

FACTUAL HISTORY

The Office accepted that on September 11, 1987 appellant, then a 33-year-old painter, sustained lumbosacral strain in the performance of duty. He received continuation of pay from September 12 to October 26, 1987 and compensation from the Office for total disability beginning May 9, 1988.

By decision dated October 22, 1991, the Office reduced appellant's compensation based on its finding that his actual earnings as a part-time painter helper fairly and reasonably represented his wage-earning capacity. In a decision dated April 20, 1993, the Office reduced appellant's compensation based on its finding that his actual earnings as a full-time painter helper fairly and reasonably represented his wage-earning capacity.

On September 18, 1996 the employing establishment notified the Office that, on September 11, 1987, the date of injury, appellant earned four percent premium pay for dirty work.² On December 4, 1996 the Office found that he was incorrectly paid at a pay rate of \$397.20 per week from October 27, 1987 to September 14, 1996. The Office determined that it should have paid him at a pay rate of \$413.08 per week and calculated that he was entitled to receive a payment of \$6,305.81.

By decision dated February 22, 2008, the Office amended its October 22, 1991 wage-earning capacity determination.³ It noted that it had adjusted appellant's pay rate to include dirty-work pay but failed to include his compensation for dirty pay in determining the current pay rate for his date-of-injury position. The Office recalculated his wage-earning capacity by dividing his actual earnings by the current pay rate for the position held at the time of injury.⁴ It found that appellant had actual earnings of 67 percent of his original wage rather than 71 percent of his original wage as found in the October 22, 1991 decision.

By decision dated February 25, 2008, the Office modified its April 20, 1993 wage-earning capacity determination. It found that it had failed to include his compensation for dirty pay in calculating his current pay rate for his date-of-injury position. The Office recalculated his

² In a decision dated February 27, 1997, the Office granted appellant a schedule award for a 37 percent permanent impairment of the right lower extremity. On November 5, 1997 the hearing representative set aside the February 27, 1997 decision and remanded the case for clarification of the extent of permanent impairment. By decision dated January 7, 1998, the Office granted appellant a schedule award for a three percent right lower extremity impairment. By decision dated June 14, 2000, the Board set aside the January 7, 1998 decision and remanded the case for further development of the medical evidence. Docket No. 98-1371. By decision dated November 6, 2001, the Office determined that appellant had no more than three percent right lower extremity impairment. On June 7, 2002 the Office granted him a schedule award for a six percent permanent impairment of the left lower extremity.

³ Appellant sustained a herniated disc in the performance of duty on November 19, 1999, assigned file number xxxxxx692. The Office paid him compensation for total disability for this injury beginning January 14, 2000. By decision dated December 6, 2001, it found that appellant's actual earnings as a supply clerk fairly and reasonably represented his wage-earning capacity.

⁴ *Albert C. Shadrick*, 5 ECAB 276 (1953); 20 C.F.R. § 10.403. Section 10.403(d) provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.

wage-earning capacity and found that he had actual earnings equivalent to 90 percent of his date-of-injury wages rather than 95 percent of his original wage as found in the April 20, 1993 decision.

On March 20, 2008 the Office notified appellant of its preliminary determination that he received an overpayment of \$635.27 because it paid him compensation at an inaccurate rate for the period November 9, 1997 through June 15, 2002. It found that he was without fault in creating the overpayment. The Office stated:

“After review of the case record, it was determined that you were paid at an incorrect pay under the wage[-]earning capacity decision dated October 22, 1991, because your employing agency failed to report that you were entitled to premium pay for ‘Dirty Pay’ which was equal to four percent of your pay. Therefore, a separate decision was issued to amend the October 22, 1991, wage[-]earning capacity decision.

“Our office attempted to adjust your initial date of injury pay rate to include your ‘Dirty Pay’ into your wage[-]earning capacity; however, we failed to include the four [percent] ‘Dirty Pay’ into the current pay rate for the date-of-injury job [] effective on February 8, 1993. Thus an overpayment occurred for the period November 9, [1997] through June 15, 2002.”⁵

The Office found that it had paid appellant \$11,270.42 for the period November 9, 1997 through June 15, 2002 but owed him only \$10,635.15, which yielded an overpayment of \$635.27. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, the Office notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

By letter dated April 3, 2008, a claims examiner indicated that he spoke with appellant on that date regarding the overpayment of \$635.27. He noted that appellant believed that the Office owed him money. The claims examiner advised him to follow his appeal rights which accompanied the March 20, 2008 letter.

On April 10, 2008 appellant requested a telephone conference. He questioned why the Office found an overpayment when a claims examiner previously found an underpayment of compensation. Appellant submitted a completed overpayment recovery questionnaire.

By letter dated May 1, 2008, the Office informed appellant that it had found an underpayment for the period March 31, 1996 to February 1, 1997 in the amount of \$445.00, an overpayment from October 20, 1991 to February 7, 1993 in the amount of \$35.55,⁶ an underpayment for the period November 3, 2002 to February 16, 2008 in the amount of \$171.99 and an overpayment for the period November 9, 1997 to June 15, 2002 in the amount of \$635.27.

⁵ The Office found an overpayment beginning November 9, 1997 rather than November 9, 2007.

⁶ The Office administrative terminated collection of this overpayment.

At the telephone conference, held on May 8, 2008, the Office questioned appellant about his financial information. By decision dated June 3, 2008, it finalized its finding that he received an overpayment of \$635.27 for the period November 9, 1997 to June 15, 2002 because he was paid at an incorrect rate. The Office further finalized its finding that he was without fault in the creation of the overpayment but determined that he was not entitled to waiver of the overpayment. It determined that appellant should send a check every month of \$50.00 to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

The Office is required by its statute and regulation to make findings of fact. Section 8124(a) provides: "The [Office] shall determine and make a finding of facts and make an award for or against payment of compensation." Its regulations provide that an Office decision "shall contain findings of fact and a statement of reasons."⁷ The Office decision should contain a discussion of the issues, a background framework so that the reader can understand the issues at hand, a discussion of the relevant evidence, a basis for the decision and a conclusion.⁸ Its procedures further specifies that a final decision must provide clear reasoning which allows the claimant to "understand the precise defect of the claim and the kind of evidence which would overcome it."⁹ Thus, a final decision must include findings of fact and a description of the basis for the findings so that the parties of interest will have a clear understanding of the reasoning behind the decision.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision on the issue of whether appellant received an overpayment of compensation. The record establishes that the Office paid appellant at an incorrect rate. The employing establishment informed the Office on September 18, 1996 that appellant was entitled to receive four percent premium pay because he performed "dirty work" at the time of his injury on September 11, 1987. The Office's procedure manual provides that "dirty-work pay" for employees who "work under conditions which soil the body or clothing more than normally expected in performing the duties of the job" is an element included in determining a claimant's pay rate for compensation purposes.¹¹ On December 4, 1996 the Office found that it had paid him at an incorrect rate from October 27, 1987 to September 14, 1996 because it did not include premiums for "dirty-work pay" in his pay rate and calculated that he was entitled to a payment of \$6,305.81. By decision dated February 22, 2008, the Office modified its October 22, 1991 wage-earning capacity after finding that it failed to adjust appellant's pay rate to include dirty-work pay in calculating the current pay rate for his

⁷ 20 C.F.R. § 10.126.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (March 1997).

⁹ *Id.*

¹⁰ *Paul M. Colosi*, 56 ECAB 294 (2005).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.7(b)(14) (December 1995).

date-of-injury position. It found that he earned 67 percent of his original wages rather than the 71 percent found in its October 22, 1991 decision. In a decision dated February 25, 2008, the Office modified its April 20, 1993 wage-earning capacity based again on its finding that it had not adjusted appellant's pay rate to include dirty-work pay in calculating the current pay rate for his date-of-injury position. It found that he earned 90 percent of his original wage rather than its previous determination that he earned 95 percent of his original wage.

The Office, in its March 20, 2008 preliminary determination of overpayment and its June 3, 2008 decision finalizing the overpayment, concluded that appellant had received an overpayment because it paid him for a loss of wage-earning capacity at an incorrect rate. It indicated that it failed to include premium pay in the form of dirty-work pay in calculating the current pay rate for his date-of-injury position. The Office, however, did not explain in its decision how the failure to include appellant's premium pay in his current pay rate for the date of injury resulted in an overpayment of compensation. Its decisions modifying his wage-earning capacity to include premiums for dirty-work pay in his current pay rate found that his actual earnings constituted a lower percentage of his original wage than previously determined.¹² In its overpayment decision, the Office concluded that it owed appellant \$10,635.15 rather than \$11,270.42 for the period November 9, 1997 through June 15, 2002 without setting forth its calculations.

The Office is required to make findings of fact and a statement of reasons regarding the material facts of the case.¹³ Its findings should be sufficiently detailed so that the claimant can understand the reasoning behind the decision.¹⁴ At present, appellant is not able to understand the precise defect of the claim and the kind of evidence which would tend to overcome it.¹⁵ The Office's failure to provide factual findings and explain the basis for its conclusion that appellant received an overpayment of compensation also precludes the Board's review of this decision. The case is, therefore, remanded to the Office for an appropriate decision that properly sets forth its calculation of any overpayment.

CONCLUSION

The Board finds that the case is not in posture for decision on the issue of whether appellant received an overpayment of compensation.¹⁶

¹² Under the *Shadrick* formula, a claimant's wage-earning capacity is expressed as a percentage by dividing actual earnings by the current earnings for the date-of-injury position. The wage-earning capacity is then multiplied by the pay rate for compensation purposes. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity. *Albert C. Shadrick, supra* note 4; 20 C.F.R. § 10.403(e).

¹³ 20 C.F.R. § 10.126; *Beverly Dukes*, 46 ECAB 1014 (1995).

¹⁴ See *Paul M. Colosi, supra* note 10.

¹⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (July 1997).

¹⁶ In view of the Board's disposition of the issue of fact of overpayment, it is premature to address the issues of the amount of the overpayment and whether appellant is entitled to waiver of the recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 3, 2008 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 17, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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