

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT D. O'QUINN and U.S. POSTAL SERVICE,
SHARTEL POST OFFICE, Oklahoma City, OK

*Docket No. 02-1008; Submitted on the Record;
Issued April 3, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had received a \$29,280.92 overpayment in compensation; and (2) whether the Office properly denied appellant's request for waiver of recovery of the overpayment.

The case has been on appeal previously.¹ In an October 2, 1997 decision, the Board found that the Office had properly determined that appellant had the physical and vocational ability to perform the duties of a computer operator. The Board, however, found that the Office had improperly calculated appellant's loss of wage-earning capacity and remanded the case for proper computation of his compensation.

On remand, the Office, in a January 6, 1998 decision, reissued appellant's loss of wage-earning capacity decision. The Office also sent appellant a CA-1032 form to report any earnings he had received in the prior 15 months. In an August 18, 1998 response, appellant indicated that he had been working since April 29, 1996 as a sales associate and cashier at a gas station, earning \$6.25 an hour with actual earnings of \$500.00 a month. In an October 19, 1999 CA-1032 form, appellant indicated that he was earning \$7.00 an hour. In a July 20, 2000 CA-1032 form, appellant indicated that he had also worked as a substitute teacher for the public school system, earning \$5.50 an hour with an estimated income of \$2,541.00 over the prior 15 months.

In a September 25, 2000 memorandum, a postal inspector reviewed appellant's case and confirmed that he had worked as a sales associate and cashier since April 29, 1996. She also

¹ Docket No. 95-1576 (issued October 2, 1997). The history of the case is contained in the prior decision and is incorporated by reference.

noted that appellant had worked as a substitute teacher for the Oklahoma City Public School District from November 18, 1994 through September 2, 1999, with a contract through June 30, 2000. She also reported that appellant had worked as a substitute teacher for Millwood Public Schools from June 1997 through December 15, 1999. Appellant indicated that he did not think he had to report his part-time work as a substitute teacher.

In a February 6, 2001 letter, the Office indicated that it had made a preliminary decision that appellant had received an overpayment of \$29,280.92 in compensation because he had earnings from several positions for the period November 18, 1994 through July 20, 2000. The Office indicated that appellant had not been sent CA-1032 forms because his case had been in the appeals process for the period 1994 to 1997, so he could not report earnings during that time. It noted that since he was receiving compensation for a loss of wage-earning capacity he was allowed to earn wages. The Office indicated that it calculated the amount of appellant's overpayment by comparing the amount of compensation he received from November 18, 1994 through July 20, 2000, with the amount of actual earnings he had received as computed under the *Shadrick*² formula. The Office found that appellant was without fault in the creation of the overpayment. It informed appellant of his right to seek waiver of recovery of the overpayment and to seek a preresoupment hearing before an Office hearing representative.

In a March 7, 2001 decision, the Office found that appellant had received a \$29,280.92 overpayment in compensation. The Office denied appellant's request for waiver of recovery of the overpayment because he had not responded to the Office's February 6, 2001 letter.

The Board finds that the case is not in posture for decision.

The Office determined that appellant had a \$29,280.92 overpayment by calculating that he had received \$96,740.06 in compensation payments from November 18, 1994 to July 20, 2000, for his loss of wage-earning capacity and then determining through the *Shadrick* formula that he had actual earnings of \$126,020.98. The Office, however, did not fully explain how it determined that appellant had actual earnings of \$126,020.98. The Office procedures indicate that when a claimant had earnings of sporadic or intermittent nature, which do not fairly or reasonably represent his wage-earning capacity, the claimant's wage-earning capacity should be deducted from continuing compensation payments using the *Shadrick* formula, with past earnings being declared an overpayment. The procedures state that the sporadic or intermittent earnings should not be used as the basis for a loss of wage-earning capacity determination but should be used to help establish the kind of work appellant could perform. The procedure manual specifically states that any worksheet used to calculate the deduction of sporadic earnings should be marked clearly with the words "actual earnings calculation, not a [loss of wage-earning capacity] determination."³ The Office procedures also provide that when the Office learns of actual earning for a lengthy period, the compensation should be determined by appellant's average pay rate and applying the *Shadrick* formula.⁴

² *Albert C. Shadrick*, 5 ECAB 376 (1953).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d)(3) (December 1993).

⁴ *Id.*, Chapter 2.814.7(d)(4) (December 1993).

It is unclear from the case record what method the Office used to determine appellant's actual earnings over the period November 18, 1994 to July 20, 2000. Appellant had sporadic work as a store clerk and as a substitute teacher. He had such sporadic earning for a lengthy period of time. The case record submitted on appeal does not contain any worksheet, in which the Office calculated appellant's sporadic earnings so that they could be deducted from the compensation he had actually received. Without such a clear calculation, in accordance with the procedure manual, the Board cannot determine whether an overpayment actually occurred or whether the amount of the overpayment is correct. The case must, therefore, be remanded for further development.

The Office should clearly set forth the total amount of intermittent earnings appellant received over the period November 18, 1994 to July 20, 2000. It should then determine which section of the procedure manual cited above applies in appellant's situation. The Office should then use the *Shadrick* formula in the manner stipulated by the appropriate section of the procedure manual to determine the amount that should be deducted from the compensation appellant received over the same period. The Office should then once again inform appellant of its preliminary finding and afford him another opportunity to seek waiver of recovery of any overpayment that it may have determined. After further development as it may find necessary, the Office should issue a *de novo* decision on whether appellant received an overpayment of compensation, the amount of the overpayment and whether recovery of the overpayment should be waived.

The decision of the Office of Workers' Compensation Programs, dated March 7, 2001, is hereby set aside and the case remanded for further action as set forth in this decision.

Dated, Washington, DC
April 3, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member