U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAMUEL M. WILCOXON and DEPARTMENT OF THE NAVY, NAVAL WEAPONS SUPPORT CENTER, Crane, IN

Docket No. 02-2384; Submitted on the Record;
Issued June 16, 2004

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity based on his actual earnings; (2) whether the Office properly determined that appellant received a $8,765.55 overpayment of compensation from November 16, 1998 to October 31, 2000; and (3) whether the Office properly denied waiver of the overpayment.

On February 4, 1991 appellant, then a 46-year-old firefighter,[1] filed a claim alleging that while examining a scuttle hole in the ceiling during a fire he injured his back and neck. The Office accepted that appellant sustained a herniated cervical disc at C5-6. Appellant's claim was expanded to include a consequential injury of major depression and sensorineural hearing loss. Appellant stopped work on May 13, 1991 and returned to light duty on September 3, 1991.

In March 1993, appellant sustained a recurrence of disability. The Office authorized surgery and on March 30, 1993 appellant underwent an anterior discectomy and fusion at C5-6. Appellant stopped work on March 30, 1993 and received appropriate compensation for total disability.

On November 16, 1998 the employing establishment offered appellant a fire protection inspector position, GS 7, step 10 at $33,898.00 per year. This position complied with the restrictions set forth by Dr. William Gossmann, an attending internist. The position was to be for 24 hours per week. On November 16, 1998 appellant accepted the job offer and began work that day. His wage-loss compensation was reduced accordingly. The record reflects that from November 16, 1998 to October 30, 2000 when he retired, appellant worked 24 hours per week.

On August 28, 2000 the Office informed appellant that he was entitled to benefits under the Federal Employees' Compensation Act and to Office of Personnel Management (OPM)

[1] Appellant was classified as a firefighter, GS 6, step 10.

benefits under the Civil Service Retirement System. The Office indicated that annuity benefits paid by OPM and benefits for wage loss paid by the Office were not payable for the same period of time. The Office requested appellant to make an election as to the benefits he would like to receive. By an election form dated September 11, 2000 appellant elected to receive retirement benefits from OPM.

In a letter dated October 4, 2001, appellant inquired as to whether he was entitled to a recalculation of his compensation benefits as a result of the 1998 Federal Firefighters Reform Act. By letter dated November 14, 2001, the Office indicated that it had reviewed appellant's benefits and determined that it had properly determined his compensation benefits and wage-earning capacity.

In a telephone memorandum dated January 25, 2002, the employing establishment advised the Office that there were discrepancies regarding appellant's date-of-injury salary. On November 16, 1998 a GS 6, step 10 firefighter earned a salary of $30,504.00 per annum and a fire protection inspector worked a 40-hour workweek. The employing establishment further advised that in October 2000, appellant's annual salary was $36,744.00.

In a decision dated January 25, 2002, the Office reduced appellant's compensation effective that same date based on his ability to earn wages as a fire protection inspector. The Office indicated that the duties of the position reflected the work tolerance limitations established by the weight of the medical evidence in the file. Appellant's training, education and work experience were considered in determining the suitability of this job, and his actual earnings of the position met or exceeded the wages of the job he held at the date of injury. The Office concluded that the actual earnings in the fire protection inspector position fairly and reasonably represented appellant's wage-earning capacity.[2] The Office noted that The Federal Firefighters Reform Act of 1998 (Public Law No. 105-277) amended Title 5 of the U.S. Code to define hours worked by firefighters in excess of 106 biweekly, or 53 weekly, as overtime. The Federal Firefighters Reform Act provided that firefighters shall not receive premium pay authorized by other provisions of subchapter V of Chapter 55 of Title 5. The effective date of this provision was the first day of the first pay period after October 1, 1998.

On February 13, 2002 the Office made a preliminary determination that appellant had been overpaid benefits in the amount of $8,765.55. The Office noted that the overpayment occurred because of appellant's loss of wage-earning capacity on November 16, 1998 had been miscalculated due to misinformation from the employing establishment with regard to the correct grade and step pay rate for a firefighter for the period of November 16, 1998 to

[2] In a loss of wage-earning capacity worksheet, the Office determined that appellant's pay rate when he was initially injured was $979.65 and the pay rate when his disability recurred on March 31, 1993 was $869.95. The figure of $979.65 was calculated using the corrected salary of a GS 6, step 10 firefighter salary on November 16, 1998 ($30,504.00 per year / 52 weeks is $586.62 per week; $586.62 X 49 percent date-of-injury premium pay rate totaling $287.44; and $586.62 X 18 percent for FLSA pay per week for a total of $105.59 for a grand total of $979.65). The Office noted that appellant actually earned $389.76 per week based on the formula of the annual salary of $33,893.00 divided by 2087 hours worked which equaled $16.24 per hour ($16.24 x 24 hours per week totaled $389.76). The wage-earning capacity loss was $521.97. The Office determined that appellant actually performed the work as a part-time fire protection inspector during the period of November 16, 1998 through October 30, 2000 and this limited-duty position fairly and reasonably reflected his ability to earn wages.

October 30, 2000. The Office indicated that from November 16, 1998 to October 30, 2000 appellant was paid compensation in the amount of $48,488.36 but should have been paid compensation of $39,722.81, resulting in an overpayment of $8,765.55. The Office determined that appellant was without fault in the matter of the overpayment. The Office indicated that appellant had the right to submit, within 30 days, evidence or arguments regarding the overpayment and his eligibility for waiver of the overpayment.

On February 22, 2002 appellant requested a review of the written record by the Branch of Hearings and Review and waiver of the overpayment. He submitted an overpayment questionnaire indicating a total monthly income of $3,598.73 and monthly expenses of $3,548.66. Appellant also noted having funds of $48,975.23.

By decision dated August 26, 2002, an Office hearing representative found that appellant received an $8,765.55 overpayment of compensation from November 16, 1998 to October 30, 2000 for which he was without fault in creating. The hearing representative further determined that as appellant's assets were in excess of the resource base of $5,000.00 he was not entitled to waiver. He was advised that the overpayment amount was due and payable.

The Board finds that the Office properly determined that appellant's actual earnings represented his wage-earning capacity.

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.[3] Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[4]

In this case, the Office issued a formal loss of wage-earning capacity decision on January 25, 2002 finding that appellant's actual earning for four hours of work a day represented his wage-earning capacity.

The Office's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings.

Section 2.814.7 of the Office procedure manual states:

> "7. *Determining WEC [wage-earning capacity] Based on Actual Earnings*. When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, the CE [claims examiner] must determine whether the earnings in the alternative employment fairly and reasonably represent the

[3] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[4] *Dennis E. Maddy*, 47 ECAB 259 (1995).

employee's WEC. Following is an outline of actions to be taken by the CE when a partially disabled claimant returns to alternative work:

"a. *Factors Considered.* To determine whether the claimant's work fairly and reasonably represents his or her WEC, the CE should consider [such factors as] whether…."

* * *

"(1) *The job is part time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;

"(2) *The job is seasonal* in an area where year-round employment is available. If an employee obtains seasonal work voluntarily in an area where year-round work is generally performed, the CE should carefully determine whether such work is truly representative of the claimant's WEC; or

"(3) *The job is temporary* where the claimant's previous job was permanent."[5]

OPM recognizes four kinds of appointments: (1) career; (2) career conditional (essentially a probationary period); (3) term (not to exceed four years and with no career status); and (4) temporary (not to exceed one year, with a one-year extension possible and with no career status). OPM also recognizes five kinds of tours of duty: (1) full time (40 hours per week); (2) part time (16 to 32 hours per week); (3) intermittent (no regularly scheduled hours); (4) seasonal (less than 12 months a year, with either a full-time, part-time or intermittent schedule); and (5) on call (usually at least six months a year on an as-needed basis, with either a full-time or part- time schedule).

The record shows that appellant was originally employed in a permanent position as a firefighter. Following his return to work on September 3, 1991, appellant sustained a recurrence of disability in March 1993 and thereafter returned to work on November 16, 1998 as a fire protection inspector for 24 hours per week. The Board finds that the evidence of record establishes that appellant's appointment and tour of duty as a fire protection inspector were equivalent to that of his date-of-injury position as a full-time firefighter. In order to accept these earnings as the best measure of his wage-earning capacity, the Office was required to determine whether appellant's part-time position fairly and reasonably represented his wage-earning capacity. The Office found that the duties of the fire protection inspector position reflected the work tolerance limitations established by the weight of the medical evidence of record, and his training, education and work experience were considered in determining the suitability of the job. The Office therefore properly determined that the position reflected appellant's wage-earning capacity.

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

Office procedures provide that a retroactive determination may be made where the claimant has worked in the position for at least 60 days, the employment fairly and reasonably represents wage-earning capacity, and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting his or her ability to work.[6]

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Shadrick*[7] decision, has been codified by regulation at 20 C.F.R. § 10.403. Section (d) of this regulation provides that an employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earning by the current pay rate for the job held at the time of the injury.[8] Section (e) of this regulation provides that the employee's wage-earning capacity in terms of dollars is computed first by multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain the employees loss of wage-earning capacity.[9]

In this case, there is no probative evidence that appellant's work stoppage at retirement was due to the employment injury. The Office, in accordance with *Shadrick* and section 10.403(d), divided appellant's current actual earnings of $389.76 by the current weekly wage of $979.65 which resulted in a figure of 40 percent. Pursuant to section 10.403(e) the Office multiplied the 40 percent by appellant's weekly wage at the time of his recurrence of disability on March 31, 1993 of $869.95 which resulted in $347.98. This amount was then subtracted from appellant's weekly wage at the time of his injury recurred $869.95, which resulted in $521.97. The $521.97 represents appellant's wage-earning capacity and, in accordance with section 8106(c) of the Federal Employees' Compensation Act, the Board finds that the Office properly computed appellant's compensation benefits.

The Board also finds that the Office properly determined that appellant was not entitled to a recalculation of his compensation benefits as a result of the 1998 Federal Firefighters Reform Act. According to FECA Bulletin No. 01-08, issued April 23, 2001, the Federal Firefighters Reform Act was passed and the Office determined that pay rates for continuation of pay and compensation would properly include extra pay authorized under the Fair Labor Standards Act,[10] for firefighters, and other employees who earn and use leave on the basis of their entire tour of duty, and who are required to work more than 106 hours per pay period. However, the Federal Firefighters Reform Act of 1998 (Public Law No. 105-277) amended Title 5 of the U.S. Code to define hours worked by firefighters in excess of 106 biweekly, or 523 monthly, as overtime. It also provides that firefighters shall not receive premium pay authorized

[6] *Tamra McCauley*, 51 ECAB 375 (2000); *Ronald Litzler*, 51 ECAB 588 (2000).

[7] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[8] 20 C.F.R. § 10.403(d).

[9] 20 C.F.R. § 10.403(e). "Pay Rate for Compensation Purposes" is, as defined in 5 U.S.C. § 8101(4), the greater of the employee's pay as of the date of injury, the date of disability begins or the date of recurrence of disability if more than six months after returning to work. "Current Pay Rate" is defined as the current, or updated, salary or pay. *See Carlos Perez*, 50 ECAB 493 (1999).

[10] 29 U.S.C. § 207(k).

by other provisions of subchapter V of Chapter 55 of Title 5. The effective date of this provision was the first day of the first pay period after October 1, 1998. As section 8114(e) of the Federal Employees' Compensation Act bars inclusion of overtime pay in pay rates for compensation purposes,[11] firefighters with effective pay rate dates on or after October 11, 1998 are not entitled to receive the extra pay. In December 2000, Public Law 106-554 amended section 5545(d) to include a paragraph stating that for the purposes of computing pay under section 8114, the pay of a firefighter covered by section 5545(b) for hours in a regular tour of duty shall not be considered overtime pay. In the case at hand, the Office determined that appellant was not working on October 1, 1998 when the Federal Firefighters Reform Act became effective and never earned the salary afforded by this Act. Appellant returned to work as a fire protection inspector on November 16, 1998. FECA Bulletin No. 01-08 specifically indicated that when making loss of wage-earning capacity determinations for firefighters with pay rate effective dates prior to October 11, 1998, such as appellant, the step increases granted by Public Law No. 105-277 should not be considered in calculating current pay for grade and step when injured, rather the original grade and step should govern the figure used. Thus the Office properly determined that appellant's compensation was not entitled to the Federal Firefighters Reform Act.

The Board further finds that appellant received an overpayment of $8,765.55 in compensation from November 16, 1998 to October 31, 2000.

The record indicates that appellant received an overpayment of compensation benefits in the amount of $8,765.55 which occurred because of a miscalculation of appellant's loss of wage-earning capacity on November 16, 1998 due to erroneous information from the employing establishment with regard to the correct grade and step pay rate for a firefighter. Appellant was injured on February 4, 1991 and at that time his position was as a firefighter, GS 6, step 10. The employing establishment erroneously indicated that the salary of a firefighter, GS 6, step 10 was $33,893.00 per year as opposed to the correct salary figure of $30,504.00 per year as set forth in the salary table for 1998. This erroneous figure was used to calculate appellant's wage-earning capacity in November 1998. As a result, for the period November 16, 1998 to October 30, 2000, appellant was paid compensation in the amount of $48,488.36 but should have been paid compensation of $39,722.81, resulting in an overpayment of $8,765.55. The Board notes that appellant was found to be without fault in the creation of the overpayment.

The Board finds that the Office did not abuse its discretion in denying waiver of the overpayment.

Section 8129 of the Federal Employees' Compensation Act[12] provides that an overpayment must be recovered unless "incorrect payment has been made to an individual who is without fault *and* when adjustment or recovery would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience." (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery

[11] 5 U.S.C. § 8114(e).

[12] 5 U.S.C. § 8129(a)(6).

of the overpayment would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience.[13]

Section 10.436 of the implementing regulation[14] provides that recovery of an overpayment will defeat the purpose of the Federal Employees' Compensation Act if recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the 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) the beneficiary's assets do not exceed a specified amount as determined (by the Office) from data furnished by the Bureau of Labor Statistics.[15] An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than $50.00.[16]

Under section 10.438 of the regulations, "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 Federal Employees' Compensation Act or be against equity and good conscience.[17]

The Office procedures provide that recovery will defeat the purpose of the Federal Employees' Compensation Act[18] if 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. This base includes all of the claimant's assets that are not exempted from recoupment. The first $3,000.00 or more, depending on the number of the individual's dependents, is also exempted from recoupment as a necessary emergency resource.[19] The procedure manual's test for determining whether a claimant needs substantially all of his current income to meet his current ordinary and necessary living expenses is whether a claimant's income is less than his monthly expenses or does not exceed his monthly expenses by more than $50.00.[20]

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[13] *See James M. Albers, Jr.*, 36 ECAB 340 (1984).

[14] 20 C.F.R. § 10.436.

[15] An individual's assets must exceed a 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. This base includes all of the individual's assets not exempt from recoupment; *see Robert F. Kenney*, 42 ECAB 297 (1991).

[16] *Sherry A. Hunt*, 49 ECAB 467 (1998).

[17] *Id*. at § 10.438.

[18] 5 U.S.C. § 8129.

[19] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.a(1)(b) (September 1994).

[20] *Id.*

In response to an Office request, appellant submitted an overpayment recovery questionnaire and reported that he had monthly income of $3,598.73 and monthly expenses of $3,548.66. The Office then determined that appellant's income exceeded his expenses by $50.07. Appellant also reported a savings account of $1,600.00, cash on hand of $50.00, stocks and bonds of $17,325.23, other personal property and funds of $30,000.00, which totals $48,975.23. After deducting the resource base of $5,000.00 for appellant and his wife he has assets of $43,975.23. The Board finds that appellant's assets exceed the allowed resource base as set forth in the Office procedure manual and therefore precludes a finding that recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act.[21]

With respect to whether recovery would be against equity and good conscience, section 10.437 of the federal regulation provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt; and when an 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.[22] Appellant has not alleged and the evidence does not demonstrate, that he relinquished a valuable right or changed his position for the worse in reliance on the overpayments. The Office therefore properly denied waiver of recovery of the overpayment.

The Board further finds that it does not have jurisdiction to review the Office's finding regarding recovery of the overpayment of compensation. The Board's jurisdiction to review recovery of an overpayment is limited to the situation where recovery is made from continuing benefits under the Federal Employees' Compensation Act. In the instant case, appellant is no longer receiving compensation benefits.[23]

[21] 5 U.S.C. § 8129(a)(6); 20 C.F.R. §§ 10.436, 10.437.

[22] 20 C.F.R. § 10.437.

[23] *See Lewis George*, 45 ECAB 144, 154 (1993); *Edward O. Hamilton*, 39 ECAB 1131, 1137 (1988); *Joyce Y. Wescott*, 30 ECAB 349, 362 (1988).

The decisions of the Office of Workers' Compensation Programs dated August 26 and January 25, 2002 are hereby affirmed.

Dated, Washington, DC
June 16, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member