

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

WILLIAM D. BEARD, Appellant	)	
	)	
and	)	<b>Docket No. 05-221</b>
	)	<b>Issued: December 20, 2005</b>
	)	
DEPARTMENT OF DEFENSE, DEFENSE	)	
LOGISTICS AGENCY McClellan, CA,	)	
Employer	)	
	)	

*Appearances:*  
*William D. Beard, pro se*  
*Miriam D. Ozur, Esq., for the Director*

Oral Argument November 8, 2005

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On October 28, 2004 appellant filed a timely appeal from a July 28, 2004 merit decision of the Office of Workers' Compensation Programs, finding that his actual earnings as an electronics engineer fairly and reasonably represented his wage-earning capacity. He also appeals a September 23, 2004 merit decision which found that he received an overpayment in the amount of \$28,013.35 and was at fault in the creation of the overpayment. The Office directed recovery of the overpayment by withholding \$800.00 from appellant's continuing compensation. 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 determined that appellant's actual earnings as an electronics engineer fairly and reasonably represented his wage-earning capacity; (2) whether it properly determined that appellant received an overpayment in the amount of \$28,013.35; (3) whether the Office properly determined that appellant was at fault in creation of the overpayment and, therefore, ineligible for waiver of the overpayment; and (4) whether the

Office properly required recovery of the overpayment by deducting \$800.00 from his continuing compensation.

### **FACTUAL HISTORY**

On August 22, 2001 appellant, then a 47-year-old electronics engineer, filed a traumatic injury claim alleging that on August 21, 2001 he sustained minor bleeding, headache, blurred vision, short-term memory loss, a cut on his left hand and bruises to his lower right arm as a result of hitting his head on a vault door frame. He stated that he was carrying coffee and reading an electronic mail assignment while walking back to his desk when he tripped over a bar and fell against the door. Appellant stopped work on August 21, 2001 and returned to his regular work duties on August 22, 2001. On February 28, 2003 the Office accepted his claim for a superficial head laceration.

By letter dated March 6, 2003, the Office referred appellant together with a statement of accepted facts and the case record to Dr. Thomas J. Mampalam, a Board-certified neurosurgeon, for a second opinion medical examination to determine, among other things, whether his headaches were causally related to the August 21, 2001 employment injury.

In an April 3, 2003 medical report, Dr. Mampalam found that appellant experienced post head trauma with postconcussive syndrome which was consistent with his headache and subjective mental status changes. He opined that this condition was directly related to the August 21, 2001 employment injury. Dr. Mampalam further opined that appellant's disability factors were entirely subjective as there were no objective neurological deficits found on physical examination. He stated that it was not possible to determine whether he had any actual mental status deficit that would render him incapable of returning to his customary work activities as additional neuropsychological evaluation was necessary. Dr. Mampalam found no preexisting or nonindustrial disability. Based on the information available to him, Dr. Mampalam stated that appellant could not return to work as an electronics engineer and that given his subjective complaints, there was no period of total disability. He indicated that appellant could perform modified work with no physical restrictions, but he might have neuropsychological limitations that could be delineated following additional neurological testing. Regarding the question of whether appellant continued to experience residuals of the accepted employment injury, Dr. Mampalam stated that his subjective complaints of headaches and mental status changes had persisted more than what was expected.

In a work capacity evaluation dated April 3, 2003, Dr. Mampalam stated that appellant's ability to work could not be determined at that time, that he had no physical limitations and that his mental capacity could be determined by neuropsychological testing.

In a letter dated May 13, 2003, the Office accepted post head trauma syndrome and postconcussion syndrome.

By letter dated July 3, 2003, the Office referred appellant together with a statement of accepted facts, the case record and a list of questions to be addressed to Dr. Jane Fielding, Ph.D., a clinical neurophysiologist. In an undated report, she indicated that appellant was evaluated on August 5 and 11, 2003. Dr. Fielding provided a history of his employment, August 21, 2001

employment injury and social and family background. She reviewed his medical records and reported her observations and the summary of test results which found that appellant had mild to severely impaired cognitive and motor deficits. Dr. Fielding diagnosed postconcussion syndrome, intracranial injury, adjustment reaction with prolonged depression, post-traumatic stress disorder, blurred vision and headache. She recommended a review of appellant's medications to reduce agents which contribute to cognitive impairment, a referral to a comprehensive brain injury rehabilitation program for cognitive rehabilitation training, speech, language and physical therapy and an ophthalmology consultation for diagnosis and treatment of visual blurring and participation in a brain injury support group for emotional support and to improve coping strategies. Dr. Fielding opined that appellant was totally disabled due to his cognitive and motor deficits. In response to the Office's questions, she stated that he had significant problems with cognitive slowing, attention, language abilities, memory functions, visuospatial abilities and motor abilities. Dr. Fielding further stated that, although appellant sustained two prior minor injuries, they did not contribute to his present disability. With regard to his treatment, she indicated that appellant had a generalized cognitive impairment that was most likely due to diffuse axonal injury which resulted from the August 21, 2001 employment injury and perhaps compounded by prior head injuries not included on the statement of accepted facts. She noted that his cognitive deficits would probably be seen on a functional imaging study such as a positron emission tomography scan, single photon emission computed tomography study or magnetic resonance imaging (MRI) scan. Dr. Fielding did not evaluate appellant's headaches, but stated that they may be caused by the stress of his disabilities. She noted that his cognitive deficits and motor impairment indicated widespread brain damage that was most likely due to an injury to subcortical tissues. Dr. Fielding stated that there had been no cessation of appellant's total disability and little improvement in his condition was expected in the future without extensive treatment to restore his cognitive and motor abilities and to improve his emotional status. Regarding his physical limitations, she found that appellant had mild to moderate impairment in the strength of his hands and severe impairment in hand speed that were attributable to the accepted employment injury. Dr. Fielding concluded that with the recommended treatment, appellant may be able to work in a modified position in one year. Without treatment, he would be totally disabled for work in the future and perhaps indefinitely.

In a work capacity evaluation dated August 15, 2003, Dr. Fielding indicated that appellant could not work eight hours a day due to excessive fatigue and severe problems with cognitive processing speed, concentration, memory and motor functions. She stated that he would be able to work eight hours a day within two years with treatment. Dr. Fielding also stated that appellant was unable to perform his regular work duties because he could not keep up with the pace or volume of work, he had language problems and he could not concentrate remember new information or communicate effectively with others. She concluded that, in addition to the above, his loss of speed and strength in his hands should be considered in identifying a position for him.

By letter dated September 18, 2003, the Office requested that Dr. George A. Palma, an attending Board-certified neurosurgeon, provide comments regarding the reports of Dr. Mampalam and Dr. Fielding. The Office further requested that he provide whether he agreed with the treatment plan recommended by Dr. Fielding.

In a September 25, 2003 letter, the Office advised appellant about his entitlement to compensation for his work-related injuries and his responsibility to return to work and to report such return. On September 26, 2003 the Office referred him to a vocational rehabilitation counselor.

In an October 4, 2003 letter, appellant informed the Office that he had returned to work on a part-time basis on March 24, 2003 and that he had used sick and annual leave and leave without pay. He wished to buy back 27 weeks of leave he used during the period March 24 through September 26, 2003.

In response to the Office's September 18, 2003 request, Dr. Palma submitted a September 30, 2003 letter in which he disagreed with Dr. Fielding's recommendation that appellant should be referred to a brain injury rehabilitation program. He stated that this treatment would not be helpful as several years had passed since his injury and it was mild. Dr. Palma related that there was little evidence that this type of rehabilitation would be helpful for the mild degree of injury sustained by appellant. He agreed with the recommendation that he undergo an ophthalmology evaluation.

In a November 7, 2003 report, Dr. Palma diagnosed post-traumatic headache syndrome. He stated that appellant could work as an electronics engineer 4 to 8 hours a day, 20 hours a week.

A March 31, 2004 letter from a vocational rehabilitation counselor indicated that on March 24, 2003 appellant began working 20 hours per week at Defense Contract Management Activity as a GS-12 electronics engineer.

By letter dated April 9, 2004, the Office requested that Dr. Palma provide a detailed narrative report regarding appellant's treatment plan, the length of his expected partial disability and an estimated date for his return to full-duty work.

Dr. Palma submitted a work capacity evaluation dated May 11, 2004 in which he found that appellant could work as an electronics engineer four to eight hours a day depending on the severity of his headaches with certain physical limitations. In a May 11, 2004 narrative report, Dr. Palma noted that he worked as a GS-12, 4 to 8 hours a day for a maximum of 20 hours a week. He stated that appellant experienced headaches which caused him to take a break in the workplace and to lie down or to leave work so that he could go home to sleep. Dr. Palma noted the medication appellant used to treat his headaches. He opined that as it had been close to three years since the date of injury and he had not shown improvement over the last year to year and one-half, he did not anticipate any further improvement. Dr. Palma further opined that appellant had reached the maximum level of improvement that could be anticipated. He concluded that his previous restrictions should be continued on an indefinite and permanent basis.

By letter dated July 27, 2004 (Form CA-2201), the Office informed appellant that it had made a preliminary finding that he had been overpaid compensation benefits in the amount of \$26,000.35, during the period March 24 through September 30, 2003. The Office found that the overpayment occurred because he received compensation for total disability in the amount of \$31,419.50 from March 24 through September 30, 2003 following his return to work. The

Office stated that on the date of appellant's disability, June 20, 2002, his weekly pay rate was \$1,533.33, as a Grade 13, Step 7. His actual earnings in his new position were less as he was reinstated as a Grade 12, Step 10 with a pay rate of \$1,515.77 per week. The Office found that appellant's wage-earning capacity was 57 percent or \$1,335.73, of his salary on the date disability began. The Office reduced the \$31,419.50 overpayment by appellant's actual earnings of \$4,084.67, health insurance premiums of \$1,153.88, optional life insurance premiums of \$8.40 and basic life insurance premiums of \$172.20, for a net overpayment of \$26,000.35. The Office found that he was at fault in the creation of the overpayment. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment and if appellant believed that recovery of the overpayment should be waived. The Office requested that he complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

The Office issued a decision on July 28, 2004 which found that appellant's actual earnings as a part-time electronics engineer fairly and reasonably represented his wage-earning capacity. The Office found that the medical evidence of record established that he could only work part time. The Office applied the principles enunciated in *Albert C. Shadrick*<sup>1</sup> and determined that appellant's pay rate when disability began was \$1,535.33 per week effective June 20, 2002; that the current pay rate of that same position was \$1,742.73 per week, effective January 1, 2004; that his current position paid \$757.89 per week; and that the adjusted wage-earning capacity amount per week in the current position was \$660.19 thereby resulting in a \$875.14 loss of wage-earning capacity.

In response to the Office's July 27, 2004 preliminary determination, appellant contended that he was not at fault in the creation of the overpayment because he was never told to report his return to work. He also contended that the Office knew he had been working since April 2003. Appellant stated that the conditions under which he could receive payments were first explained to him in September 2003 when he was notified of the acceptance of his employment injury. He noted that his new position in Goleta, California was far south of his home in Sacramento and he incurred substantial costs in maintaining expenses for two households. Appellant stated that his finances had been a mess since June 2002 and that he was still receiving late notices and incurring late fees. He argued that repayment of the overpayment would cause severe financial hardship and requested waiver of recovery of the overpayment.

Appellant requested that the Office make a determination based on the written record. In a Form OWCP-20, completed on August 26, 2004, he noted that the overpayment occurred approximately one year prior in September 2003 and the money was used to pay off the debt he incurred while he was out of work. With regard to his monthly income, appellant stated that his wife worked, but she lived in Sacramento, California. He reported monthly income of \$2,000.00 as a part-time GS-12 employee. Appellant also reported having a daughter and son as dependents. He listed monthly expenses of \$500.00 for rent or mortgage, \$500.00 for food, \$700.00 for utilities, \$1,200.00 for other expenses relating to his residence in Sacramento,

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<sup>1</sup> 5 ECAB 376 (1953).

\$200.00 for a visa credit card and \$200.00 for another creditor, totaling \$3,300.00. Appellant indicated that he had \$400.00 in a checking account, \$400.00 in a savings account and \$8,000.00 in an individual retirement account.

By decision dated September 23, 2004, the Office found that appellant received an overpayment of compensation in the amount of \$2,013.00 during the period July 11 through August 7, 2004. The Office determined that he received compensation in the amount of \$4,680.00, which did not take into account his actual earnings during the period. The Office found that he was entitled to receive \$2,667.00 every 28 days and deducted this amount from \$4,680.00 which resulted in an overpayment of \$2,013.00. The Office concluded that appellant received an overpayment totaling \$28,013.35 by combining the prior \$26,000.35 overpayment and \$2,013.00 overpayment. The Office determined that he was at fault in the creation of the overpayment on the grounds that he failed to immediately report his return to work and to return any compensation he received during the period he worked to avoid an overpayment. The Office ordered recovery of the overpayment by deducting \$800.00 a month from appellant's continuing compensation.

### **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.<sup>2</sup> 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 Act<sup>3</sup> provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earning fairly and reasonably represent his wage-earning capacity.<sup>4</sup> 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 a measure.<sup>5</sup>

The formula for determining loss of wage-earning capacity, developed in the *Shadrick* decision,<sup>6</sup> has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.<sup>7</sup>

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<sup>2</sup> See *Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>5</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>6</sup> *Albert C. Shadrick* *supra* note 1.

<sup>7</sup> 20 C.F.R. § 10.403(c).

## ANALYSIS -- ISSUE 1

The Board finds that appellant's actual wages fairly and reasonably represent his wage-earning capacity. On March 24, 2003 appellant returned to work as a part-time GS-12 electronics engineer, which conformed to the restrictions outlined by Dr. Palma, who found that he could work as an electronics engineer 4 to 8 hours a day, 20 hours a week. Appellant began working in the modified position on March 24, 2003 and continued working in the position through July 28, 2004, the date the Office issued a formal loss in wage-earning capacity decision. The fact that he earned wages in this position through the date of the Office's decision supports his capacity to earn such wages.<sup>8</sup> Further, appellant has not submitted any medical evidence establishing that there was a material change in the nature and extent of the employment-related superficial head laceration and post head trauma and postconcussion syndromes at the time of the Office's July 28, 2004 decision.<sup>9</sup>

As appellant's actual wages in his modified position fairly and reasonably represent his wage-earning capacity, the Board must determine whether the Office properly calculated his wage-earning capacity based on his actual earnings on July 28, 2004. The Board finds that the Office properly applied the *Shadrick* formula in determining loss of wage-earning capacity based on his actual earnings. The Office first calculated appellant's wage-earning capacity in terms of percentage by dividing his earnings by the "current" pay rate.<sup>10</sup> The Board finds that the Office properly used his actual earnings of \$757.89 per week and a current pay rate for his date-of-injury job of \$1,742.73, per week to determine that appellant had a 43 percent wage-earning capacity. The Office then multiplied the pay rate at the time of the injury, \$1,535.33, by the 43 percent wage-earning capacity percentage. The resulting amount of \$660.19 was then subtracted from appellant's date-of-injury pay rate of \$1,535.33, which provided a loss of wage-earning capacity of \$875.14 per week. The Office then multiplied this amount by the appropriate compensation rate of three-fourths, to yield \$656.36. The Office found that cost-of-living adjustments were applicable and then calculated the final compensation figure of \$2,625.44 every 4 weeks effective February 19, 2004. The Board, therefore, finds that the Office properly determined that appellant's actual earnings fairly and reasonably represent his wage-earning capacity and the Office properly reduced his compensation in accordance with the *Shadrick* formula to reflect the receipt of his actual wages as a part-time electronics engineer effective February 19, 2004.

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<sup>8</sup> The Office procedure manual provides that, after a claimant has been working for 60 days, the Office will determine whether his actual earnings fairly and reasonably represent his wage-earning capacity and, if so, shall issue a formal decision no later than 90 days after the date of return to work. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

<sup>9</sup> See *Laura E. Vasquez*, 49 ECAB 362 (1998).

<sup>10</sup> "The Office may use any convenient date for making the comparison as long as both rates are in effect on the date used for comparison." 20 C.F.R. § 10.403(d).

## LEGAL PRECEDENT -- ISSUE 2

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.<sup>11</sup> When an overpayment has been made to an individual because of error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.<sup>12</sup>

Overpayments of compensation occur when a claimant returns to work and continues to receive compensation.<sup>13</sup> The Office's procedure manual provides:

“Once an overpayment is identified and calculated, the overpayment examiner is responsible for determining whether the claimant was with fault or without fault, issuing a preliminary finding and unless a hearing is requested, the overpayment examiner is responsible for issuing a final decision. It is important that the overpayment examiner carefully consider all the variables in making a fault determination.

“It is also critical that all overpayments be handled separately, especially in relation to the fault finding. While on occasion there may be more than one overpayment identified on a claim and it may seem less cumbersome to combine the two overpayments in order to quote one debt figure, this should not be done. Rather, the overpayment examiner should consider the overpayments separately, because each overpayment situation must be considered on its own merit, in terms of fault finding.<sup>14</sup>

“When a preliminary finding on the question of fault is made, the overpayment examiner will prepare a memorandum for the file stating the finding and the rationale. The overpayment examiner will then immediately release the preliminary finding which informs the claimant of the fact and amount of the overpayment and of the preliminary finding on the question of fault.<sup>15</sup>

“If the claimant is determined to be with fault, Form CA-2201 must be released along with an OWCP-20 within 30 days of the date the overpayment is identified. Both the reason that the overpayment occurred and the reason for the finding of fault must be clearly stated. Form CA-2201 informs the claimant of the right to submit evidence and the right to a precoupment hearing on the issues of (a) fact

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<sup>11</sup> 5 U.S.C. §§ 8101-8193, 8102(a).

<sup>12</sup> 5 U.S.C. § 8129(a).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

<sup>14</sup> *Id.* at Chapter 6.200.4 (May 2004).

<sup>15</sup> *Id.* at Chapter 6.200.4a (May 2004).



and amount of the overpayment; (b) fault; and (c) waiver. Along with Form CA-2201, the overpayment examiner should provide a clearly written statement explaining how the overpayment was calculated.”<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant received an overpayment of compensation that occurred because he received compensation for temporary total disability from March 24 through September 30, 2003 and July 11 through August 7, 2004 while earning wages as a part-time electronics engineer. However, the Board finds that the Office’s September 23, 2004 decision, which found that appellant received an overpayment of compensation in the amount of \$28,013.35, did not comply with the requirements of the Office’s procedure manual. The Office did not separately handle the overpayments as the Office combined a \$26,000.35 overpayment which occurred during the period March 24 through September 30, 2003 with a \$2,013.00 overpayment which occurred during the period July 11 through August 7, 2004 and concluded that appellant received a \$28,013.35 overpayment. Further, there is no indication that the Office’s calculation of the \$2,013.00 overpayment was provided to appellant in a preliminary determination of the overpayment, thereby precluding him from assessing whether the amount of the overpayment stated by the Office was correct<sup>17</sup> and whether he was at fault in the creation of the overpayment. The Office’s July 27, 2004 preliminary determination did not provide reasons why appellant was at fault in the creation of the \$26,000.35 overpayment.

The case will be remanded to the Office for the separate handling of the two overpayments. The Office should issue new preliminary determinations for each overpayment that address how the overpayments were calculated, whether appellant was at fault in the creation of the overpayment and if so, the reasons for the finding of fault.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant’s actual earnings as an electronics engineer fairly and reasonably represented his wage-earning capacity. The Board further finds that appellant received an overpayment of compensation during the period March 24 through September 30, 2003 and July 11 through August 7, 2004, but the case is remanded to the Office for issuance of new preliminary determinations in accordance with the Office’s procedures.

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<sup>16</sup> *Id.* at Chapter 6.200.4a(1) (May 2004).

<sup>17</sup> *Carlos L. Campbell*, Docket No. 04-2093 (issued March 1, 2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 23, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision. The Office's July 28, 2004 decision is affirmed.

Issued: December 21, 2005  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board