overpayment occurred because appellant returned to gainful employment on October 1, 1998 and continued to receive and keep compensation for total wage loss until January 30, 1999. The Office stated that appellant was at fault in the creation of the overpayment because he was informed by letter dated December 11, 1997 to return any checks received after he had returned to work. The Office informed appellant that he may, within 30 days, submit additional evidence or argument and request a hearing or reevaluation on the record with regard to the issues of whether the overpayment occurred in the stated amount, whether he was at fault in this matter and whether the overpayment should be waived.

In a May 15, 1999 overpayment calculation worksheet, the Office calculated that appellant received a $2,630.44 overpayment from October 5, 1998 to January 30, 1999. This worksheet indicated that compensation should have been based on an LWEC from October 5, 1998 to January 30, 1999 on actual earnings of $338.64 a week.

[2] The Office also made an annotation regarding the return to work as October 1, 1998.

[3] The record does not indicate how the Office may have determined the prevailing wage rate and availability of this position.

In an August 18, 1999 questionnaire, appellant indicated that he received compensation at the rate of six dollars per hour or $240.00 a week from Stewart General Services during October 5 to December 28, 1998.

By decision dated October 5, 1999, the Office determined that the preliminary finding that appellant was with fault in the creation of the overpayment was correct.[4]

The Board finds that the Office did not meet its burden of proof in reducing appellant's compensation based on his loss of wage-earning capacity effective January 31, 1999.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of compensation benefits.[5]

The Act, at 5 U.S.C. § 8106(a), provides that: "If the disability is partial, the United States shall pay the employee during the disability, monthly monetary compensation equal to a 66 2/3 percent of the difference of between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability."

Under section 8115(a) of the Act,[6] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the impaired employee's wage-earning capacity, must be accepted as such measure.[7] This principle is premised upon the theory that wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions and is thus best measured by actual wages earned.[8]

If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[9]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized

[4] The Office informed appellant in this decision that the overpayment was $2,630.14.

[5] *Louis B. McKenna*, 46 ECAB 328 (1994).

[6] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[7] *Don J. Mazurek*, 46 ECAB 447 (1995).

[8] *See Albert L. Poe*, 37 ECAB 684 (1986).

[9] *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

by the Office for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*[10] will result in the percentage of the employee's loss of wage-earning capacity. The basic range of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.[11]

In its March 16, 1999 reduction of compensation, the Office informed appellant that they were adjusting his compensation based on the difference between his pay rate as determined for compensation purposes and his wage-earning capacity. The Office calculated that appellant's weekly pay rate was $564.40 per week and his adjusted earning capacity in his new position was $338.64 per week. The Office chose the position of floor estimator, a selected position. The Office determined that appellant could perform the duties of a floor estimator, a light-duty position which required the ability to lift up to five pounds; however, the record does not reflect how this position was determined. The record does reflect that appellant worked in a temporary position as a day laborer from October 5 to December 28, 1998 when he was laid off due to lack of work. There is no indication that the Office considered whether appellant's actual earnings as a laborer fairly and reasonably represented his loss of wage-earning capacity.

As appellant did have actual earnings, the Office could only proceed to determine appellant's wage-earning capacity based upon a selected position if the Office first established that appellant's actual earnings did not fairly and reasonably reflect his wage-earning capacity or if the Office established that appellant had not complied with vocational rehabilitation.[12]

Regarding the selection of actual earnings or a selected position as the basis for the wage-earning capacity determination, the Act[13] provides:

> "If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage[-]earning capacity as appears reasonable under the circumstances is

[10] 5 ECAB 376 (1953).

[11] *Karen L. Lonon-Jones*, 50 ECAB ___ (Docket No. 97-155, issued March 18, 1999).

[12] 20 C.F.R. § 10.403(a)(1999) provides in pertinent part as follows: 5 U.S.C. § 8115 outlines how compensation for partial disability is determined. If the employee has actual earnings, which fairly and reasonably represent his wage-earning capacity, those earnings may form the basis for payment of compensation for total disability. (See sections 10.500 through 10.520 concerning return to work). If the employee's actual earnings do not fairly and reasonably represent his wage-earning capacity, those earnings may form the basis for payment of compensation for partial disability. (See sections 10.500 through 10.520 concerning return to work). If the employee's actual earnings do not fairly and reasonably represent his wage-earning capacity, or if the employee has no actual earnings, the Office uses the factors stated in 5 U.S.C. § 8115 to select a position which represents his wage-earning capacity. However, the Office will not secure employment for the employee in the position selected for establishing a wage-earning capacity.

[13] 5 U.S.C. § 8115(a).

> determined with due regard to: (1) the nature of his injury; (2) the degree of physical impairment; (3) his usual employment; (4) his age; (5) his qualification for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."

The Office's procedure manual cautions the claims examiner that in determining whether the claimant's earnings fairly and reasonably represent his wage-earning capacity, the claims examiner should not consider the factors set forth in 5 U.S.C. § 8115(a).[14] The Board has further held that it is only appropriate for the Office to consider the factors enumerated in section 8115(a) when it has been shown that actual wages do not fairly and reasonably represent wage-earning capacity.[15] In most cases, appellant's qualifications for other employment and physical abilities would allow the Office to identify several selected positions within various wage ranges.

The Board has long recognized, however, that actual earnings are generally the best measure of wage-earning capacity as they more reasonably reflect appellant's employment capacity in the open labor market. The Board explained in *Billie S. Miller*[16] that "[g]enerally, actual wages earned in the open labor market more accurately represent an employee's earning capacity and constitute a more reliable gauge than a secondary method such as an opinion of a vocational rehabilitation adviser." In keeping with this principle, to meet its burden of proof the Office must identify a deficiency in appellant's actual earnings such that the actual earnings do not fairly and reasonably represent wage-earning capacity. As the Office bears the burden of proof, the Office may not simply exercise its discretion and select either actual earnings or a selected position as the basis for a wage-earning capacity determination. The Office's procedure manual offers limited guidance in determining whether actual earnings do fairly and reasonably represent wage-earning capacity. The procedure manual notes that the factors to be considered in determining whether the claimant's work fairly and reasonably represents his wage-earning capacity include the kind of appointment, that is whether the position is temporary, seasonal or permanent; and the tour of duty, that is whether the position is part time.[17] In some cases it would, therefore, be obvious that appellant's actual earnings do not "fairly and reasonably" represent wage-earning capacity.

In the present case, the Office arbitrarily used the selected position of floor estimator without explanation. The record does not show that the position of floor estimator would offer that same wage. The Office improperly combined the two methods of determining wage-earning capacity. There was no evidence that appellant refused to work at a higher wage or worked below his capacity. The record also reflects that appellant worked as a day laborer until he was laid off at the rate of $6.00 per hour for $240.00 per week. As the Office had appellant's actual earnings, they did not offer any evidence to show that they were not fairly and reasonably

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity,* Chapter 2.814.7(a) (December 1993).

[15] *Monique L. Love,* 48 ECAB 378 (1997).

[16] 15 ECAB 168, 172 (1963).

[17] *Supra* note 11.

representative of appellant's wage-earning capacity. Additionally, the record does not reflect that appellant failed to comply with vocational rehabilitation. Therefore, it was premature for the Office to evaluate appellant's wage-earning capacity pursuant to the factors provided in 5 U.S.C. § 8115.

The Board finds that appellant received an overpayment of compensation.

When an employee returns to work and ceases to have any loss of wages, compensation for wage loss is no longer payable.[18] As appellant received monetary compensation for periods after he returned to work, he received an overpayment of compensation.

The Board further finds that the case is not in a posture for decision with regard to the waiver of the overpayment.

Section 10.431 of the federal regulations[19] implementing the overpayment provision of the Act[20] provides that before seeking to recover an overpayment or adjust benefits, the Office will advise the beneficiary in writing that:

> (a) The overpayment exists and the amount of overpayment;
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> (b) A preliminary finding shows either that the individual was or was not at fault in the creation of the overpayment;
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> (c) He or she has the right to inspect and copy government records relating to the overpayment; and
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> (d) He or she has the right to present evidence which challenges the fact or amount of the overpayment, and/or challenges the preliminary finding that he or she was at fault in the creation of the overpayment. He or she may also request that recovery of the overpayment be waived.

Additionally, the Office's procedures require that "a clear statement showing how the overpayment was calculated" be provided with a notice of preliminary determination.[21]

By letter dated May 5, 1999, the Office notified appellant of its preliminary determinations regarding the overpayment. The Office indicated the amount of the overpayment, but did not provide "a clear statement showing how the overpayment was calculated." The Office did not explain how the overpayment was calculated and in its final determination used a different figure. As the Office thus failed to follow proper procedures in determining the amount of the overpayment and failed to afford appellant an effective opportunity to present relevant

[18] *See Donney T. Gala*, 39 ECAB 1357 (1988); *Chauncey L. Moore, Jr.*, 34 ECAB 553 (1983).

[19] 20 C.F.R. § 10.431 (1999).

[20] 5 U.S.C. § 8129.

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, Computing Compensation, Chapter 2.901.8(a) (September 1986).

evidence and argument in that regard, the Board finds that the case must be remanded for a *de novo* determination of the amount of the overpayment.

Additionally, there is a discrepancy regarding the period of the overpayment. Based on the statement of appellant's employer, it appears that the overpayment occurred from October 5 to December 28, 1998, when appellant worked as a day laborer earning $6.00 per hour or $240.00 per week. This would appear to approximate about $2,928.00 in wages he received. Office records appear to indicate that appellant received about $5,218.33 in compensation during this period. This would apparently result in a $2,290.33 overpayment. However, the Office indicated that the overpayment was incurred from October 1, 1998 to January 31, 1999. The Office's May 19, 1999 worksheet, which calculated the $2,630.44 final amount, erroneously indicated that the LWEC was in effect from October 5 to January 30, 1999. However, those actual earnings listed at $338.64 are not consistent with the weekly wages reported by appellant's employer.

Additionally, the Board further finds that the Office improperly found that appellant was at fault with regard to the overpayment.

Section 8129 of the Act[22] 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 or would be against equity and good conscience." Thus, if appellant was at fault in creating the overpayment, the overpayment is not subject to waiver.

Section 10.433 of the implementing federal regulations[23] provides that the Office 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 the Office 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
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> (2) Failed to provide information which he or she knew or should have known to be material; or
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> (3) Accepted a payment, which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).

The Office found that appellant was at fault based on the third standard acceptance of a payment which he knew or should have known was incorrect. For a finding of fault based on the

[22] 5 U.S.C. § 8129(a)(b).

[23] 20 C.F.R. § 10.433 (1999).

third standard, the evidence must establish that at the time appellant received the compensation check or checks constituting the overpayment he knew or should have known that such check was incorrect.[24] However, the evidence in the record fails to establish that appellant accepted any compensation which he knew or should have known was incorrect.

With respect to whether an individual is without fault, section 10.433(b)[25] of the Office's regulations provides in relevant part:

> "Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."[26]

Appellant and his private employer stated that he returned to work on October 5, 1998 and was laid off on December 28, 1998 due to lack of work. The Office computer computation logs show that appellant was issued gross compensation checks dated September 13 to October 10, 1998 for $1,719.00; October 11 to November 7, 1998 for $1,719.00; November 8 to December 5, 1998 for $1,719.00; and December 6, 1998 to January 2, 1999. The time frame these checks covered was exactly 98 days. The May 19, 1998 letter from the Office advised appellant that he would receive 90 days of assistance from the Office to help him meet his goal while he searched for employment and at the end of the 90-day period, his compensation would be reduced based on the wage-earning capacity of $14,560.00 or $12,480.00 per year. It is unclear from the record if appellant was ever offered the assistance while he searched for employment or if he thought the assistance covered him while he worked at a reduced capacity. Since the notification from the Office was subsequent to the December 11, 1997 letter, it was reasonable that appellant may have interpreted the assistance letter to mean that his compensation would be reduced after the 90-day period. Based upon the May 19, 1998 notification from the Office, and the absence of any evidence showing that appellant knowingly accepted a payment for which he or she knew to be incorrect, the Board finds that under these circumstances, the evidence is insufficient to establish that at the time appellant received his checks, he knew they were incorrect.[27]

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[24] *See Monty R. Bullock*, 40 ECAB 500 (1989); *Willis J. Brooks*, 40 ECAB 431 (1989); *Marlene R. Pavlo*, 38 ECAB 716, 718 (1987).

[25] 20 C.F.R. § 10.433(b) (1999).

[26] *Id.*

[27] Although Office procedures presume that claimants are aware of the period covered by each compensation check, in light of the Office's letter regarding a reduction after 90 days, it was not necessarily unreasonable for appellant to believe that the payments were correct. The Board notes that in 1994, the Office amended its procedures for determination of overpayments, by stating that: "[i]n determining whether or not a claimant is at fault … the claims examiner should be aware that all disability compensation checks issued through ACPS [the automatic rolls] have the compensation period printed on the face of the checks." The Office procedures state that the customary printing of specific periods "may not be sufficient to find the claimant at fault but should be considered with all of the other factors in making the determination." Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.5 (September 1994).

On remand, the Office should recalculate the amount of the overpayment. The Office should then prepare an amended preliminary overpayment determination, informing appellant of the amount of the overpayment, accompanied by a "clear statement showing how the overpayment was calculated." The notice should also inform appellant that he was without fault in creating the overpayment and request that he completed an overpayment recovery questionnaire reflecting his current financial circumstances for the purposes of determining his eligibility for waiver. After such further development as the Office may find necessary, it should issue a *de novo* decision on the issues of the amount of the overpayment and whether it should be waived.

The decision of the Office of Workers' Compensation Programs dated October 5, 1999 is affirmed with respect to the fact of the overpayment, set aside with respect to the amount of the overpayment, and reversed with respect to the issue of fault. The March 16, 1999 LWEC decision is reversed. The case is remanded for further proceedings in accordance with this decision of the Board.

Dated, Washington, DC
June 6, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member