U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAVERN R. DeSPLINTER and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Aurora, IL

Docket No. 99-1454; Submitted on the Record;
Issued May 23, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's wage-earning capacity was represented by the selected position of associate chiropractor as of January 1, 1992; and (2) whether the Office properly determined that an overpayment of $129,371.14 was created; and (3) whether the Office properly determined that appellant was at fault in creating the overpayment.

This is the fourth appeal to the Board. In a decision dated September 27, 1990, the Board found that the Office had not met its burden of proof in establishing that appellant's employment-related disability had ceased by March 16, 1986.[1] By decision dated November 5, 1993, the Board found that the Office had not properly determined appellant's loss of wage-earning capacity.[2] The Board found that the Office had not provided a sufficient basis for a determination of the prevailing wage rate for chiropractors in appellant's area, nor had it established that the position was reasonably available. By decision dated September 9, 1998, the Board found that the Office had not properly determined the wage rate for the selected position of associate chiropractor.[3] The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

In a decision dated December 16, 1998, the Office determined that the selected position of associate chiropractor, with wages of $36,644.69, represented appellant's wage-earning capacity as of January 1, 1992. The Office reduced appellant's compensation to reflect his wage-earning capacity. On November 27, 1998 the Office issued a compensation payment of $127,826.14 for compensation from January 1, 1992 to November 7, 1998, based on his loss of wage-earning capacity. The Office also issued a payment dated December 5, 1998 for $1,545.00, covering the period November 8 to December 5, 1998.

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[1] Docket No. 90-540.

[2] Docket No. 93-92.

[3] Docket No. 96-1843.

By letter dated December 16, 1998, the Office made a preliminary determination that an overpayment of $129,371.14 had been created because appellant had received disability retirement benefits during the period January 1, 1992 to December 5, 1998. The Office also made a preliminary determination that appellant was at fault in creating the overpayment.

In a decision dated February 3, 1999, the Office denied modification of its December 16, 1998 wage-earning capacity determination. By decision dated February 5, 1999, the Office finalized its overpayment and fault determinations.

The Board has reviewed the record and finds that the Office properly reduced appellant's compensation as of January 1, 1992 to reflect his wage-earning capacity as an associate chiropractor.

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 in such benefits.[4]

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[5]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist 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 the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[6] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[7]

As demonstrated in the prior appeals to the Board, the Office has made several attempts to properly determine appellant's wage-earning capacity as of January 1, 1992 based on the selected position of associate chiropractor.[8] The evidence of record indicated that appellant was

[4] *Carla Letcher*, 46 ECAB 452 (1995).

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

[6] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[7] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(f) (December 1995) provides that a retroactive wage-earning capacity based on a constructed position should not be made where the claimant is being paid compensation for temporary total disability. As indicated, in this case appellant had not been receiving compensation.

medically and vocationally qualified to perform the position. The Board notes that the Office is not obligated to actually secure employment for appellant.[9] Even if the employee is unsuccessful in obtaining work or has submitted documents from individual employers indicating that jobs were not available, this does not establish that the selected position was not reasonably available.[10]

The remaining issue as of the last appeal was establishing the proper wage rate for an entry level associate chiropractor in the Houston, Texas area as of 1992. The Office had determined the prevailing wage rate was $64,000.00, based on widely disparate responses from five chiropractors in the area, without referring to the rehabilitation specialist's own data on wages. Upon remand from the Board, the Office secured a November 9, 1998 report from a rehabilitation specialist. The specialist noted that a 1990 survey had reported wages of $33,945.60 per year; to calculate 1992 wages, the specialist applied the relevant Employment Cost Index for wages and salaries and determined that wages of $36,644.69 would be appropriate for a entry-level associate chiropractor in 1992. The Board finds that this represents the weight of the probative evidence. The expertise of a rehabilitation specialist is properly relied on in determining wage rates and the specialist provided an opinion with supporting explanation. Based on a wage-earning capacity of $36,644.69, the Office properly reduced appellant's compensation in accord with the *Shadrick* decision.

The Board further finds that the Office properly determined that an overpayment of $129,371.14 was created.

A claimant is not entitled to receive both compensation and retirement benefits from Office of Personnel Management (OPM) during the same period.[11] The record indicates, and appellant does not dispute, that he received disability retirement benefits from January 1, 1992 to December 5, 1998. Therefore the entire amount of compensation paid, $129,371.14, represents an overpayment.

The Board further finds that the Office properly found appellant to be at fault in creating the overpayment.

Section 8129(b) of the Act[12] provides: "Adjustment 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 would be against equity

[9] *Dennis D. Owen, supra* note 6.

[10] *See Karen L. Lonon-Jones*, 50 ECAB ___ (Docket No. 97-155, issued March 18, 1999); *Wilson L. Clow*, *Jr., supra* note 5. Appellant argued that his age would prevent him from being hired as an associate chiropractor, but he was qualified to work as a chiropractor and the rehabilitation specialist had opined that associate positions were reasonably available.

[11] *See, e.g., Norman F. Bligh,* 41 ECAB 230 (1989); *see also* 20 C.F.R. § 10.421(a).

[12] 5 U.S.C. §§ 8101-8193.

and good conscience."[13] No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.[14]

On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: "(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect."

In this case, the record contains a letter from the Office dated February 6, 1998, notifying appellant that he could not receive both OPM benefits and compensation for wage loss during the same period. When appellant received the November 27, 1998 compensation payment indicating that it represented compensation for the period commencing January 1, 1992, he should have known it was incorrect. On appeal, appellant states that a payment for such a large amount could not be a mistake, without further explanation. He also stated that he elected to receive compensation benefits in February 1998 and expected a payment for back benefits; he did not discuss the February 6, 1998 letter or explain why he believed he was entitled to compensation during periods that he received OPM retirement benefits. The Board finds that the evidence establishes that appellant should have known the November 27 and December 5, 1998 payments were incorrect. Since appellant accepted payments he should have known were incorrect, the Office properly found appellant to be at fault in creating the overpayment. Appellant is therefore not entitled to waiver of the overpayment.

The decisions of the Office of Workers' Compensation Programs dated February 5 and February 3, 1999, and December 16, 1998 are affirmed.

Dated, Washington, DC
May 23, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

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[13] 5 U.S.C. § 8129(b).

[14] *Gregg B. Manston*, 45 ECAB 344 (1994).