U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT D. KERLEY and DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, Keyport, WA

Docket No. 00-791; Submitted on the Record;
Issued May 22, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI, PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective August 15, 1999 based on its determination that appellant's actual earnings as a purchasing agent fairly and reasonably represented appellant's wage-earning capacity; (2) whether the Office properly determined that appellant received an overpayment of compensation benefits in the amount of $4,849.02 from February 20, 1995 through August 14, 1999; and (3) whether the Office properly determined that appellant was not without fault in the creation of the overpayment.

This case is before the Board for a second time. Previously, the Board reversed the Office's determination that the constructed position of an expediter fairly and reasonably represented appellant's wage-earning capacity; accordingly, the Office did not meet its burden of proof in reducing appellant's compensation.[1]

In a September 13, 1999 decision, the Office reduced appellant's compensation effective August 15, 1999 based on its determination that appellant's position as a purchasing agent as of February 20, 1995 fairly and reasonably represented appellant's wage-earning capacity pursuant to 5 U.S.C. § 8115.

By letter dated September 13, 1999, the Office advised appellant that an overpayment had occurred from February 20, 1995 through August 14, 1999 and that he was at fault in the creation of the overpayment. The Office also advised appellant of his appeal rights.

By decision dated November 9, 1999, the Office finalized its preliminary determination of an overpayment of $4,849.02 from February 20, 1995 through August 14, 1999 and its finding of fault.

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[1] Docket No. 96-846 (issued May 26, 1999).

The Board has duly reviewed the case record and finds that the Office properly reduced appellant's compensation effective August 15, 1999.

Once the Office accepts a claim and pays compensation, it has the burden to justify termination or modification of compensation benefits.[2] Pursuant to section 8115(a) of the Federal Employees' Compensation Act,[3] wage-earning capacity is determined by the actual earnings received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[4] The Board has stated that "[g]enerally, 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 injured employee's wage-earning capacity, must be accepted as such measure."[5]

The record establishes that appellant started employment as a purchasing agent with Day Zimmerman/Basil on February 20, 1995. Under the Office's procedures, after a claimant has been working in a position for 60 days, the Office will determine whether the actual earnings fairly and reasonably represent the claimant's wage-earning capacity.[6]

In this case, the Office determined that actual earnings did fairly and reasonably represent appellant's wage-earning capacity and there is no contrary evidence or indication that the position was seasonal, temporary or less than full time.[7]

The Office determined that appellant's actual earnings from February 20, 1995 to February 3, 1996 equaled $20,881.12 based on Internal Revenue Service documents. The Office then divided the amount of appellant's "earnings" by the number of weeks during the period in question and obtained $401.56 as the average weekly pay rate. This method of calculating the average weekly pay rate to determine the pay rate for actual earnings spanning a lengthy period of time is outlined in the Office procedure manual. The procedure manual states "where the Office learns of actual earnings that span a lengthy period of time (*e.g.*, several months or more), the compensation entitlement should be determined by averaging the earnings for the entire period."[8]

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[2] *Harold S. McGough*, 36 ECAB 332 (1984).

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8115(a).

[5] *Gregory A. Compton*, 45 ECAB 154 (1993); *Clarence D. Ross*, 42 ECAB 556 (1991); *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

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

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

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(4) (June 1996).

The Office thereafter used the formula for determining loss of wage-earning capacity based on actual earnings, developed in *Shadrick*,[9] has been codified at 20 C.F.R. § 10.303. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate.[10] In this case, the Office properly used average weekly earnings of $449.60 and a current pay rate for the date-of-injury job of $533.60 per week to calculate wage-earning capacity. The pay rate at the time of injury, $449.60, is multiplied by the wage-earning capacity percentage, in this case 75 percent and the resulting dollar amount, $337.20, is subtracted from the pay rate at the time of injury to determine the loss of wage-earning capacity, which equals $112.40. This amount is multiplied by the appropriate compensation rate, three-fourths in this case, totaling $84.30. Applicable cost-of-living adjustments are added to total $410.00 every four weeks.

The Board, therefore, finds that the Office properly determined that appellant's actual earnings represented his wage-earning capacity and properly reduced his compensation according to the *Shadrick* principles. Adjustment to appellant's wage-earning capacity was effective August 15, 1999.

The Board further finds that the Office properly determined that appellant received an overpayment of compensation benefits in the amount of $4,849.02 from February 20, 1995 through August 14, 1999.

The record reveals that appellant had been receiving compensation based upon the constructed position of expediter, which the Board reversed in its May 26, 1999 decision. The expediter position, which appellant had initially been rated had a $9.00 hourly rate. Appellant's actual earnings in his purchasing agent position in 1995 yielded a $10.04 hourly rate. The Office properly determined retroactively that as appellant's wage-earning capacity was being based upon his actual earnings as a purchasing agent, for the period February 20, 1995 to August 14, 1999, appellant had a greater wage-earning capacity than previously calculated. Therefore, an overpayment was created in the amount of $4,849.02 for the period in question.

The Board finds that the Office improperly determined that appellant was not without fault in the creation of the overpayment in the amount of $4,849.02 and remands the case for a waiver determination.

Section 8129(a) of the Act provides that, where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.[11] The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "[a]djustment 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

[9] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[10] 20 C.F.R. § 10.303(b). According to this section, current pay rate means the current pay rate for the job held at the time of injury.

[11] 5 U.S.C. § 8129.

would be against equity and good conscience."[12] Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.[13]

In evaluation of whether appellant is without fault, the Office will consider whether appellant's receipt of the overpayment occurred because he relied on misinformation given by an official source within the Office or another government agency which appellant had reason to believe was connected with administration of benefits as to the interpretation of the Act or applicable regulations.[14]

In determining whether an individual is at fault, section 10.433(a) of the Code of Federal Regulations provides in relevant part:

"An individual is with fault in the creation of an overpayment who:

> (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
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> (2) Failed to furnish information which the individual knew or should have known to be material; or
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> (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[15]

In this case, the Office applied the third standard -- appellant accepted a payment which he knew or should have known was incorrect. The Office stated that appellant should have been aware that wage-loss benefits being paid were incorrect because his wage-earning capacity was greater than that initially calculated by the Office. Appellant earned $9.00 an hour as an expediter and $10.04 an hour as a purchasing agent. Although appellant was making $1.04 more than what the Office had originally calculated in its December 8, 1994 decision, the Board finds that appellant would have had no future knowledge that the Office's December 8, 1994 wage-earning capacity was errouneous and that there would be a retroactive determination based on his actual wages. Moreover, appellant immediately reported his employment status in his letter of March 20, 1995 and stated he started working as a purchasing agent on February 20, 1995. Because appellant properly notified the Office of his employment and could not foresee the result of the appellate process concerning his wage-earning capacity, the Board finds that appellant is without fault in the creation of this overpayment.

A finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must exercise it discretion to determine whether recovery

[12] 5 U.S.C. § 8129(b).

[13] *Harold W. Steele*, 38 ECAB 245 (1986).

[14] 20 C.F.R. § 10.435(b)(1) (1999).

[15] 20 C.F.R. § 10.433(a).

of the overpayment would "defeat the purpose of the Act or would be against equity and good conscience," pursuant to the guidelines provided in the implementing federal regulations.[16] Accordingly, the case must be remanded for a determination of waiver of overpayment.

The November 9, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed regarding the overpayment of compensation, is reversed with regard to the fault finding and is remanded to the Office for consideration of appellant's eligibility for waiver of the overpayment of compensation.

Dated, Washington, DC
May 22, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[16] 20 C.F.R. § 10.434 (1999).