

FACTUAL HISTORY

This is appellant's second appeal before the Board.¹ On December 21, 1992 she filed an occupational disease claim which was accepted by the Office for bilateral carpal tunnel syndrome, tennis elbow and cervical and thoracic strains. As of the date of injury, appellant was a Level 05/G, working 11:00 p.m. to 6:50 a.m. Tuesday through Saturday at an hourly pay rate of \$15.80 or weekly pay rate of \$632.00. She did not stop work but utilized sick leave on an intermittent basis.

Appellant stopped work on July 10, 1993 and underwent surgery for a left carpal tunnel release on July 13, 1993.² She filed a Form CA-7 claim for compensation. As of July 10, 1993, her supervisor noted that appellant earned \$32,017.00 a year with premium pay of \$3,508.80 or a weekly pay rate of \$683.19. The record reflects that appellant returned to modified duty on February 8, 1994 and worked intermittently until April 13, 1994. Although she was offered modified duty on May 23, 1994, the Office determined that the work was not suitable and that the employing establishment was unable to find work accommodating her medical restrictions. She was returned to the periodic rolls in receipt of compensation for total disability based on her pay rate as of the date disability began.

Appellant returned to modified limited-duty work as a distribution clerk on June 8, 1996 as a Level 5/K earning \$34,993.00 without premium pay or \$672.94 weekly. She continued to work until July 22, 1999 and, on August 5, 1999, filed a Form CA-7 claim for compensation.³ On the reverse of the form, her supervisor noted that as of July 22, 1999 appellant was earning \$38,650.00 a year without premium or Sunday pay or \$743.27 a week. Under night pay, appellant's supervisor wrote "previously noted" and on the form wrote "Employee is stating that she has not been paid for night differential since 1996. Night differential should have been figured in with her pay. Please advise the employee and the agency if she did receive her night differential." Appellant was returned to the periodic rolls in receipt of compensation for total disability.

The record contains correspondence related to appellant's concern that she had not received premium pay, night differential or Sunday pay during two periods: after she first stopped work on July 10, 1993 to her return to modified duty on June 22, 1996 and after she stopped work again on July 22, 1999 to December 1, 2001. In a December 12, 2001 memorandum, the Office found that appellant's pay rate effective July 10, 1993, the date disability began, was \$898.69 a week. For the period July 10, 1993 to June 22, 1996, the Office stated that it had paid \$65,806.79 in compensation but that appellant was due \$100,455.54, a difference of \$34,638.75. While reference was made to the period July 22, 1999 to December 1,

¹ Docket No. 96-1752 (issued September 22, 1997). The Board reversed an April 5, 1996 Office decision, which terminated appellant's medical benefits for the conditions of tennis elbow cervical and thoracic strains. It affirmed the termination of medical benefits for the accepted carpal tunnel syndrome and affirmed schedule awards issued on April 2, 1996 for 20 percent impairment of the right upper extremity and 10 percent impairment of the left upper extremity.

² On November 16, 1993 appellant underwent surgery for a right carpal tunnel release.

³ On June 28, 1999 the Office authorized surgery for ulnar nerve release of both elbows.

2001, the memorandum was not completed as to any amount due. Computer records, however, reflect that the new \$898.69 weekly pay rate was made effective with compensation paid as of January 27, 2002. In emails commencing September 27, 2002, the employing establishment inquired as to why appellant's net compensation proceeds had increased as of January 2002. The employing establishment noted that, pursuant to an Equal Employment Opportunity (EEO) settlement agreement of May 9, 1996, appellant began working a dayshift Monday through Friday when she returned to modified duty on June 22, 1996, with no nights or weekends.

In an August 11, 2003 memorandum, a senior claims examiner noted that appellant's pay rate as of July 10, 1993 when disability began was \$683.19 per week and that she received compensation through June 8, 1996 when she returned to modified duty. After she stopped work on July 22, 1999, her pay rate was \$743.27 per week. The memorandum states: "Worksheets run on August 11 [and] 12 confirm that the claimant was entitled to: \$200,072.81 for the period July 10, 1993 to August 9, 2003; \$78,991.37 for the period July 10, 1993 to August 7, 1996; and \$121,081.44 for the period July 22, 1999 to August 9, 2003. However, the claimant was paid \$224,072.81 for the same period." The memorandum found a \$44,802.08 overpayment "primarily due to the fact that the claimant requested lost premium pay (ND/SP); however, she is and was not entitled to this as the fact of the matter is that the [U.S. Postal Service] was required to offer her a job with day[-]time hours and no weekends due to an EEO [Commission] grievance filed by the claimant and not as a result of the claimant's work[-]related injury."

In an August 13, 2003 preliminary overpayment determination, the Office advised appellant that she had received an overpayment of \$44,802.08 as she received premium pay, which appellant knew she was not entitled to as a result of the May 9, 1996 EEO Commission settlement. The Office found appellant at fault in the creation of the overpayment as she failed to furnish information material to her case and made an incorrect statement and accepted payments which she knew or should have known to be incorrect. The Office advised appellant of her right to request a prerecoument hearing and submit additional evidence or arguments pertaining to the overpayment finding and fault determination.⁴ On August 18, 2003 appellant requested a prerecoument hearing on the issues of fault and possible waiver of the overpayment.

On September 5, 2003 the Office vacated the August 13, 2003 preliminary overpayment determination and issued a new preliminary overpayment finding in the amount of \$22,074.00. The Office noted that the overpayment occurred because she was over paid for lost premium pay to which she was not entitled. An attached memorandum found, as follows:

"As of July 10, 1993, the claimant was a [L]evel 5 step G with an annual salary of \$32,017.00 plus an additional \$3,508.80 premium pay for a total of \$35,525.80 or \$683.19 per week.

"The claimant stopped work on July 10, 1993 through June 7, 1996, returning to work as of July 8, 1996, to a position of a [L]evel 5 step K earning \$34,993.00 per year without any premium pay.

⁴ As of August 10, 2003 the Office adjusted appellant's compensation benefits to reflect a weekly pay rate of \$743.27 effective July 22, 1999.

“While there is some disagreement as to the reason or reasons that the claimant was not accommodated with premium pay as of that date the records are inconclusive and the claimant was entitled to [loss of wage-earning capacity] in order to accommodate her lost premium pay. A worksheet supporting this [loss of wage-earning capacity] is enclosed.

“The claimant continued to work in this position until July 22, 1999, when she again stopped work for the Postal Service from which she has not returned to the present date. At the time appellant stopped work on July 22, 1999, she was employed as a [L]evel 5 step O with an annual salary of \$38,650.00 or \$743.27 per week. As the claimant was not earning premium pay as of the date of her most recent work stoppage the Office compared the present wages of a [L]evel 5 step G as of that date plus the 11 percent premium pay that the claimant was earning as of her date disability began and determined that the base salary for a [L]evel 5 step G was \$36,289.00 plus \$3,991.79 for a total of \$40,280.79 or \$774.63 per week.

“As \$774.63 is greater than \$743.27 the claimant should have been placed on the rolls at that rate, however, she was compensated at a pay rate of \$898.69 resulting in an overpayment in the above case. In addition, the Office in an attempt to accommodate lost premium pay from her initial work stoppage in July 10, 1993, adjusted all previously paid [compensation] to the incorrect pay rate of \$898.69 resulting in the above overpayment of \$22,047.00. The exact breakdown for the overpayment by pay periods is as follows:

“Claimant was entitled to \$78,991.37 for the period July 10, 1993 to June 7, 1996.

“Claimant was entitled to \$6,439.96 for the period June 8, 1996 to July 21, 1999.

“Claimant was entitled to \$128,699.51 for the period July 22, 1999 to September 6, 2003.

“Claimant was entitled to a total of \$214,040.84 for the period July 10, 1993 to September 6, 2003.

“Claimant was paid \$105,198.72 for the period July 10, 1993 to June 21, 1999.

“Claimant was paid \$130,889.12 for the period June 22, 1999 to September 6, 2003.

“Claimant was paid a total of \$236,087.84 for the period July 10, 1993 to September 6, 2003.”

The Office advised appellant that she was found at fault in the creation of the overpayment as she knew or should have known the payments made by the Office were incorrect as they were based on pay rates on the average of \$200.00 over her normal salary pay rate and based on her initiation of a premium pay miscalculation. Appellant was again advised as to her

right to a prerecoumment hearing, which she requested on September 8, 2003.⁵ A hearing was held on June 21, 2003 and she submitted financial records pertaining to her monthly income and expenses.

By decision dated August 26, 2004, an Office hearing representative affirmed the overpayment finding in the amount of \$22,047.00, modified to find that appellant was not at fault in the creation of the overpayment. He denied waiver of the overpayment finding a total monthly income of \$5,746.24 and expenses of \$3,994.30 such that recovery of the overpayment would not defeat the purposes of the Federal Employees' Compensation Act and that the record did not warrant waiver on the grounds of equity and good conscience. The hearing representative directed recovery of \$325.00 from appellant's continuing compensation, finding it would allow the Office to recover the overpayment without depriving appellant of sufficient funds to meet ordinary and necessary living expenses.

LEGAL PRECEDENT -- ISSUE 1

Section 8101(4) of the Act provides that the rate of pay to be used in calculating compensation is based on the greatest of either appellant's monthly pay at the date of injury, the date disability began or the date compensable disability recurred if it recurred more than six months after appellant's return to work.⁶

Where an employee sustains an injury-related disability that prevents the employee from returning to the employment held at the time of injury or from earning equivalent wages, but that does not render the employee totally disabled for all gainful employment, the employee is considered partially disabled and is entitled to compensation for loss of wage-earning capacity.⁷ Regarding elements of pay, Office procedures provide that when the job held at injury included additional elements of pay which would be reflected in the pay rate for compensation purposes, such as night differential or Sunday pay, such additional pay elements must be reflected in the current pay for the same job. This should be done by increasing the current base pay by the same percentage as the original base pay was increased by the additional pay elements.⁸

The relevant regulations provide that compensation for partial disability is payable as a percentage of the difference between the employee's pay rate for compensation purposes and the employee's wage-earning capacity.⁹ Pay rate for the purposes of the calculation is the salary or wages for the job held at the time of injury at the time of the determination.¹⁰ The employee's wage-earning capacity in terms of percentage is computed by dividing the employee's earnings

⁵ Appellant submitted personnel records indicating that her base pay rate as of March 8, 2003 was \$42,808.00. She contended that she was due additional compensation for loss of premium pay.

⁶ 5 U.S.C. § 8101(4). See *Bette L. Kvetensky*, 51 ECAB 346, 348-49 (2000).

⁷ See *Domenick Pezzetti*, 45 ECAB 211 (1993).

⁸ *Sue A. Sedgwick*, 45 ECAB 211, 217 n.18 (1993).

⁹ 20 C.F.R. § 10.403(b).

¹⁰ 20 C.F.R. § 10.404(c).

by the current or updated, pay rate for the position held at the time of injury, which means the employee's actual earnings and multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity. The loss of wage-earning capacity is then obtained by subtracting the resulting dollar amount from the pay rate for compensation purposes.¹¹

ANALYSIS -- ISSUE 1

The Office found an overpayment of compensation as appellant received wage-loss benefits based on an incorrect pay rate. On September 5, 2003 the Office made the preliminary determination of an overpayment in the amount of \$22,074.00, because she received an excess in premium pay to which she was not entitled. The Office noted that, information from the employing establishment established that as of July 10, 1993, the date disability began, appellant had a weekly pay rate of \$683.19, which included premium pay.¹²

As of her return to work on June 8, 1996, appellant worked in a position earning \$34,993.00 per year without premium pay or \$672.94 a week. The Office noted that "[w]hile there is some disagreement as to the reason or reasons that the claimant was not accommodated with premium pay," she was entitled to compensation to replace her loss in premium pay. While noting a worksheet supporting the loss of wage-earning capacity calculation was enclosed, it is not readily apparent that the Office explained the application of the *Shadrick* formula to appellant. The hearing representative subsequently noted, however, that following her return to work appellant lost premium pay in June 1996 without differential for Sunday and night hours. He compared the pay rate as of the date disability began of \$683.19 with the current pay rate as of June 8, 1996 for the job and step held when injured (Level 5/step G) or \$772.52 a week and compared this to her actual earnings as of June 8, 1996 (Level 5/step K) of \$672.94 a week. He noted that under the *Shadrick* formula appellant had a loss of wage-earning capacity of \$47.83 per week and was due compensation of \$44.25 per week between June 8, 1996 to July 22, 1999 based on her loss of premium pay.¹³

As of July 22, 1999 when appellant stopped work, the Office noted in the September 5, 2003 preliminary determination that appellant was employed at Level 5/step O with an annual salary of \$38,650.00 or \$743.27 per week. As appellant was not earning premium pay, Office compared her actual wages with those of a Level 5/Step G (\$36,289.00) updated as of July 22, 1999 and added an 11 percent premium pay element (\$3,991.79) to find a total of \$40,280.79 or weekly rate of \$774.63. The Office noted that appellant should have been placed on the compensation rolls at the \$774.63 pay rate but instead had received compensation at a \$898.69 weekly pay rate, resulting in an overpayment as the Office duplicated premium pay. Total compensation paid appellant between July 10, 1993 and September 6, 2003 was \$236,087.84. The Office noted that during this period, however, she should have received a total of \$214,040.94, as follows: \$78,991.37 for wage loss from July 10, 1993 to June 7, 1996 at the \$683.19 weekly pay rate; \$6,349.96 for lost premium pay following her return to work June 8,

¹¹ See *Dorothy Lams*, 47 ECAB 584, 586 (1996); *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹² Appellant's pay rate as a Level 5/Step G was \$32,017.00 annual salary and \$3,508.80 in premium pay.

¹³ He noted that appellant was due \$6,349.96 for this period to compensate lost premium pay.

1996 to July 21, 1999; and \$128,699.51 for wage loss from July 22, 1999 to September 6, 2003, at the updated pay rate of \$774.63. The difference of \$22,046.90 represents an overpayment in compensation benefits.

On appeal, appellant contends that she was not compensated at the correct weekly pay rate. She indicated that the present salary of a Level 5 clerk was \$42,808.00 and, with a night differential of \$3,508.80, her salary should be \$46,316.80 or a weekly pay rate of \$890.70. However, her argument is not in keeping with the Office's pay rate determinations under the *Shadrick* decision. Compensation for wage loss is computed using the greater of the pay rates in effect on the date of injury, the date disability began or the date disability recurred, if more than six months after the employee resumed regular full-time employment. Appellant's date of injury weekly pay rate of \$632.00 is not applicable because she did not stop work due to injury-related disability on December 21, 1992, when she filed her claim for compensation. Rather, she stopped work on July 10, 1993 when she underwent surgery for left carpal tunnel syndrome. As of that date, the evidence of record reflects her base salary of \$32,017.00 a year as a Level 5/Step G with premium pay of \$3,508.80 or a total weekly pay rate of \$683.19.¹⁴ Appellant received appropriate compensation as of the date disability began. Although appellant returned to work on June 8, 1996 and a compensable disability recurred after six months, as of July 22, 1999 her base annual salary of \$38,650.00 resulted in a weekly pay rate of \$743.27. Because this did not reflect any allowance for premium pay, the Office updated the salary of a Level 5/Step G -- noting that as of July 22, 1999 base salary was \$36,289.00 -- to which it added the 11 percent premium pay element, \$3,991.79, to find a total updated salary of \$40,280.79 or \$774.63 per week. As appellant's recurrent pay rate of \$743.27 was lower than the updated pay rate in effect when her disability began of \$774.63, the Office properly used the updated pay rate for the date disability began because it was the higher of the two.¹⁵ The Board finds that the Office's pay rate calculations are supported by the evidence of record and conform to the *Shadrick* formula. Appellant has not introduced sufficient evidence to establish that the percentage of premium pay as determined by the Office was erroneous. For this reason, the Board will affirm the Office's findings regarding fact and amount of overpayment. Based on the erroneous December 12, 2001 determination of a weekly pay rate of \$898.69, appellant received an overpayment of compensation for the period July 10, 1993 to September 6, 2003.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within its discretion pursuant to statutory guidelines.¹⁶ The statutory guidelines are found in section 8129(b), which states: "Adjustment of 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 [the Act] or would be

¹⁴ The premium pay represents 11 percent of the annual salary.

¹⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(7) (December 1995).

¹⁶ See *Rudolph A. Geci*, 51 ECAB 423 (2000); *Robert Atchison*, 41 ECAB 83 (1989).

against equity and good conscience.”¹⁷ Since the Office found appellant to be without fault in the matter of the overpayment, it may only recover the overpayment if it is determined that recovery would not defeat the purpose of the Act or be against equity and good conscience. The guidelines for this determination are set forth in the Office’ implementing federal regulations at sections 10.436 and 10.437.¹⁸

Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary 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 the resource base of \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent.¹⁹

Recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such overpayment or on notice it would be paid, relinquished a valuable right or change her position for the worse.²⁰ To establish that a valuable right was relinquished, the individual must show that the right was valuable, that it cannot be regained and the action taken was based chiefly or solely on the payments or notice of such payments.²¹ Office regulations state that 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 the 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. Failure to submit the requested 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.²²

¹⁷ 5 U.S.C. § 8129(b).

¹⁸ 20 C.F.R. §§ 10.436 and 10.437.

¹⁹ 20 C.F.R. § 10.436.

²⁰ See *Jorge O. Diaz*, 51 ECAB 124 (1999).

²¹ *Id.*

²² 20 C.F.R. § 10.438(b). See *Linda Hilton*, 52 ECAB 476 (2001); *Robert B. Hutchins*, 52 ECAB 344 (2001).

ANALYSIS -- ISSUE 2

The evidence submitted included the overpayment recovery questionnaire (Form OWCP-20) and supporting documentation²³ and a July 29, 1993 CA-7 form. In the Form OWCP-20,

²³ The supporting documentation includes, May 3, 2004 proposed changes to 2001 and 2002 Internal Revenue Service (IRS) returns; a March 24, 2004 Washington Mutual home loan statement noting a principal balance of \$108,669.76 and an amount due on May 1, 2004 of \$1,382.01; receipts dated August and December 2003 indicating cash payment for clothes and books for Stanisha Williams in a total amount \$1,800.00 and a May 2004 cash receipt in the amount of \$400.00 for allowance money paid by Johnny Williams; an October 3, 2003 money order in the amount of \$250.00 made out to Stanisha Williams from Johnny C. Williams; a Resource One Credit Union membership agreement for Marcus Ray Williams for a savings account; a June 16, 2004 negative balance of \$1,784.29 for Marcus Williams; a CitiCard with a balance of \$393.04, with no identification as to who the card holder is; a July 18, 2004 credit statement for Johnny C. Williams with a balance of \$133.47 and minimum payment due of \$10.00; a June 24, 2004 discover statement for Johnny C. Williams with a balance of \$450.31 and a minimum payment due of \$10.00; a January 1, 2004 SBC bill for \$164.60 for appellant; a January 7, 2004 bill for \$398.86 for a 1996 Plymouth for car repairs; customer receipts from the postal service dated November 15, 2003 and March 31 and April 4, 2004 in the amount of \$175.00 made out to Bannerman & Williams; an April 17, 2004 customer's receipt in the amount of \$100.00 for Stanisha Williams; a June 18, 2004 bill from Medical Center at Lancaster in the amount of \$45.85; a July 5, 2004 water utility bill for \$59.10; a DNA diagnostic center invoice for DNA testing for appellant's son and grandson in the amount of \$515.00 with a balance due of \$300.00; a July 7, 2004 bill from United Consumer financial in the amount of \$56.66; a Hartford insurance quarterly premium notice of \$118.43 for Johnny C. Williams; a June 2, 2004 ADT security services bill for \$75.47; a Cross Country Visa Bank statement for appellant with a balance of \$342.40 and minimum payment due of \$67.00; a September 2, 2003 credit file statement on appellant with a balance of \$805.00 and minimum payment due of \$25.00; an August 12, 2003 Midland credit management bill with a balance due of \$5,120.60; a Comcast bill; a vehicle renewal registration fee due of \$62.80 for a 2001 mercury; dental bill for Stanisha with no payment due; a June 27, 2004 bill for Bealls with a balance due of \$1,641.04 and minimum monthly payment of \$109.00; June 16, 2004 bill for \$30.52 from physicians emergency care; a March 16, 2004 bill for Capri Ransom in the amount of \$3.98; a June 12, 2004 bill for an oil change in the amount of \$21.50 for a 2004 Nissan Maxima; a July 1, 2004 Orchard Bank bill with a balance due of \$1,401.90 and minimum monthly payment of 43.00; a June 1, 2004 First National credit statement noting a balance of \$791.56 and minimum monthly payment due of 28.00; a May 31, 2004 First National credit statement noting a balance of \$808.01 and a minimum monthly payment of \$29.00; a July 22, 2004 Sam's club bill noting a balance of \$283.13 and minimum monthly payment of \$15.00; an April 21, 2004 Sprint PCS bill for \$171.65; a June 29, 2004 bill for \$41.65 by Ennis Regional; a July 20, 2004 bill from Budco Financial Services for \$124.15 for Extended Service Plan from Ford Motor Company; a July 6, 2004 bill from PS plus sizes with a balance due of \$905.85 and minimum monthly payment due of \$46.00; a June 5, 2004 Direct TV bill for \$88.00; a July 16, 2004 Chevron credit card bill for Johnny C. Williams with a balance of \$1,268.88 and minimum monthly payment due of \$155.51; a May 12, 2004 water utility bill with a payment due of \$52.58; a March 16, 2004 bill from Arrow Financial services with a balance of \$1,257.39; a June 4, 2004 Ohio Life Insurance quarterly payment of \$150.00 for a policy on Mary J. Duffy; a May 27, 2004 State Farm Insurance automobile insurance bill in the amount of \$324.78 for a 1989 Chrysler, a 1996 Plymouth, a 2004 Nissan and 2001 mercury; a 2004 Fall term Texas Tech University bill for \$8,036.78; a February 24, 2004 American Medical Association Cingular bill for Johnny C. Williams in the amount of \$73.44, based upon an unpaid prior balance of \$36.44 and current changes of \$37.00; a February 26, 2002 Resource One Bank statement for appellant showing a checking account balance of \$3,512.08; a December 31, 2002 credit card receipt for \$200.00; a July 10, 2004 American Express bill for Johnny C. Williams with a balance of \$863.84 and minimum monthly payment due of \$17.00; a July 2, 2004 Visa bill for Johnny C. Williams with a balance of \$847.48 and minimum monthly payment of \$22.53; a July 5, 2004 Bank One credit card bill with a balance of \$454.62 and minimum monthly payment of \$11.00; a May 10, 2004 bill from City Wide Wrecker Service for Johnny C. Williams for an indecipherable amount; payments of \$738.94 made by Johnny C. Williams for the period November 17, 2003 to May 18, 2004 for the tax period December 31, 2001; a July 12, 2004 Gas history account for appellant with an amount due of \$31.30; a July 23, 2004 Gas history account for Johnny C. Williams with an amount due of \$341.62; a July 13, 2004 electric utility bill with an amount due of \$341.62; a December 31, 2001 Resource One bank statement with a balance of \$12,345.37 in checking and \$25.00 in Savings; a January 31, Continued

appellant listed four dependents, which included her mother, Mary Chappell; Stanisha Williams, her daughter, who is age 20; Marcus Williams, her son, who is age 24; and Kapri Ransom, her grandchild, who is age 4. Expenses included \$1,400.00 for rent/mortgage and yearly expenses of \$40,577.36. She noted a total monthly income of \$5,752.24,²⁴ a savings balance of \$25.00 and a checking balance of between \$0.00 and \$40.00. In an attached worksheet she noted as monthly expenses: electric -- \$275.00; gas -- \$165.00; water -- \$64.47; direct TV -- \$84.00; cable TV -- \$60.00; Resource One -- \$100.00; Sprint cellular telephone -- \$72.00; Bells -- \$115.00; State Farm -- \$216.17; Southwestern Bell -- \$143.70; U.C. financial -- \$56.66; Ohio State Life Insurance -- \$50.00; I.T.T. life insurance -- \$40.00; Budco Financial -- \$124.00; Johnny Cingular -- \$72.00; car note Nissan -- \$402.78; Washington Mutual -- \$1,400.00; Miran -- \$100.00; cross country -- \$50.00; credit services -- \$70.00; ADT -- \$25.21; Voluntary benefits -- \$15.64; plus size -- \$100.00; groceries -- \$450.00; Johnny lunch money -- \$100.00; Chevron -- \$200.00; beauty shop (Stanisha, Kapri and appellant) -- \$200.00; Johnny gas bill -- \$200.00; Exxon Mobile -- \$60.00; mowing lawn -- \$100.00; medicine -- \$150.00; household cleaners -- \$25.00; massages -- \$40.00; Stanisha tuition/housing -- \$800.00; Stanisha allowance -- \$400.00; Cougar 2001 warranty -- \$124.15; Arrow Financial -- \$100.00; Blue Cross/Blue Shield -- \$217.24; life insurance -- \$6.80; Sam's Club Credit Department -- \$25.00; Shell -- \$100.00; Bank One -- \$100.00; City Bank -- \$100.00; Discover -- \$100.00; American Express -- \$100.00; Bank of America -- \$100.00; and Medicare insurance -- \$59.00 for total monthly expenses of \$7,659.02.

The Office hearing representative noted that appellant "claimed a total of \$8,659.02 monthly expenses as well as outstanding balances of \$130,635.16 to various creditors and \$68,770.31 in other debts." He noted, however, that appellant could not claim her mother, son or grandchild as dependents under the Act and, therefore, the expenses related to such individuals would not be considered ordinary and necessary expenses. He noted that appellant identified Johnny C. Williams as the father of appellant's daughter in a March 20, 2004 letter and found that Mr. Williams did not qualify as a dependent.

On appeal, appellant contends that the hearing representative erred in disallowing expenses incurred by her husband. While appellant did not list her husband as a dependent on the overpayment questionnaire form, she has stated on various Office forms that she is married and listed Johnny Williams. The hearing representative disallowed the following expenses incurred by appellant's husband: \$72.00 for Cingular bill; \$250.00 for glasses; \$100.00 for lunch money; \$200.00 for gas bill; \$100.00 husband's bicycle; \$500.00 clothes; \$100.00 for Shell; \$100.00 for Bank One; \$100.00 for City Bank; \$2,500.00 for Discover; \$2,500.00 for

2002 Resource One bank statement showing a checking account balance of \$3,977.04; a May 12, 2003 letter from the IRS to appellant and Johnny C. Williams regarding a tax deficiency for the year ending December 31, 2001. With regards to the proposed IRS debt of \$1,021.00 for 2001 tax return and \$3,126.00 for the 2001 tax return, the only identification on the form is a social security number, which is not appellant's social security number based upon a credit report. The Board notes that the three cash receipts, each in the amount of \$600.00 and the May 2004 cash receipt by Mr. Williams do not contain any identification as to who they were paid to. The Arrow Financial Services bill noted it was willing to settle the bill for \$628.70 if paid by or before April 12, 2004. The record contains no evidence of whether appellant accepted this offer or how this expense was incurred. The December 31, 2002 credit card receipt contains no information as to what the charge was for or who charged the amount. With regards to the Bank One Master Card bill, it is unclear as to whose bill this is as no name was noted on the account.

²⁴ This was based upon a monthly income of \$5,562.24 plus \$190.00 for Social Security benefits.

American Express; and \$1,500.00 for Bank of America. The Board finds further development of the evidence is necessary in order to determine whether Mr. Williams may properly be considered a qualified dependent and, if so, whether any of these expenses were ordinary and necessary. The Board notes that Office procedures provide that an individual's total income includes any funds which may reasonably be considered available for his or her use, regardless of the source.²⁵ As appellant did not list Mr. Williams as a dependent on her overpayment recovery form it is unclear whether his income was included in calculation of her total monthly income.

The Office also disallowed a number of expenses claimed by appellant, including \$84.00 for Direct Television services, \$60.00 of cable television service, \$72.00 for cellular telephone, \$56.00 for UC Financial, \$50.00 for Ohio State Life Insurance, \$40.00 for ITT life insurance, \$200.00 for beauty shop, \$70.00 for pager, \$100.00 for lawn mowing, \$200.00 for bath and body work, \$40.00 for massages, \$600.00 for car rentals, \$246.00 for daughter's van rental, \$750.00 for attorney fee, \$112.00 for post office box, \$80.00 for washeteria, \$400.00 for gas and food for Stanisha, \$300.00 for city health club, \$700.00 for 24-hour fitness, \$59.00 for Medicare insurance, \$8,000.00 for Stanisha's tuition, \$400.00 for Stanisha coming home, \$1,200.00 for books for Stanisha, \$400.00 for Stanisha's room deposit, \$280.00 for High riders a student organization Stanisha belongs to, \$280.00 for dorm room comforters, \$400.00 for airplane tickets, \$400.00 for Stanisha's allowance, \$200.00 for birthday party and \$500.00 for Christmas party. The Office hearing representative properly disallowed expenses for Direct TV, Cable TV and ITT life insurance as they were not ordinary and necessary monthly expenses. The Ohio State Insurance was properly disallowed as it was a policy for appellant's mother who is not considered a dependent and was properly found not to be a dependent by the hearing representative. He also disallowed the expenses incurred for Stanisha's tuition as they were paid by Johnny Williams, who the hearing representative found was not a dependent. As noted above further development of the evidence is necessary to determine whether Mr. Williams qualifies as a dependent. On remand, the Office should develop the issue and consider whether these expenses are ordinary and necessary and, if not, provide a statement of reasons. As to the other expenses disallowed, the hearing representative did not provide a full explanation for disallowing the remaining expenses. The procedure manual states that the hearing representative "must state in writing the reason for the finding" disallowing expenses as not ordinary and necessary.²⁶ On remand, the Office should consider whether these expenses are ordinary and necessary and if they are not, provide a rationale supporting this determination.

The hearing representative disallowed the following expenses because appellant failed to explain how they were ordinary and necessary. These expenses include: \$124.00 for Budco Financial; \$100.00 for Miran; \$70.00 for credit services; \$25.21 for ADT; \$15.84 for plus size; \$100.00 for Sam's Club; \$450.00 for Chevron; \$200.00 Specticied (sic) lawns; \$100.00 for rat poison; \$384.00 oil changes for five cars;²⁷ \$320.00 registration for five cars; \$300.00 inspection

²⁵ See *Otto A. Fernandez*, 55 ECAB ____ (Docket No. 03-1942, issued May 27, 2004).

²⁶ Federal (FECA) Procedure Manual, Part 6 -- Initial Overpayment Action, *Waiver of Recovery*, Chapter 6.200.6(a)(3) (May 2004) (the hearing representative or Office examiner "must state in writing the reason for the finding" disallowing expenses as not ordinary and necessary).

²⁷ The Board notes that the Office's procedure manual provides for the allowance of expenses for only up to two

for five cars; \$781.00 for towing cars; \$6,000.00 for repairs to five cars; \$1,460.00 for tires for three cars; \$1,460.00 for pound charges on two cars; \$800.00 for eight queen size comforters per year; \$1,000.00 for 2001 Cougar warranty; \$200.00 for church; \$500.00 for money orders; \$40.00 for postage; \$93.60 for car wash; \$200.00 for shampooing carpet; \$100.00 for Stanisha's bicycle; \$75.00 for appellant's bicycle; and \$75.00 for Six Flags with Church. The Board finds the Office properly disallowed these expenses as it is appellant's burden of proof to establish that the expenses are ordinary and necessary.²⁸

The hearing representative allowed: \$1,400.00 for her mortgage; \$64.67 for water; \$165.00 for gas (TXU); \$275.00 for electric (TXU); \$143.70 for telephone (SBC); \$402.78 for Nissan auto loan; \$62.50 (\$750.00 annual amount) for Stanisha's glasses; \$40.00 (\$480.00 annual amount) for appellant's glasses; \$40.00 for dry cleaning; \$450.00 for groceries; \$60.00 for Exxon; \$150.00 for medicine; \$25.00 for household cleaners; \$83.00 paint the house (\$1,000.00); \$49.00 for car repair; \$125.00 for air conditioner repairs (\$1,500.00); \$44.00 for washer/dryer repair (\$530.00); \$20.00 for stove repair (\$246.00); \$42.00 for plumbing (\$500.00); \$100.00 for Stanisha's clothes (\$1,200.00); \$83.00 for appellant's clothes (\$1,000.00); \$6.40 for medical costs out of pocket (\$76.37); \$43.00 for Orchard Bank Master Card; \$67.00 for Cross Country Visa; \$20.00 for Citibank; and \$28.00 for First National Visa. The Board notes that the record reflects appellant's mortgage payment is \$1,382.01. Appellant has not submitted supporting documentation regarding glasses for herself and her daughter, washer/dryer repair, stove repair, painting the house, air conditioner repairs or plumbing repairs. Office regulations state it is appellant's burden of proof to support her expenses. As the case is being remanded, appellant should provide additional supporting documentation for these expenses.

CONCLUSION

The Board finds that the Office properly found an overpayment in the amount of \$22,046.90 for the period July 10, 1993 to September 6, 2003 based upon an incorrect pay rate and that appellant was not at fault in the creation of the overpayment. The Board finds that the case requires further development as to the status of appellant's husband as a dependent and further consideration of her monthly expenses and income with regard to waiver.

vehicles per family; *see* Federal (FECA) Procedure Manual, Part 6 -- Initial Overpayment Action, *Waiver of Recovery*, Chapter 6.200.6(a)(3)(a) (May 2004).

²⁸ Federal (FECA) Procedure Manual, Part 6 -- Initial Overpayment Action, *Waiver of Recovery*, Chapter 6.200.6(a)(3) (May 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 26, 2004 is affirmed with respect to fact and amount of overpayment. As to waiver, the decision is set aside and the case remanded for further proceeding consistent with the above opinion.

Issued: July 21, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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