

**United States Department of Labor
Employees' Compensation Appeals Board**

ROY K. WILSON, Appellant

and

**FEDERAL DEPOSIT INSURANCE
CORPORATION, Irving, CA, Employer**

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**Docket No. 04-28
Issued: December 6, 2004**

Appearances:
Roy K. Wilson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On September 24, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated September 27, 2002 and August 12, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of financial manager; (2) whether the Office properly determined that appellant received an overpayment of \$610.07; and (3) whether the Office properly denied waiver of the overpayment as well as the overpayment issues.

FACTUAL HISTORY

On January 9, 1995 appellant, then a 52-year-old investigations specialist, filed an occupational disease claim alleging that, as a result of his federal employment, he sustained carpal tunnel syndrome, pain in his left arm, left side and latissimus dorsi muscle, tingling in the

left side of the face and left leg and a general feeling of fatigue. By letter dated July 12, 1995, the Office accepted appellant's claim for left carpal tunnel syndrome, left carpal tunnel release (performed on March 28, 1995), left rotator cuff tear and left frozen shoulder adhesive capsulitis. Compensation benefits were paid.

On December 12, 1995, Dr. Brent W. Miller, appellant's treating Board-certified orthopedic surgeon, diagnosed: (1) left shoulder chronic tendinitis, secondary to work injury of February 17, 1994; (2) left carpal tunnel syndrome, status post endoscopic carpal tunnel release, with residual, also secondary to work injury of February 17, 1994; and (3) degenerative disc disease, cervical spine, multiple levels, nonindustrial. Dr. Miller noted that it was his opinion that appellant demonstrated a disability precluding forceful activities, which indicates that he has lost approximately 50 percent of his preinjury capacity for lifting, pushing, pulling, grasping and manipulation. Dr. Miller also opined that appellant was unable to perform his usual and customary job activities requiring computer inputting. Appellant has undergone various vocational rehabilitation efforts since that time. It is noted that, as his previous job appointment ended February 18, 1995 and there is no comparable work available at the employing establishment, appellant cannot return to his date-of-injury job.

By letter dated December 29, 1999, the Office referred appellant for a second opinion. In a medical report dated February 2, 2000, Dr. Frederic Workmon, a Board-certified orthopedic surgeon, indicated that he had examined appellant on January 27, 2000 and reviewed his medical record and diagnosed appellant with: (1) degenerative disc disease, cervical spine, multiple levels; (2) left shoulder chronic impingement syndrome with frozen shoulder, severe; (3) status post left carpal tunnel release, status post endoscopic and open release, with residual symptoms; status post left hemiparesis, secondary to a hypertensive crisis, with residual and reflex sympathetic dystrophy, left arm. He opined: "[T]here is a firm indication that the frozen shoulder, tendinitis of the shoulder and the carpal tunnel have relationship to his industrial accident by direct cause." Dr. Workmon indicated that vocational rehabilitation efforts were appropriate if he could do something to manage appellant's pain and discomfort. He recommended further medical testing.

In a November 10, 2000 report, Dr. Miller recommended that appellant continue with his vocational retraining with restrictions of no repetitive strenuous gripping or grasping with the left hand, no at or above shoulder lifting or work on the left and a lifting restriction of 10 to 25 pounds total. In his final medical report dated July 8, 2001, Dr. Miller noted:

"[Appellant] is released to duty with the following permanent work preclusions: No repetitive strenuous gripping or grasping with the left hand. No at or above shoulder work or lifting on the left. A 10-pound lifting restriction. I would also add a keying restriction of no more than 30 minutes out of every hour."

Dr. Miller further noted that appellant can proceed with his vocational rehabilitation within the work restrictions as noted above under work status. He further opined: "Both [appellant's] compressive neuropathies at the wrist and elbow and the patient's shoulder injury appear to be directly related to [appellant's] industrial exposure of February 17, 1994." Finally, Dr. Miller noted that appellant "may be considered permanent and stationary at this time." He noted that appellant lost approximately 50 percent of his preinjury capacity for lifting, pushing, pulling,

grasping, pinching, holding and torque activities, as well as activities requiring finger dexterity on his nondominant left side.

Appellant continued vocational rehabilitation with Goldfarb and Associates, who provided employment leads. The vocational counselor noted, however, that appellant stated that he is having significant restrictions in terms of activities of daily living which would prevent him from returning to work. In a labor market assessment dated January 29, 2002, the vocational rehabilitation specialist indicated that he had provided job placement in regard to the positions of vice president, branch manager, financial; assistant branch manager, financial; as well as financial manager. He noted that these occupations “continue to be available in the current labor market.” He described the position of financial manager:

“The position of financial manager involves managing branch or office of financial institution such as commercial bank, credit union, finance company or savings bank. Worker directs and coordinates activities to implement institution policies, procedures and practices concerning granting or extending lines of credit, commercial loans, real estate loans and consumer credit loans. Worker directs through subordinates, supervises activities of employees implementing establishment services.”

The vocational rehabilitation specialist noted that this job was sedentary and required maximum lifting of 10 pounds. He indicated this position paid a weekly wage of \$1,154.00.

On February 22, 2002 the Office issued a notice of proposed reduction in benefits, as it found that appellant had the capacity to earn wages as a financial manager at a rate of \$1,154.00 per week. This reduction of compensation was made final by decision dated September 27, 2002.

Before appellant’s compensation rate was changed on September 27, 2002 he was issued a check covering the period from September 8 through October 5, 2002. Accordingly, appellant received compensation for the one-week period covering September 27 through October 5, 2002, in the amount of \$1,792.93 when he should have only been paid \$1,182.86 to reflect his wage-earning capacity.¹ Therefore, the Office found that appellant incurred an overpayment in the amount of \$610.07 for the period covering September 27 through October 5, 2002. The Office noted that appellant was not with fault in connection with the overpayment because he had no knowledge of when a constructed wage-earning capacity would be issued. On October 1, 2002 the Office notified appellant that it had made a preliminary determination that an overpayment occurred in the amount of \$610.07 and that he was not at fault in the creation of the overpayment.

On October 15, 2002 appellant requested an oral hearing. The record contains a form where the line is checked indicating that appellant requested waiver of the overpayment and a hearing and stating that the financial documents are enclosed. However, this document is not

¹ The employing establishment indicated that, if appellant had continued to be employed as an investigations specialist, his compensation would be \$90,792.00 per year, which the Office determined would be \$1,746.00 per week.

signed or dated and no financial documents were attached. At the hearing held on May 12, 2003, appellant testified, inter alia, that he was incapable of sustaining eight-hour days and that he was having trouble remembering things. He noted that to be a financial manger, one had to be able to process, retain and recall massive amounts of information, that he was unable to do this at the present time.

On August 12, 2003 the hearing representative issued a decision wherein she affirmed the Office's finding that appellant's wage-earning capacity was represented by the position of financial manager. The hearing representative further found that, although appellant was not at fault in the creation of the overpayment, appellant failed to submit supporting financial documentation and accordingly, there was no waiver of the \$610.07 overpayment. Finally, the hearing representative returned the case to the Office for adjudication of an outstanding claim with regard to stress/stroke.

LEGAL PRECEDENT -- ISSUE 1

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 of benefits.²

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 or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.³

Wage-earning capacity is a measure of the employee's ability to earn wages in the open market under normal employment conditions. The job selected for determining wage-earning capacity must be a job reasonably available in the general labor in the commuting area in which the employee lives.⁴

ANALYSIS -- ISSUE 1

In the instant case, appellant could not return to the job he held at the time of the injury because the position had expired. Furthermore, appellant was not currently working and therefore, had no actual earnings. Accordingly, the Office properly evaluated appellant's wage-earning capacity on the open market and concluded that the position of financial manager, which paid approximately \$1,154.00 per week, was suitable. The evidence of record supports this

² *James B. Christenson*, 47 ECAB 775 (1996).

³ *Rosa M. Garcia*, 49 ECAB 272 (1998).

⁴ *Id.*; *Albert L. Poe*, 37 ECAB 684, 690 (1986).

conclusion. Appellant's physician, Dr. Miller, indicated that appellant was released to duty with restrictions. There is no medical opinion in the record that indicates that the appellant's the proposed position went beyond the restrictions as set by Dr. Miller. Appellant's current vocational rehabilitation counselor, indicated that appellant could work as a financial manager. He noted that this job was sedentary and required maximum lifting of 10 pounds. He also noted that the position was available in the current labor market. The Office procedure manual provides that "[b]ecause the [rehabilitation specialist] is an expert in the field of vocational rehabilitation, the [claims examiner] may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable."⁵ Appellant's allegations that he will not be able to perform the duties of financial manager due to physical disabilities and the fact that his medication makes him drowsy are unsupported by medical evidence. Accordingly, the Office properly determined that the position of financial manager represented appellant's wage-earning capacity.⁶

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a)⁷ of the Act provides that when an overpayment of compensation occurs "because of an error of fact or law," adjustment or recovery shall be made by decreasing later payments to which the individual is entitled.⁸

ANALYSIS -- ISSUE 2

An overpayment of \$610.07 occurred because appellant received a total compensation rate instead of a reduced rate for the period September 27 through October 5, 2002. Before the decision reducing appellant's compensation due to loss of wage-earning capacity was issued on September 27, 2002 appellant received a compensation check which included payment based on total disability for the period of September 27 through October 5, 2002. The difference between the amount of compensation appellant was paid for this week, \$1,792.93 and the amount that appellant should have received based on his wage-earning capacity as a financial manager, \$1,182.86, was \$610.07, the amount of the overpayment. There is no dispute as to the actual figure.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.8(b)(2) (December 1993).

⁶ In the hearing representative's decision, she noted that appellant filed a claim for stress/stroke and that a decision needed to be rendered with regard to whether this condition was work related. However, the hearing representative noted that there is no indication in the medical reports that appellant's stroke may have caused additional pain and that there was nothing to indicate how this may impact on her ability to work. Accordingly, the hearing representative properly determined that the stroke would not interfere with reaching a decision as to whether the position of financial manager represented appellant's wage-earning capacity.

⁷ 5 U.S.C. § 8129(a).

⁸ Federal (FECA) Procedure Manual, Part 9 -- Debt Management, *Initial Overpayment Actions*, Chapter 9.200.6(b)(3) (September 1989); *see also James Lloyd Otte*, 48 ECAB 334, 337 (1997).

LEGAL PRECEDENT -- ISSUE 3

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to the statutory guidelines.⁹ These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] 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 this subchapter or would be against equity and good conscience."¹⁰ Since the Office found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that the recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 14.436 of the Office's regulation¹¹ provides that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: "(a) [t]he beneficiary from whom [the Office] seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) [t]he beneficiary's assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics." Section 10.437¹² states that recovery of an overpayment is also considered to be against good conscience if the individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.

20 C.F.R. § 10.438 states:

"(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the [Act] or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

"(b) Failure to submit the request information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished."

ANALYSIS -- ISSUE 3

The Office determined that appellant was without fault in the creation of the overpayment. However, although appellant was provided with the opportunity, he submitted no

⁹ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ 20 C.F.R. § 10.436.

¹² 20 C.F.R. § 10.437.

financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act. Absent evidence documenting appellant's financial status, the Office cannot determine whether appellant is entitled to waiver and waiver cannot be granted. Accordingly, the Office properly denied waiver.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to reflect his ability to be employed as a financial manager. The Board also affirms the Office's finding of an overpayment of \$610.07 and affirms the finding that appellant is not entitled to a waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated August 12, 2003 and September 27, 2002 are hereby affirmed. The Board notes, however, as noted by the hearing representative, that there is still an outstanding issue to be resolved as to the adjudication of the stress/stroke claim, and this case is returned to the Office for the proper development of the stress/stroke claim.

Issued: December 6, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member