

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

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C.F., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Woodacre, CA, Employer )

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**Docket No. 07-1971  
Issued: February 20, 2008**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 19, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated May 9, 2007, finding that she had received an overpayment of 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 appellant received an overpayment of compensation in the amount of \$2,021.78 for the period January 1, 2004 to October 1, 2005; and (2) whether the Office properly denied waiver of the overpayment.

**FACTUAL HISTORY**

This case has previously been on appeal before the Board.<sup>1</sup> On December 16, 1999 appellant, then a 57-year-old career clerk, filed an occupational disease claim alleging that she

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<sup>1</sup> Docket No. 00-2045 (issued November 28, 2001).

developed an emotional condition due to the actions of her postmaster. By decision dated March 3, 2000, the Office denied her claim. Appellant requested reconsideration on March 13, 2000. By decision dated March 31, 2000, the Office declined to reopen appellant's claim for consideration of the merits. Appellant requested review by the Board and by decision dated November 28, 2001, the Board affirmed the Office's decisions.

Appellant requested reconsideration on December 11, 2001. The Office declined to modify its prior decisions on February 19, 2002. She again requested reconsideration on October 6, 2002 and submitted a favorable Equal Employment Opportunity Commission decision. By decision dated November 15, 2002, the Office accepted appellant's claim for major depression.

Appellant began work in the private sector in the year 2000 at Woodacre Improvement Club earning \$18.00 per hour. By letter dated October 2, 2003, the Office informed appellant that she was entitled to compensation based on her actual earnings at the Woodacre Improvement Club. The Office instructed her to provide notification if she stopped working or if she received an increase in pay. The Office informed appellant that the failure to provide notification of an increase in pay could result in an overpayment of compensation. Appellant's compensation was based on her actual earnings of \$584.74 per week.

In a letter dated December 1, 2005, appellant stated that she was returning her last two compensation checks dated October 29 and November 26, 2005 and requested that the Office remove her from the periodic rolls effective October 1, 2005. She elected to receive benefits from the Office of Personnel Management beginning October 1, 2005.

By decision dated February 2, 2006, the Office found that appellant's private sector employment at Woodacre Improvement Club earning \$18.00 per hour with wages of \$720.00 per week fairly and reasonably represented her wage-earning capacity. The Office reduced her compensation benefits based on her actual earnings. In a letter dated February 9, 2006, the Office informed appellant of her entitlement to compensation under the Federal Employees' Compensation Act. Appellant elected retirement benefits.

On March 2, 2006 the Office made a preliminary determination that appellant had received an overpayment of compensation in the amount \$2,021.78 for the period January 1, 2004 to October 1, 2005. The Office stated that the overpayment occurred as appellant's actual earnings in the private employment increased from January 1, 2004 to October 1, 2005 and her weekly earnings averaged \$724.23. Appellant was entitled to \$9,032.50 for the time period but was actually paid \$11,054.28 resulting in an overpayment of \$2,021.78. The Office found that appellant was without fault in the creation of the overpayment and allowed her 30 days to submit a response.

Appellant responded on March 10, 2006 and submitted the overpayment recovery questionnaire. She stated that she believed that the overpayment resulted from a \$2,000.00 bonus she received on January 4, 2005. Appellant stated that repaying the debt would cause severe financial hardship and requested waiver of the overpayment. She listed her monthly income as \$2,445.52. Appellant indicated that her monthly expenses were: \$1,200.00 in rent; \$300.00 for food; \$50.00 for clothing; \$500.00 per month for utilities; \$250.00 for miscellaneous

expenses and monthly credit card payment of \$20.00 for \$2,320.00 in expenses each month. She indicated that she had savings of \$3,000.00. Appellant completed the form on March 10, 2006.

By decision dated May 9, 2007, the Office found that appellant had received an overpayment in the amount of \$2,021.78, that she was not at fault in the creation of the overpayment and that the circumstances of the case did not warrant waiver of the overpayment. The Office found that appellant had sufficient income such that recovery of the overpayment would not defeat the purpose of the Act or be against equity and conscience as her income exceeded her expenses by \$125.52 more than \$50.00. The Office requested that appellant repay the entire amount.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of the Act<sup>2</sup> provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of duty. Section 8106(a) provides in pertinent part as follows:

“If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between [her] monthly pay and [her] monthly wage-earning capacity after the beginning of the partial disability, which is known as [her] basic compensation for partial disability.”<sup>3</sup>

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the case of *Shadrick*, has been codified at section 104.3 of the Office’s regulations.<sup>4</sup> Under the *Shadrick* formula, the Office first calculates an employee’s wage-earning capacity in terms of percentage by dividing the employee’s actual earnings by the current or updated, pay rate for the position held at the time of injury. The employee’s wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes, defined in 20 C.F.R. § 10.5(a) as the pay rate at the time of injury, the time disability begins or the time disability recurs, whichever is greater, by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted that appellant developed a major depression as the result of actions of her supervisor. At the time of the injury she worked full time as a career clerk. Appellant

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8106(a).

<sup>4</sup> See *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(c).

<sup>5</sup> *Id.*; 20 C.F.R. § 10.403(e).

stopped work at the employing establishment in 2000 and returned to work in the private sector in the year 2000 at Woodacre Improvement Center earning \$18.00 per hour.

The Office paid appellant compensation for a loss of wage-earning capacity beginning on October 2, 2003 using the *Shadrick* formula. The Office found that she was actually earning \$584.74 per week. However, appellant received a bonus of \$2,000.00 from her employment on January 4, 2005. In order to properly apply the *Shadrick* formula, the Office must obtain accurate figures for the current rate of pay for the job held when injured and the employee's current actual earnings. If any of the initial figures are inaccurate, any calculation under the *Shadrick* formula will be inaccurate even if the formula is properly applied.<sup>6</sup> As the Office inaccurately paid appellant compensation based on her earnings without her bonus, she received an overpayment of compensation.

The Office recalculated the amount of compensation owed to appellant from January 1, 2004 to October 1, 2005 using the correct information. The Office subtracted the amount of compensation it should have paid appellant from January 1, 2004 to October 1, 2005, \$9,032.50 from the amount she actually received, \$11,054.28 to find an overpayment of \$2,021.78.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act<sup>7</sup> provides: "Adjustment or recovery 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 against equity and good conscience."<sup>8</sup> If a claimant is without fault in the creation of an overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 through 10.437 of the Office's regulations.<sup>9</sup>

According to section 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current, ordinary and necessary living expenses and, also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.<sup>10</sup> For waiver under the defeat the purpose of the Act standard, an appellant must meet the two pronged test and show that she

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<sup>6</sup> See *Paul M. Colosi*, 56 ECAB 294, 299 (2005).

<sup>7</sup> 5 U.S.C. §§ 8101-8193, § 8129(b).

<sup>8</sup> 5 U.S.C. § 8129(b).

<sup>9</sup> 20 C.F.R. §§ 10.434, 10.437.

<sup>10</sup> Office procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

needs both substantially all of her current income to meet current ordinary and necessary living expenses<sup>11</sup> and that her assets do not exceed the resource base.<sup>12</sup>

In order to establish that, recovery of an overpayment would be against equity and good conscience, an overpaid individual must either establish that she would experience a severe financial hardship in attempting to repay the debt<sup>13</sup> or overpaid individual could also establish that, in reliance on such payment or on notice that such payments would be made, she gave up a valuable right or changed her position for the worse.<sup>14</sup> If the claimant is not entitled to waiver under the “defeat the purpose of the Act” clause the “against equity and good conscience” clause must be considered by the Office in the written decision.<sup>15</sup>

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

Although the Office found that appellant was without fault in the matter of the overpayment, repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. The Office accepted all the financial disclosures of appellant on the overpayment recovery questionnaire and correctly noted that her monthly income exceeded monthly expenses by more than \$125.00. This means that appellant does not need substantially all of her current income to meet current ordinary and necessary living expenses.<sup>16</sup> The Office properly concluded that recovery of the overpayment would not cause hardship to appellant or defeat the purpose of the Act.

Further, as it appears that appellant would not experience severe financial hardship in attempting to repay the debt and she made no argument that she gave up a valuable right or changed her position for the worse in reliance on the overpaid compensation. Recovery of the overpayment is not considered to be against equity and good conscience.

The Board notes that it does not have jurisdiction to review the Office’s finding directing recovery of the overpayment. The Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.<sup>17</sup>

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<sup>11</sup> An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

<sup>12</sup> *W.F.*, 57 ECAB \_\_\_\_ (Docket No. 06-769, issued August 11, 2006).

<sup>13</sup> 20 C.F.R. § 10.437(a).

<sup>14</sup> *Id.* at § 10.437(b).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b) (May 2004)

<sup>16</sup> *Id.* at 6.200.6(a)(1)-(4) (September 1994).

<sup>17</sup> *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$2,021.78. The Board further finds that the Office properly determined that appellant was not entitled to waiver.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 9, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 20, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board