

FACTUAL HISTORY

On March 8, 1995 the Office accepted that appellant, then a 32-year-old telecommunications specialist, sustained employment-related bilateral carpal tunnel syndrome and authorized October 2, 1995 and January 4, 1996 surgical releases. She also underwent right elbow ulnar release on July 25, 1996. Appellant returned to limited duty, and on September 8, 1997 was removed from her position because she was physically unable to perform her date-of-injury job. She was then placed on the periodic compensation rolls and referred for vocational rehabilitation services.

On March 7, 2000 the Office notified appellant that it proposed to terminate her compensation benefits on the grounds that her accepted condition had resolved. Appellant moved from Arizona to the Miami, Florida area, and she subsequently submitted an Office Form EN1032 dated January 20, 2001 in which she reported her reemployment as a telecommunications analyst with Exxon Mobil Corporation effective May 31, 2000, earning \$44,135.00 for the period May 31 through December 31, 2000. On a Form EN1032 dated June 23, 2001, she reported earnings of \$1,516.00 per week with Exxon Mobil, and on a Form EN1032 dated July 10, 2002, she reported earnings of \$27,683.00 for the period July 1 through December 31, 2001 and \$16,095.00 for the year 2002. Social Security Administration earnings reports indicate that in the year 2000 appellant earned \$54,703.86 and in 2001 she earned \$76,376.06.

In a letter dated November 26, 2002, the Office referred to the March 7, 2000 letter and informed appellant that her compensation benefits would not be terminated as proposed but, due to her reemployment in May 2000, her wage-loss compensation was being suspended effective December 1, 2002. The Office further informed her that it appeared that an overpayment in compensation had been created for the period May 31, 2000 through November 30, 2002 because she had earned income while receiving compensation benefits. The Office requested that she submit W-2 forms.

By decision dated February 25, 2003, the Office determined that appellant's actual earnings after May 31, 2000, which met or exceeded the current wages of the job held when injured, fairly and reasonably represented her wage-earning capacity and reduced her compensation accordingly.

On February 26, 2003 the Office informed appellant that it had made a preliminary determination that she received an overpayment of compensation in the amount of \$82,625.90 for the period May 31, 2000 through November 30, 2002 because she continued to receive wage-loss compensation after she returned to work. The Office found appellant at fault in the creation of the overpayment because she knew or should have known she was not entitled to receive wage-loss compensation after her return to work.

On March 24, 2003 appellant, through her attorney, requested a preresoucement hearing that was held on September 23, 2003. Appellant testified that she began work at Exxon on May 31, 2000 and continued until April 5, 2002. She stated that she was then unemployed until March 2003. Appellant testified that she did not dispute that an overpayment was created but contended that the period April 28 through May 28, 2000 was included in determining the

amount, and that she was also entitled to compensation for the period after April 5, 2002 when she became unemployed. She alleged that she was not at fault as she was told by her rehabilitation counselor that she might be entitled to continue to receive wage-loss compensation after her return to work and she had reported her earnings on Office 1032 forms.

By decision dated December 31, 2002, an Office hearing representative affirmed the February 25, 2003 decision finding that appellant's actual earnings after May 31, 2000 fairly and reasonably represented her wage-earning capacity. The hearing representative also finalized the finding that an overpayment in compensation in the amount of \$82,625.90 had been created for which appellant was at fault because she knew or should have known that she was not entitled to continue to receive wage-loss compensation after her return to work.

LEGAL PRECEDENT -- ISSUE 1

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability ceased or that it is no longer related to the employment. Section 8115(a) of the Federal Employees' Compensation Act² provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual 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 After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity, application of the principles set forth in the *Albert C. Shadrick*⁵ decision will result in the percentage of the employee's loss of wage-earning capacity.⁶ This has been codified by regulation at 20 C.F.R. § 10.403. Section 10.403(d) provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.⁷ Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-

¹ See *Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

⁴ *Roberta R. Moncrief*, 52 ECAB 418 (2001); *Hubert F. Myatt*, 32 ECAB 1994 (1981).

⁵ 5 ECAB 376 (1953).

⁶ See *Hattie Drummond*, 39 ECAB 904 (1988); *Alfred C. Shadrick*, *supra* note 5.

⁷ 20 C.F.R. § 10.403(d) (1999); see *Afegalai L. Boone*, 53 ECAB ____ (Docket No. 01-2224, issued May 15, 2002).

earning capacity should be made after a claimant has been working in a given position for more than 60 days.⁸

ANALYSIS -- ISSUE 1

In the instant case, appellant began working at Exxon on May 31, 2000 where she continued until April 5, 2002. She worked in the position for almost two years when the Office determined her wage-earning capacity on February 25, 2003. The Board has held that in a case such as this, a retroactive wage-earning capacity determination may be appropriate.⁹ Office procedures provide that a retroactive determination may be made where the claimant 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. In this case, appellant testified that she stopped work on April 5, 2002 when she was terminated by Exxon. The work stoppage therefore did not occur because of a change in her injury-related condition affecting her ability to work.¹⁰

Where the Office learns of actual earnings that span a lengthy period of time, the compensation entitlement should be determined by averaging the earnings for the entire period, determining the average pay rate, and applying the *Shadrick* formula,¹¹ that is, the Office first calculates the employee's wage-earning capacity in terms of a percentage by dividing actual earnings by current date-of-injury pay rate. In the instant case, the Board finds that the Office properly used appellant's actual annual earnings of \$76,376.06 and a current pay rate for her date-of-injury job of \$916.50 per week, an amount in excess of her date-of-injury weekly earnings.¹² The Board therefore finds that the Office properly determined that appellant's actual earnings fairly and reasonably represented her wage-earning capacity and the Office properly reduced appellant's compensation in accordance with the *Shadrick* formula.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of the Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.¹³ No further compensation for wage loss is payable once the employee

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (June 1996); see *William D. Emory*, 47 ECAB 365 (1996).

⁹ *Juan A. Dejesus*, 54 ECAB ____ (Docket No. 03-1307, issued July 16, 2003).

¹⁰ *Id.*

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d) (June 1996).

¹² The Board notes that the Office indicated that appellant's actual weekly earnings were \$1,476.92 whereas, based on an annual salary of \$76,376.06, her actual weekly earnings would be \$1,468.77. The Board deems this error harmless, however, appellant's actual weekly earnings of \$1,468.77 is greater than her date-of-injury weekly earnings. See *Fred Stingl*, 35 ECAB 1097 (1984).

¹³ 5 U.S.C. § 8102(a).

has recovered from the work-related injury to the extent that he or she can perform the duties of the position held at the time of injury, or earn equivalent wages.¹⁴ A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.¹⁵

ANALYSIS -- ISSUE 2

Appellant does not contest that an overpayment in compensation occurred. She contended at the hearing that the overpayment incorporated an incorrect period and, therefore, the amount was incorrect. The record, however, establishes that the Office paid appellant compensation totaling \$82,636.90 beginning on May 31, 2000 through November 30, 2002. Appellant testified that she began work at Exxon on May 31, 2000 and she continued working there until April 5, 2002. As stated earlier, her work stoppage on April 5, 2002 did not occur because of a change in her injury-related condition affecting her ability to work.¹⁶ She was, therefore, not entitled to receive compensation benefits for the period of her unemployment from April 2002 until March 2003. The Board finds that the Office permissibly determined that an overpayment in compensation in the amount of \$82,625.90 had been created for this period.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless “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.”¹⁷

Section 10.433(a) of the Office’s regulations provides that the Office:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”¹⁸

¹⁴ 20 C.F.R. § 10.515(a).

¹⁵ *Donna M. Rowan*, 54 ECAB ____ (Docket No. 03-908, issued July 11, 2003).

¹⁶ *Juan A. Dejesus*, *supra* note 9.

¹⁷ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

¹⁸ 20 C.F.R. § 10.433(a); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

Section 10.434(b) provides that whether the Office determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁹

ANALYSIS -- ISSUE 3

In this case, the Office found that appellant was at fault in creating the overpayment because she knew or should have known she was not entitled to wage-loss compensation after her return to work on May 31, 2000. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.²⁰ Even if an overpayment resulted from negligence by the Office, this does not excuse the employee from accepting payment that the employee knew or should have been expected to know to be incorrect.²¹ The record in this case indicates that appellant has two master's degrees and was employed in a technical field. Although appellant reported her return to work and the Office continued to pay compensation for total disability, as she was working in a position that paid substantially more than her date-of-injury job, she knew or should have known that her acceptance of ongoing wage-loss compensation was incorrect after she returned to work. The Office therefore properly found appellant to be at fault in the creation of the overpayment in compensation and thus not entitled to waiver.²²

CONCLUSION

The Board finds that the Office properly determined that appellant had no loss of wage-earning capacity effective May 31, 2000 and that she was at fault in the creation of an overpayment in compensation in the amount of \$82,625.90 and, therefore, the overpayment was not subject to waiver.

¹⁹ 20 C.F.R. § 10.433(b).

²⁰ *Sinclair L. Taylor*, *supra* note 18.

²¹ *Diana L. Booth*, 52 ECAB 370 (2001).

²² The Board lacks jurisdiction to review the recovery of the overpayment in this case as its review is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *Albert Pineiro*, 51 ECAB 310 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 31, 2003 is affirmed.

Issued: October 29, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member