

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

ROBERT J. GOWELL, Appellant

and

**DEPARTMENT OF JUSTICE, MARSHALL'S
SERVICE, Allentown, PA, Employer**

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**Docket No. 05-436
Issued: July 8, 2005**

Appearances:
Robert J. Gowell, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On December 10, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated April 20, 2004, wherein the Office determined appellant's wage-earning capacity. Appellant also appealed the decision dated September 8, 2004, wherein the Office found that appellant received an overpayment of benefits, that he was at fault in its creation and was not entitled to waiver and that repayment could be recovered from continuing compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether appellant's actual earnings as a theology teacher fairly and reasonably represent his wage-earning capacity; (2) whether an overpayment was created in the amount of \$7,289.72 for the period September 7, 2003 to April 17, 2004; (3) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thus precluding waiver of recovery; and (4) whether the Office properly determined that it would recover the overpayment by making deductions from his continuing payments of compensation in the amount of \$100.00 every four weeks.

FACTUAL HISTORY

On January 20, 1999 appellant, then a 31-year-old deputy marshal, filed a traumatic injury claim alleging that he sustained pain in his elbow, hand and right shoulder when “bench pressing during fit time.” Appellant’s claim was accepted for right shoulder injury, and appellant underwent a right shoulder arthroscopy and acromioplasty on May 8, 2000. Appellant stopped work as of May 8, 2000.

Appellant received vocational rehabilitation training as a paralegal. On August 25, 2003 appellant began employment as a teacher of theology at Bethlehem Catholic High School. Due to an administrative error, compensation continued to be paid to appellant for total disability through September 6, 2003. Although appellant was entitled to a portion of the check for loss of wage-earning capacity, he was not entitled to the whole check and accordingly was overpaid from August 25 to September 6, 2003. By decision dated October 15, 2003, the Office determined that appellant had been overpaid in the amount of \$421.57. Although appellant was found to be without fault in the creation of this overpayment, waiver of the overpayment was denied.¹

By decision dated April 20, 2004, the Office determined that appellant’s wages as a teacher of \$18,000.00 per year fairly and reasonably represented appellant’s wage-earning capacity and reduced appellant’s compensation accordingly.

On May 14, 2004 the Office issued a preliminary finding that appellant had been overpaid in the amount of \$7,289.72. The Office found that the overpayment occurred because appellant returned to work as a teacher but received full compensation payments from September 7, 2003 to April 17, 2004.² The Office noted that as it had previously notified appellant of the overpayment of \$421.57 for receiving full compensation benefits while appellant was working, appellant was at fault in the amount of the overpayment. Appellant requested a telephone conference. At the telephone conference appellant indicated that his monthly income was \$4,413.01 (\$167.56 salary and \$3,245.45 compensation). He listed his monthly expenses as: mortgage \$1,755.00; food \$300.00; utilities \$350.00; car insurance \$216.67; payment to Wachovia Bank \$400.00; student loan \$87.00; and miscellaneous \$750.00. Appellant also noted that he paid up to \$1,000.00 a month on credit cards. It was noted that appellant’s monthly income exceeded his monthly expenses by \$554.34.

By decision dated September 8, 2004, the Office affirmed the finding of an overpayment in the amount of \$7,289.72. The Office noted that appellant should have known that he could not receive full compensation payments while working full time based on appellant’s levels of intelligence and education and the fact that there was a previous overpayment on his case for the same reason. Accordingly, the overpayment could not be waived. In light of appellant’s failure to respond to the memorandum of conference advising the office on his preferred method of

¹ As the decision was issued over one year before appellant filed his current appeal, this Board does not have jurisdiction over the October 15, 2003 decision. 20 C.F.R. § 501.3(d).

² The Office noted that appellant should have been paid \$25,831.43 for the period September 7, 2003 to April 17, 2004, but was instead paid \$33,121.51, which amounted to an overpayment of \$7,289.72.

repayment, the Office stated that the overpayment will be collected by deducting \$100.00 per month from appellant's compensation payments.

LEGAL PRECEDENT -- ISSUE 1

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 The actual earnings in the position are compared with the current wages of the date-of-injury position to determine loss of wage-earning capacity.⁵

ANALYSIS -- ISSUE 1

In the present case, appellant began work as a theology teacher on August 25, 2003 and was paid \$18,000.00 per year. He was working successfully in this position for more than seven months when the Office determined that it represented his wage-earning capacity on April 20, 2004. As there is no evidence showing that these wages did not fairly and reasonably represent his wage-earning capacity, the Board accepts appellant's actual earnings in this position as the best measure of his wage-earning capacity.⁶ Appellant's performance of this position in excess of 60 days is persuasive evidence that actual wages in the position represents his wage-earning capacity.⁷

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Shadrick*⁸ decision, has been codified by regulation at 20 C.F.R. § 10.403. Section 10.403(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.⁹ Section 10.403(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

³ 5 U.S.C. § 8115(a); *see Loni J. Cleveland*, 52 ECAB 171, 176-77 (2000).

⁴ *Loni J. Cleveland*, *supra* note 3.

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

⁶ *Don J. Mazurek*, 46 ECAB 447 (1995).

⁷ Office procedure provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

⁸ *Albert C. Shadrick*, *supra* note 5.

⁹ 20 C.F.R. § 10.403(d).

amount is then subtracted from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity.¹⁰

The Office, in accordance with *Shadrick* and section 10.403(d), divided appellant's current actual earnings of \$346.15 per week by the current weekly wage of \$1,591.73, which resulted in a figure of 22 percent. Pursuant to section 10.403(e) the Office multiplied the 22 percent by appellant's weekly wage at the time of his recurrence on May 8, 2000 of \$1,325.77, which resulted in \$291.66. This amount was subtracted from appellant's weekly wage at the time the injury recurred of \$1,325.77, which resulted in \$1,034.11. Thus, \$1,034.11 represents appellant's capacity. Appellant is entitled to compensation at a rate of $\frac{3}{4}$ of this amount, which equals a compensation rate of \$775.58 per week.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act¹¹ provides in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”

Section 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.¹²

ANALYSIS -- ISSUE 2

The record shows that appellant was employed as a theology teacher at a rate of \$18,000.00 per year commencing August 25, 2003. Appellant was paid at a rate for total disability compensation from September 7, 2003 to April 17, 2004. Because appellant received full-time wages from the employing establishment during the period September 7, 2003 to April 17, 2004, he was not entitled to total disability compensation from the Office for the same period. The Board finds that the Office properly determined that appellant should have been paid \$25,831.43 partial disability compensation for the period September 7, 2003 through April 17, 2004, for a total of \$25,831.43, but instead was paid based on total disability in the amount of \$33,121.15. This resulted in an overpayment of \$7,289.72.

¹⁰ 20 C.F.R. § 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).

¹¹ 5 U.S.C. § 8129(a).

¹² 5 U.S.C. § 8116(a).

LEGAL PRECEDENT -- ISSUE 3

The Office may 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 the Office 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 with respect to 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; (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).¹³

Whether or not the Office determines that an individual was 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.¹⁴

ANALYSIS -- ISSUE 3

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that he accepted payments, which he knew or should have known to be incorrect.¹⁵ The Board finds that appellant should have known that he was not entitled to receive compensation checks for total disability for the period September 7, 2003 to April 17, 2004, because he had returned to work on August 25, 2003 and was receiving total disability compensation for the same time period. Appellant had already received a decision noting that an overpayment had occurred for the same reason in this same case for the period from August 25 to September 6, 2003. Accordingly, appellant should have been aware that he was not entitled to receive full compensation payments while he was working. Furthermore, appellant had a significant amount of education and was trained as a paralegal. Accordingly, the Board finds that appellant accepted payments he knew or should have known to be incorrect and he is at fault under section 10.433(a). Since appellant was at fault in the creation of the overpayment, waiver of recovery of the overpayment is precluded.

LEGAL PRECEDENT -- ISSUE 4

Section 10.441 of Title 20 of the Code of Federal Regulations, addressing recovery of overpayments, provides in relevant part:

“(a) When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the

¹³ 20 C.F.R. § 10.433(a).

¹⁴ 20 C.F.R. § 10.433(b).

¹⁵ *Robin O. Porter*, 40 ECAB 421 (1989).

overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”¹⁶

ANALYSIS -- ISSUE 4

The Board finds that the Office properly required repayment by withholding the overpayment amount from the amount of compensation due appellant. Appellant never proposed a plan to repay the overpayment. Appellant’s monthly income was \$4,413.01 and his monthly expenses amounted to \$3,858.67. Accordingly, appellant had \$554.34 extra per month and the Office only required \$100.00 of this amount be deducted from appellant’s continuing compensation payments. The Board finds that the Office properly determined that this would not pose an undue hardship on appellant.

CONCLUSION

The Board finds that the Office properly determined that appellant’s actual wages as a theology teacher represented his wage-earning capacity. The Board further finds that the Office also properly determined that appellant received an overpayment in the amount of \$7,289.72 for the period September 7, 2003 to April 17, 2004 and that the Office properly determined that recovery would be made by making deductions from appellant’s continuing compensation payments.

¹⁶ 20 C.F.R. § 10.441. See also *Levon H. Knight*, 40 ECAB 658 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 8 and April 20, 2004 are affirmed.

Issued: July 8, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member