

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH R. BARNETT and DEPARTMENT OF THE NAVY,
NAVAL PUBLIC WORKS CENTER, Norfolk, VA

*Docket No. 01-1414; Submitted on the Record;
Issued November 20, 2002*

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 received an overpayment in the amount of \$39,223.79; (2) whether the Office abused its discretion by denying a waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment by withholding \$762.00 every four weeks from his continuing compensation.

Appellant, then a 37-year-old carpenter, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) on April 19, 1982 alleging that on April 16, 1982 a nail flew in his left eye in the performance of duty.¹ The Office accepted his claim for a severe laceration of the cornea with prolapsed iris and ruptured lens of the left eye.²

The record reflects that appellant was unable to return to his date-of-injury job; however, he eventually returned to full-time employment as a cashier and eventually a custodian.

By decision dated August 27, 1987, the Office found that the position of carpenter with wages of \$307.60 per week fairly and reasonably represented appellant's wage-earning capacity.

On December 29, 2000 the Office adjusted appellant's compensation based on his actual earnings as a clerk/cashier since 1995.

In a letter dated January 19, 2001, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of \$39,223.79. The overpayment occurred because an incorrect pay rate was used for compensation

¹ The record reflects that this case was on appeal previously with respect to an attorney fee dispute.

² Appellant received a schedule award for 100 percent loss of the left eye.

payments.³ The Office further advised appellant that he was without fault in the creation of the overpayment. The Office also advised appellant that he had the right to submit any additional evidence or arguments if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment and if he believed that recovery of the overpayment should be waived. Additionally, the Office advised appellant that he could request a precoupment hearing before an Office representative. The Office also advised appellant that he should provide information regarding his income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of the Federal Employees' Compensation Act⁴ to recover the overpayment.

Appellant did not respond or complete the Office's overpayment recovery questionnaire.

By decision dated April 6, 2001, the Office finalized the January 19, 2001 preliminary determination that appellant received an overpayment in the amount of \$39,223.79 and was without fault in the creation of the overpayment. The Office also found that appellant was not entitled to a waiver of recovery of the overpayment. Further, the Office determined that the overpayment should be repaid in the amount of \$762.00 dollars every 28 days until the \$39,223.79 plus 6 percent interest, was paid in full.⁵

The Board finds that the Office improperly determined that an overpayment of \$39,223.79 was created in this case.

In the present case, the Office found in its January 19, 2001 preliminary determination that appellant received an overpayment of \$39,233.79 because he returned to work on June 15, 1995 with actual earnings; however, he continued to receive compensation based on total disability until December 3, 2000. The Office calculated that the excess compensation appellant received from June 15, 1995 through December 30, 2000 totaled \$39,223.79. However, in calculating the overpayment in this case, the Office relied upon the December 29, 2000 loss of wage-earning capacity (LWEC) decision. The Office did not explain why this date was used as they had already issued a formal LWEC decision on August 27, 1987, and there is no indication that the Office formally modified its loss of wage-earning capacity determination with explanations for the modification.

In order to modify a formal loss of wage-earning capacity determination, the Office must establish either that the original rating was in error, that the claimant's medical condition had changed or that the claimant has been vocationally rehabilitated.⁶ The burden of proof is on the

³ The record reflects that appellant received compensation based on total disability for work, when he worked and had actual earnings, which only entitled him to receive, reduced compensation.

⁴ 5 U.S.C §§ 8101 *et seq.*

⁵ The Board notes that the Office had issued a December 29, 2000 decision establishing appellant's loss of wage-earning capacity, which resulted when appellant returned to work. The Board notes on appeal that appellant did not contest this decision and accordingly, will not review the merits of this decision.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(a) (June 1996).

party seeking modification in this case of the Office.⁷ The Office may modify a wage-earning capacity determination if the claimant is employed in a new job earning 25 percent more than the current rate of pay for the job for which the claimant was rated.⁸ The Office must:

“(1) Determine the duration, exact pay, duties and responsibilities of the current job.

“(2) Determine whether the claimant underwent training or vocational preparation to earn the current salary.

“(3) Assess whether the actual job differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated.”⁹

In the instant case, the Office did not formally modify the August 27, 1987 decision based on any of the above reasons. No explanation was provided by the Office as to why they were issuing a new decision on December 29, 2000. As the Office failed to follow its own procedures in modifying the original wage-loss determination, the Office did not meet its burden of proof to formally modify the original LWEC decision. Therefore, the evidence of record does not establish the fact or amount of any overpayment in this claim, since the periods were not adequately explained or calculated. Accordingly, the overpayment determinations must be reversed. In view of the Board’s decision on this issue, it will not address the remaining issues.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(b) (June 1996).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c) (June 1996).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(d) (June 1996).

The April 6, 2001 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
November 20, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member