United States Department of Labor
Employees' Compensation Appeals Board

THERESA L. ESPINOZA, Appellant	)	
	)	**Docket No. 05-818**
and	)	**Issued: March 1, 2006**
EMPLOYMENT STANDARDS ADMINISTRATION, SMALL BUSINESS ADMINISTRATION, El Paso, TX, Employer	)	

Appearances:
Theresa L. Espinoza, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 23, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 10, 2005, finding a $15,351.00 overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether the Office properly determined that appellant received a $15,351.00 overpayment of compensation from August 10, 2003 to November 27, 2004, due to receipt of total disability compensation instead of compensation based on the loss of wage-earning capacity determination; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly recovered the overpayment by withholding $341.80 from continuing compensation payments.

FACTUAL HISTORY

This is the second appeal in the present case. In an October 30, 2001 order, the Board set aside the Office's decision dated June 3, 2002 and remanded the case.[1] The Board determined that the Office failed to review additional factual and financial information with regard to waiver of an overpayment, properly submitted by appellant and received by the Office prior to its decision. The facts and the circumstances of the case up to that point as set forth in the Board's prior order and incorporated herein by reference.[2] Other germane evidence will be set forth as necessary.

Appellant was referred for vocational rehabilitation and the counselor noted, in a report dated July 12, 2002, that appellant was employed as a part-time light-duty administrative assistant at the Catholic Diocese of El Paso. Appellant's employment was effective July 13, 2002, with hours from 8:30 a.m. to 12:30 p.m., and a salary of $17,548.00 per year or $337.45 per week.[3] In a letter dated October 30, 2002, appellant advised that her job ended on September 30, 2002 because the business closed permanently. She requested that her previous compensation be restored until she found other employment.

Upon remand of the case by the Board, in a decision dated November 13, 2002, the Office found that appellant received a $1,287.00 overpayment of compensation from May 22, 2001 to March 23, 2002, for which she was without fault in creating. The overpayment occurred because optional life insurance premiums were not deducted from her compensation for the period May 22, 2001 to March 23, 2002. In an accompanying memorandum, the Office noted that additional evidence and arguments were considered; however, the circumstances of the case did not warrant waiver of the overpayment. Therefore, the Office advised that the debt would be collected by deducting $100.00 from appellant's continuing compensation.

In a Form CA-1032 dated January 6, 2003, appellant advised that she had returned to work in a position as an interim director with the Catholic Diocese of El Paso effective July 13, 2002. Appellant noted that she worked from July 13 to September 30, 2002 when the employer closed permanently. The position was part time 20 hours per week at a pay rate of $19.58 per hour, for gross earnings of $6,298.10. Appellant noted that the position was terminated when the employer closed.

By a decision dated March 19, 2003, the Office found that appellant had been employed as a part-time administrative assistant effective July 13, 2003 with wages of $337.46 per week and that her earning fairly and reasonably represented her wage-earning capacity. The Office

[1] The Office accepted that appellant sustained an aggravation of cervical disease in the performance of duty. The record reflects that, at the time of injury in 2000, appellant was a full-time GS-9 employee.

[2] Docket No. 02-1803 (issued October 30, 2002).

[3] The Office noted that appellant returned to work on July 13, 2002; however, she was paid temporary total disability from June 16 to July 13, 2002, in the amount of $3,963.76. The Office noted that appellant was entitled to temporary total disability from June 16 to July 12, 2002 and compensation at the loss of wage-earning capacity rate for the day of July 13, 2002. The Office determined an overpayment of $89.72 occurred; however, administratively terminated it as it was not cost effective to pursue collection.

noted that appellant had a weekly loss of wage-earning capacity of $1,177.42 and would be entitled to adjusted weekly compensation of $841.00. The Office advised appellant that her compensation would be adjusted to $3,364.00 every four weeks. It noted that appellant worked 4 hours per day in her position as an administrative assistant and worked in the position over 60 days. The Office advised that there was no evidence that the position was temporary and there was no evidence of recurrence of disability.

In letters dated August 14, 2003, February 5 and April 2, 2004, appellant noted that, from July 2001 to September 30, 2002, she was temporarily employed part time, 20 hours per week with the Catholic Diocese of El Paso. She advised that she obtained the temporary position through her own efforts. On April 26, 2004 the Office responded to appellant's correspondence and advised her that if she disputed the wage-loss determination of March 19, 2003 she must exercise her appeal rights.

By letter dated December 17, 2004, the Office advised appellant that, while a March 19, 2003 formal decision reduced her monetary compensation, her benefits were not adjusted to reflect the change. The Office noted that effective December 25, 2004 the compensation benefits were reduced in accordance with the March 19, 2003 decision and that an overpayment would be addressed by a separate decision.

In daily computation log worksheets dated December 10 and 18, 2004, the Office noted that appellant was paid $73,063.57 in compensation from August 10, 2003 to November 27, 2004. The Office noted that, in accordance with the decision dated March 19, 2003, appellant should have been paid $57,712.57 for this period, which resulted in an overpayment of compensation of $15,351.00.

By a letter dated December 29, 2004, appellant advised that she was appealing the reduction in compensation and alleged overpayment.

On January 10, 2005 the Office made a preliminary finding that appellant received a $15,351.00 overpayment of compensation. The Office noted that the overpayment occurred because appellant's compensation payments were processed as total disability as opposed to partial disability for the period of August 10, 2003 to November 27, 2004. The Office also determined that appellant was at fault as she knew or reasonably should have known that she was not entitled to full compensation as she was notified by a decision dated March 19, 2003 that she would be paid at a reduced compensation rate; however, she continued to accept the compensation payments. Appellant was further informed of her right to challenge the Office's finding.

On January 25, 2005 appellant submitted a statement advising that she was unable to admit or refute the Office findings with regard to the overpayment amount of $15,351.00, as she was not able to reconcile the Office figures with her monthly benefits statements. She advised that the correct compensation from August 10, 2003 to November 27, 2004 was $3,364.00 per month and therefore her overpayment would total $12,530.00, not $15,351.00 as set forth by the Office. Appellant requested a more definite statement with regard to the calculation of the overpayment and additional time to respond.

By letter dated February 4, 2005, the Office stated that it enclosed a printout of appellant's compensation history for the period July 13, 2003 to the present along with a computation of the correct amount appellant should have been paid for the same period.[4] The Office advised that she was paid compensation totaling $73,063.57 for the period August 10, 2003 to November 27, 2004 when she should have been paid $57,712.57, which resulted in an overpayment of $15,351.00. The Office advised that no additional time would be granted to respond to the preliminary finding of overpayment and again requested that any additional evidence or argument be submitted by February 10, 2005.

By decision dated February 10, 2005, the Office found that appellant received a $15,351.00 overpayment of compensation from August 10, 2003 to November 27, 2004, for which she was at fault in creating. The Office noted that the overpayment occurred because appellant's compensation payments were not reduced in accordance with the loss of wage-earning capacity decision of March 19, 2003, for the period August 10, 2003 to November 27, 2004. In an accompanying memorandum, the Office indicated that appellant should have reasonably known that she was not entitled to full compensation as she was notified by a decision dated March 19, 2003 that she would be paid at a reduced compensation rate. The Office noted that the overpayment would be recovered by withholding $341.80 from continuing compensation payments effective March 19, 2005.[5]

LEGAL PRECEDENT

The Federal Employees' Compensation 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.[6] When an overpayment has been made to an individual 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 the individual is entitled.[7]

Section 2.814.7 of the Office procedure manual states:

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

[4] These documents were not attached to the February 4, 2005 Office correspondence.

[5] After the February 10, 2005 decision, appellant submitted additional evidence including a form requesting a waiver of overpayment, a letter from the Catholic Diocese of El Paso and another statement dated February 9, 2005, received by the Office on February 18, 2005, noting that she was not provided with a clear explanation as to how the Office computed the alleged overpayment. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

[6] 5 U.S.C. § 8102(a).

[7] *Id*. at § 8129(a).

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

> a. Factors Considered. To determine whether the claimant's work fairly and reasonably represents his or her WEC, the CE should consider [such factors as] whether....
>
> > (1) The job is part time (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
> >
> > (2) The job is seasonal in an area where year-round employment is available. If an employee obtains seasonal work voluntarily in an area where year-round work is generally performed, the CE should carefully determine whether such work is truly representative of the claimant's WEC; or
> >
> > (3) The job is temporary where the claimant's previous job was permanent."[8]

ANALYSIS

A loss of wage-earning capacity determination was made on March 19, 2003, where the Office found that appellant had been employed as a part-time administrative assistant effective July 13, 2003 and continued to work in the position over 60 days. The Office calculated the compensation rate at $3,364.00 every four weeks or $337.46 per week and concluded that her actual earnings as a part-time administrative assistant fairly and reasonably represented appellant's wage-earning capacity. The Office further determined that an overpayment was created when appellant's compensation payments were incorrectly processed as total disability as opposed to partial disability for the period August 10, 2003 to November 27, 2004.

Initially, the Board notes that in determining whether there is an overpayment of compensation it must first determine whether the loss of wage-earning capacity determination was properly calculated. Appellant was originally employed in a permanent position as a full-time GS-9 administrator. Following her injury she participated in vocational rehabilitation and returned to work on July 12, 1002 as a part-time administrative assistant. This position was not a full-time position,[9] rather this position was four hours per day. The Board finds that the evidence in this case is insufficient to support that appellant's employment as a part-time administrative assistant position was equivalent to that of her date-of-injury position as a full-time administrator. Her federal appointment was full time, eight hours per day, permanent position. In the private sector she obtained work part time, four hours per day. The evidence clearly shows that the position accepted in July 2002 and commencing July 13, 2002 four hours per day was not the equivalent of the date-of-injury position. Before the Office accepted these earnings

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

[9] *See Richard M. Knight*, 42 ECAB 320 (1991).

as the best measure of her wage-earning capacity, the Office was required to determine whether appellant actual earnings in the part-time position fairly and reasonably represented her wage-earning capacity. The Office made no such finding in this case. The Office erred by not evaluating whether the part-time position fairly and reasonably represented appellant's wage-earning capacity in the March 19, 2003 decision, which is the basis of the underlying overpayment determination. The Office improperly determined appellant's wage-earning capacity.[10]

Moreover, appellant had a claim for disability compensation pending at the time the Office issued the March 19, 2003 loss of wage-earning capacity determination. The Board has found that it is improper to issue a loss of wage-earning capacity determination when there is a pending compensation claim.[11] Office procedures manual pertaining to cases where a claimant stops work after reemployment indicate that, if no wage-earning capacity rating has been completed at the time of the work stoppage, the claims examiner will consider whether it is appropriate to issue a retroactive loss of wage-earning capacity determination.[12] The claims examiner must ask the claimant for his or her reasons for ceasing work. If the reasons constitute an argument for a recurrence of disability, appropriate development and evaluation of the medical and factual evidence will be undertaken. In *Terry Hedman*,[13] the Board held that a partially disabled claimant who returns to a light-duty job has the burden of proving that he or she cannot perform the light duty, if a recurrence of total disability is claimed. In the present case, appellant worked in a light-duty part-time position from July 13 to September 30, 2002, when she stopped work and claimed disability. Appellant advised the Office that her employer closed permanently and also claimed a resumption of total disability. Her stated reasons for ceasing work constitute an argument for a recurrence of disability.

As the Office erred by not evaluating whether the part-time position fairly and reasonably represented appellant's wage-earning capacity and improperly issued a loss of wage-earning capacity determination when there was a pending compensation claim, the overpayment decision dated February 10, 2005 will be reversed.

[10] *Id.*, *see David Champion*, (Docket No. 01-1976, issued December 31, 2003). *See also Connie L. Potratz-Watson*, 56 ECAB ___ (Docket No. 03-1346, issued February 8, 2005) (the Office must address the issue and explain why a part-time position is suitable for a wage-earning capacity determination based on the specific circumstances of the case; where the Office did not acknowledge this or explain why it used the part-time position in making a formal wage-earning capacity decision, the Office did not meet its burden of proof in finding wage-earning capacity).

[11] *See William M. Bailey*, 51 ECAB 197 (1999) (where the Board found that the Office improperly issued a retroactive loss of wage-earning capacity determination when there was a pending claim for compensation from the time of the work stoppage).

[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(b)(1) (December 1995); *see also William M. Bailey*, *supra* note 11.

[13] 38 ECAB 222 (1986).

CONCLUSION

The Board finds that the Office did not establish that appellant received an overpayment of compensation from August 10, 2003 to November 27, 2004.[14]

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2005 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 1, 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

[14] The Board finds that it is unnecessary to address the second and third issues in this case in view of the Board's disposition of the first issue.