

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEE EGBERT and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Sebastopol, CA

*Docket No. 00-994; Submitted on the Record;
Issued September 27, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment in the amount of \$10,869.94 was created; (2) whether the Office abused its discretion by denying waiver of the overpayment; and (3) whether the Office properly reduced appellant's compensation on January 5, 2000 based on his capacity to perform the duties of a customer service clerk.

Appellant, then a 66-year-old postal clerk, filed an occupational disease claim on August 31, 1996 alleging that on July 15, 1996 he injured his right shoulder while in the performance of duty. The Office accepted his claim for right shoulder strain and impingement syndrome, based on the August 29, 1996 report of Dr. Steven E. Levenberg, Board-certified in internal medicine.

Appellant was employed as a casual worker who resigned on September 10, 1996 prior to the end of his first 89-day assignment. At the time of the injury, appellant earned \$360.00 a week at the rate of \$9.00 an hour.

The record establishes that appellant's employment would have expired in September 1996.¹ The employing establishment indicated that a casual employee similarly employed would have earned \$4,320.00. The Office calculated that appellant's pay rate for compensation purposes was \$9.00 an hour times 40 hours a week for a total of \$360.00 a week.

In a November 8, 1996 report, Dr. Lance Barlas, Board-certified in orthopedic surgery, examined appellant and noted his history of injury and treatment to his right shoulder. He diagnosed impingement syndrome of the right shoulder and a possible rotator cuff tear.

¹ In a May 13, 1997 letter, the employing establishment informed the Office that appellant's date-of-injury position would have ended on September 20, 1997. The ending date of 1997 appears to be a typographical error in this letter.

On November 25, 1997 Dr. Barlas filled out a work capacity evaluation indicating that appellant could work 8 hours a day with certain restrictions that included pushing and pulling for only one hour but not more than 20 pounds and lifting for up to 1 hour but not more than 10 pounds. Appellant could not reach over his shoulder and was limited to two hours of normal reaching and two hours of driving.

On December 17, 1997 the Office referred appellant for rehabilitation. In a January 1998 report, a vocational rehabilitation specialist noted appellant's extensive work history and conducted vocational testing. Appellant's scores were in the 99th and 92nd percentiles, with superior abilities. After a variety of rehabilitation efforts, the vocational rehabilitation services were terminated when job placement was unsuccessful. The rehabilitation counselor identified the positions of customer service clerk and underwriting clerk as suitable for appellant in his partially disabled capacity. The rehabilitation counselor indicated that the position of customer service clerk, Department of Labor's *Dictionary of Occupational Titles* No. 299.367.010 and underwriting clerk, Department of Labor's *Dictionary of Occupational Titles* No. 219.367.038 were reasonably available within appellant's commuting area at a weekly wage range of \$280.00 to \$320.00 and were consistent with his light-duty work restrictions.

In a January 28, 1998 work capacity form, Dr. Barlas reiterated that appellant could not work eight hours a day, could sit, stand and walk continuously, could occasionally lift up to 20 pounds and should avoid reaching above his shoulder or high-speed work with his arms. In a July 27, 1999 report, Dr. Barlas stated that appellant's right shoulder symptoms were "unchanged" in the past 15 months. Appellant's condition was "permanent and stationary."

On November 16, 1999 the Office determined that the position of customer service clerk closely matched appellant's job qualifications and restrictions, and after ascertaining the current pay rate for appellant's job when injured, calculated his loss of wage-earning capacity.²

By letter dated December 2, 1999, the Office informed appellant that an incorrect pay rate was used to calculate compensation payments. The Office advised appellant that he was a casual employee hired on an 89-day appointment, earning \$9.00 dollars an hour and that his pay rate should have been calculated using the minimum formula. His rate of pay should have been \$207.69 a week instead of \$360.00 a week.

On December 2, 1999 the Office issued a notice of proposed reduction of compensation on the basis that appellant was able to earn wages as a customer service clerk with no loss of wage-earning capacity. The Office allotted appellant 30 days within which to submit any contrary evidence.

In a letter dated December 15, 1999, the Office determined that an overpayment of compensation had occurred in the amount of \$10,869.94 because an incorrect pay rate was used for compensation payments. The Office advised appellant that he was without fault in the

² The formula for determining loss of wage-earning capacity based upon actual earnings was developed in *Albert C. Shadrick*, 5 ECAB 376 (1953), and codified by regulation at 20 C.F.R. § 10.403(d) (1999). Section (d) of this regulation provides that wage-earning capacity in terms of percentage is obtained by dividing the employee's earnings by the "current pay rate."

creation of the overpayment and had the right to submit any additional evidence or arguments regarding waiver of the overpayment.

Appellant completed the Office's overpayment recovery questionnaire on December 20, 1999, indicating that his total monthly income was \$2,858.00 and that his total monthly expenses were \$2,937.00. In response to the questions on assets, appellant indicated that he had no cash on hand, no savings, a checking account balance of \$460.00 and personal property consisting of a 1992 automobile. He listed his wife's assets as \$100.00 cash on hand, a checking account balance of \$920.00, a credit union account of \$5,700.00, a stock bond or mutual fund of \$75,050.00. He also stated that he should not have to burden his wife for his support.

By decision dated January 5, 2000, the Office found that waiver of the overpayment in the amount of \$10,869.94 was not warranted, as appellant and his wife had \$82,230.00 in assets. The Office also found that appellant's income exceeded expenses by more than \$50.00 because his clothing expense was excessive.

By decision also dated January 5, 2000, the Office reduced appellant's compensation to zero based on his ability to perform the selected position of customer service clerk. The Office calculated that appellant had no loss of wage-earning capacity.

The Board finds that the Office properly determined that an overpayment of \$10,869.94 occurred.

The Federal Employees' Compensation Act³ provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment in which he was injured substantially for the entire year immediately preceding the injury and would have been afforded employment for substantially a whole year, except for the injury. Section 8114(d) provides the means for calculating average annual earnings in determining pay rates. If an employee did not work substantially the whole year prior to the injury or was employed in a position that would have afforded employment for substantially a whole year, as is the case here, section 8114(d)(3) provides:

“If either of the foregoing methods of the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of injury having regard to the previous earnings of the employee in federal employment and of other employees of the United States in the same or most similar employment in the same or neighboring location, other previous employment of the employee or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within one year immediately preceding his injury.”

The record establishes that appellant worked as a casual employee for 8 hours a day, 40 hours a week from June through September 1996 for a total of 89 days and would not have

³ 5 U.S.C. §§ 8101-8193.

worked past September 20, 1997. The Office's initial calculations of appellant's pay rate were based on appellant's compensation at the rate of \$9.00 dollars an hour for 40 hours a week as if he had worked for one year. The record indicates that since appellant had no other employment in the year prior to September 10, 1996, his employment was not for substantially a whole year and his position would not have afforded him the opportunity to stay for a year. Therefore, the Office used an incorrect full-time rate of pay of \$9.00 dollars an hour for 40 hours a week instead of the part-time rate of pay.

The purpose of section 8114(d)(3) is to determine the annual earning capacity for an employee that closely approximates his true earning capacity.⁴ The Office determined that the pay rate should have been calculated using the minimum formula of \$9.00 an hour * 8 hours a day * 150 days a year, divided by 52 weeks which was equal to \$207.69 as described under section 8114(d)(3) of the Act. This was proper as appellant was not entitled to a higher pay rate under any other applicable provision of section 8114.⁵ Appellant received compensation from September 10, 1996 to December 4, 1999 in the amount of \$46,088.76 but should have received \$35,218.82, resulting in an overpayment of \$10,869.94. Therefore, the record establishes that the Office correctly determined the amount of the overpayment.

The Board further finds that the Office abused its discretion in denying waiver of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office rests within its discretion, to be exercised pursuant to the statutory guidelines. Thus, the only question before the Board is whether the Office's refusal to deny waiver under the factual circumstances of this case constituted an abuse of discretion.⁶

Section 8129(b) of the Act⁷ 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 and good conscience."⁸ The Office's procedure manual provided that the clause "defeat the purpose of the Act" applied only to beneficiaries such as appellant, who are or were entitled to compensation benefits. The procedure manual then stated:

"(1) *Recovery* of an overpayment will *defeat the purpose* of the subchapter if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living

⁴ *William R. Emerson*, 31 ECAB 62 (1979); *Irvin Goldman*, 23 ECAB 6 (1971).

⁵ *See Robin Bogue*, 46 ECAB 488 (1955).

⁶ *Ronald E. Smith*, 36 ECAB 652, 654 (1985).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8129(b).

expenses under the criteria set out in this section. Recovery will defeat the purpose of the subchapter to the extent that:

- (a) The individual from whom recovery is sought needs substantially all of his or her current income (including FECA monthly benefits) to meet current ordinary and necessary living expenses, and
- (b) 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.”⁹

The Office procedure manual then defines income and assets, stating:

“*Income.* The individual's total income includes any funds, which may reasonably be considered available for his/her use, regardless of the source. Income to a spouse will not be considered available to the individual unless the spouse was living in the household both at the time the overpayment was incurred and at the time the waiver is considered.”

“*Assets.* An individual's assets include:

- (a) Liquid Assets -- cash on hand, the value of stocks, bonds, savings accounts, mutual funds and the like.
- (b) Nonliquid Assets -- the fair market value of property such as a camper, second home, extra automobile, jewelry, etc.

“Assets for these purposes do not include the value of household furnishings, wearing apparel, family automobile, burial plot or prepaid burial contract, a home which the person maintains as the principal family domicile or income producing property if the income from such property has been included in comparing income and expenses.”¹⁰

For waiver under this standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base.¹¹ An individual is deemed to need substantially all of his

⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6a(1) (September 1994); *See Robert Wehnolz*, 38 ECAB 311(1986).

¹⁰ Federal (FECA) Procedure Manual, Chapter 2.901, Overpayments (June 1985).

¹¹ *Forest E. Brown, II*, 44 ECAB 278, 284 (1992); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (September 1994).

current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹²

In this case, appellant's overpayment recovery questionnaire showed that his monthly income exceeded his monthly expenses by \$79.00 dollars per month.¹³ The Office did not count any part of the \$400.00 clothing expense because it was "excessive" and "not explained."

While the burden is on a claimant to show that his expenses are normal and needed for a legitimate purpose, the procedure manual requires that the Office explain why it discounts or reduces any claimed expenses, particularly those for food, clothing or vehicles.¹⁴ The manual states that the Office must show in writing the reasons for its finding and "provide clear and complete rationale."¹⁵ Here, the Office merely "noted" without explanation that \$400.00 a month for clothing was excessive and unexplained.

The Office further found that appellant's assets exceeded the resource base of \$5,000.00 for an individual with a spouse. The definition of "assets" in the Office's procedure manual, when compared to appellant's overpayment recovery questionnaire, shows that appellant's assets exceeds this resource base only if his wife's checking, credit union accounts and stocks are included. However, appellant's wife kept her assets as separate property as they were part of an inheritance and thus retained the character of separate property under California law.¹⁶

The Board finds that the Office erred in determining that appellant's assets exceeded the resource base set forth in the Office's procedure manual by improperly including the separate property of his wife. The Board has held that a spouse's assets which are separately held and which are not normally considered reasonably available to meet ordinary and necessary living expenses are not available for purposes of determining the assets of an overpaid claimant. The Office could not recover appellant's overpayment from his wife's separate property under California law or Board precedents.¹⁷ Thus, appellant's assets do not exceed the resource base of \$5,000.00 set forth in the Office's procedure manual.

The Board further finds that the Office properly reduced appellant's compensation based on his capacity to perform the duties of a customer service clerk.

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

¹³ This included income from the assets of appellant's wife.

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(3) (September 1994).

¹⁵ *Id.*

¹⁶ *Earl C. Poppell*, 39 ECAB 1455 (1988); *Thomasset v. Thomasset*, 121 Cal. App. 2d 116 (1954).

¹⁷ *See Earl C. Poppell*, note 15; *see Yolanda Librera*, 37 ECAB 388 (1986); *Marty Jocewicz*, 37 ECAB 233 (1985).

Once the Office has determined that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation. If the employee's disability is no longer total but is partial, appellant is only entitled to the loss of his wage-earning capacity.¹⁸

Under section 8115(a) of the 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 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.¹⁹

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 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*²⁰ will result in the percentage of the employer's loss of wage-earning capacity.

The initial question presented is whether the position of customer service clerk was determined with due regard to the nature of appellant's employment injury and the degree of physical impairment.

In this case, the Office determined that appellant was no longer totally disabled based on the reports of Dr. Barlas, a Board-certified orthopedic surgeon and appellant's treating physician, who reported that appellant could work eight hours a day with light-duty restrictions.

The selected position of customer service clerk was classified as essentially office work, including taking orders, keeping records, notifying customers, answering telephone and mail inquiries, and resolving complaints. The Office found that the selected position was within appellant's physical limitations based on the work restriction evaluation by Dr. Barlas, noting that the position allowed for flexibility in movement. His January 1998 evaluation form and July 1999 report finding no change in appellant's condition since he last examined him 15 months previously are reasonably current with the Office's January 2000 decision.²¹

¹⁸ *Gregory A. Compton*, 45 ECAB 154 (1993).

¹⁹ *See* 5 U.S.C. § 8115(a); *see also* *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

²⁰ 5 ECAB 376 (1953).

²¹ *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

Accordingly, the Board finds that appellant's wage-earning capacity was determined with due regard to appellant's physical impairment as provided in section 8115(a). The Office has therefore met its burden of proof in reducing appellant's compensation based upon his wage-earning capacity. The Board further finds that the mathematical calculation of appellant's loss of wage-earning capacity is correct and in accordance with the Office's procedures.

The decision of the Office of Workers' Compensation Programs dated January 5, 2000 is hereby affirmed with regard to fact and amount of overpayment, the decision regarding waiver is set aside and the case is remanded for further proceedings consistent with this opinion. The January 5, 2000 loss of wage-earning capacity decision is affirmed.

Dated, Washington, DC
September 27, 2001

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member