United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket No. 09-1440**
	)	**Issued: April 12, 2010**
DEPARTMENT OF THE ARMY, COMMISSARY, Bamberg, Germany, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 22, 2009 appellant filed a timely appeal from the November 5, 2008 merit decision of the Office of Workers' Compensation Programs, which reduced his wage-loss compensation to reflect his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office's December 1, 2008 merit decision finding an overpayment of compensation.[1]

ISSUES

The issues are: (1) whether the Office properly reduced appellant's wage-loss compensation to reflect his wage-earning capacity as a pharmacy technician; and (2) whether the Office properly found that appellant was at fault in creating a $3,282.08 overpayment of compensation from July 21 to August 30, 2008.

[1] Appellant identified the December 1, 2008 decision on his application for review but did not explain his disagreement and made no factual or legal argument directly relating thereto. *See* 20 C.F.R. § 501.3(c)(5) (contents of notice of appeal).

FACTUAL HISTORY

On September 20, 1989 appellant, then a 28-year-old warehouse foreman, sustained an injury in the performance of duty when a forklift ran over his right foot. He stopped work at that time. The Office accepted his claim for décollement of the right heel.[2] Through direct deposit, appellant received compensation for temporary total disability on the periodic rolls.

On July 21, 2008 appellant returned to work full time as a pharmacy technician with the Department of Veterans Affairs earning $33,135.00 per year. The Office continued to pay compensation for total disability through August 30, 2008.[3]

On September 12, 2008 the Office made a preliminary determination that appellant received a $3,310.69 overpayment from July 21 to August 30, 2008 because he received net compensation in that amount after returning to work.[4] It found that he was at fault in creating this overpayment because he should have known that he could not receive compensation for wage loss and earnings from employment at the same time.

In a decision dated November 5, 2008, the Office reduced appellant's wage-loss compensation based on his wage-earning capacity as a pharmacy technician. It found that the duties of his position reflected the work tolerance limitations established by the weight of the medical evidence. The Office noted that appellant had been working in his current position for over 60 days.

The Office compared appellant's actual weekly earnings in his new job, $635.07,[5] to the current pay rate of his date-of-injury job, $929.92.[6] This showed that he had the capacity to earn 68 percent of his previous wages, but still had a 32 percent loss of wage-earning capacity as a result of his employment injury, for which he remained entitled to compensation. Appellant's pay rate at the time of injury was $506.40 per week,[7] 32 percent of which was $162.05 per week in lost wages. At a compensation rate of 75 percent, appellant's weekly compensation came to $121.54, effective September 20, 1989, the date of injury. With increases in the Consumer Price Index, this rose to $200.25 per week through 2008, or $801.00 in gross compensation every 28 days effective July 21, 2008. The Office showed its calculation on Form CA-816.

On November 14, 2008 the Office paid appellant compensation for his newly determined loss of wage-earning capacity beginning July 22, 2008.

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[2] A separation of adherent tissues or degloving injury.

[3] On August 2, 2008 appellant received $2,260.96 in compensation for the period July 6 to August 2, 2008. On August 30, 2008 he received the same amount of compensation for the period August 3 to 30, 2008.

[4] $2,260.96 every 28 days / 28 * 41 days = $3,310.69.

[5] $33,135.00 per year / 2,087 hours * 40 hours = $635.07 per week.

[6] $23.17 per hour * 2,087 hours / 52 weeks = $929.92 per week.

[7] $12.66 per hour * 40 hours = $506.40 per week. His grade was WS-5, Step 2.

In a decision dated December 1, 2008, the Office found that appellant received a $3,282.08 overpayment from July 21 to August 30, 2008. It calculated the amount by taking the net compensation appellant received during that period, $3,310.69, and reducing it by the compensation he should have received on July 21, 2008, $28.61.[8] The Office found he was at fault in creating the overpayment because he should have known that he could not receive wage-loss compensation and employment earnings for the same period and should have requested that his compensation payments be adjusted after he returned to work on July 21, 2008. It decided to recover the overpayment by deducting $50.00 from appellant's continuing compensation payments.

On appeal, appellant contends that the Office miscalculated his wage-loss compensation, as it did not compute with what the Office stated in its November 5, 2008 decision: "Or, in other words, we are paying you ¾ of the difference between what you are making and what you would have made had you not been injured." He noted that he would have made $48,356.00 annually, 75 percent of which was $36,267.00. "The difference is totaled to $45,879 annual, but not $48,356 as justified in the document. The difference is approximately $207.00 not being included per month."

Appellant also argued that cost-of-living increases should be included. He stated that his weekly salary as a pharmacy technician was much less than the Office's figure of $635.07. He indicated that he was a WS-5, Step 3 when he was terminated at the expiration of his appointment as a warehouse foreman in 1991.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.[9] A partially disabled employee with one or more dependents is entitled to compensation equal to 75 percent of the difference between his pay[10] and his wage-earning capacity after the beginning of the partial disability.[11]

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings fairly and reasonably represent his wage-earning capacity.[12] Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that

[8] $801.00 every 28 days / 28 = $28.61 per day.

[9] 5 U.S.C. § 8102(a).

[10] *See id*. at § 8101(4) (defining pay as pay at the time of injury, pay at the time disability begins, or pay at the time compensable disability recurs if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater).

[11] *Id*. at § 8106(a).

[12] *Id*. at § 8115(a).

they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[13]

In the case of *Albert C. Shadrick*,[14] the Board set forth the principle that if current actual earnings are used as one of the factors in computing an employee's wage-earning capacity, then the current increased wage for the employee's original job should also be used to avoid any distortions caused by changes in business conditions since the injury. Following this principle, the Office established the "*Shadrick*" formula as the method of computing compensation when determining an injured worker's wage-earning capacity.[15]

When pay is reported as an annual salary, the weekly pay rate is computed by dividing the reported annual salary or average annual earnings by 52. When pay is reported on an hourly basis, the amount is multiplied by 2,087 (by administrative determination, the number of hours in a full work year based on a 40-hour workweek) and then divided by 52.[16]

ANALYSIS -- ISSUE 1

Appellant expressed no disagreement with the purpose of the Office's November 5, 2008 decision, which was to reduce the compensation he was receiving for total wage loss because he returned to work on July 21, 2008 and once again began earning wages. As the Office found, appellant has demonstrated his capacity to perform the duties of his pharmacy technician position for a period of months. As wages actually earned are generally the best measure of wage-earning capacity, appellant's annual wages of $33,135.00 must be accepted as his wage-earning capacity. There is no evidence showing that these wages do not fairly and reasonably represent his wage-earning capacity.

Appellant does question the Office's calculations. He disputes the Office's weekly salary figure of $635.07 and states that he earned much less. An annual salary of $33,135.00 divided by 2,087 work hours in a year times 40 hours in a week equals $635.07. The Office's determination of appellant's actual weekly earnings is correct.

Appellant also disputed the Office's use of his date-of-injury pay rate, when he was a WS-5, Step 2. He indicated the Office should use his higher pay rate in 1991, when he was terminated as a WS-5, Step 3. The law provides that the Office must use appellant's pay at the time of injury, pay at the time disability began or pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater. Appellant stopped work when he

[13] *Don J. Mazurek*, 46 ECAB 447 (1995).

[14] 5 ECAB 376 (1953).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (December 1993). For the formula itself, see *id*., *Computing Compensation*, Chapter 2.901.15.c (October 2009).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.10 (April 2002).

was injured on September 20, 1989, and he suffered no qualifying recurrence. The Office properly paid compensation based on his date-of-injury pay rate as a WS-5, Step 2.

Appellant further argues that the cost-of-living increases should be included. They were. When the Office compared appellant's actual earnings as pharmacy technician to the current pay of his date-of-injury job, as the *Shadrick* formula requires, it determined that he still had a 32 percent loss of wage-earning capacity due to his accepted injury. Thirty two percent of his date-of-injury pay rate, $506.40 per week, was $162.05 per week in lost wages. At the compensation rate of 75 percent, this meant appellant was entitled to $121.54 per week in gross compensation. That was in 1989 dollars. So the Office applied all applicable increases in the Consumer Price Index from the date of injury through 2008, which increased the $121.54 figure to $200.25 per week, or $801.00 in gross compensation every 28 days. The Board has thoroughly reviewed the Office's November 5, 2008 decision and finds that the Office properly reduced appellant's compensation for wage loss to reflect his wage-earning capacity as a pharmacy technician. The Board will affirm the Office's November 5, 2008 decision.

The second page of the Office's decision provides a few figures but does not sufficiently explain how the Office determined appellant's entitlement to continuing compensation for wage loss beginning July 21, 2008. It does not show, for example, the Office's application of cost-of-living increases. The Office should provide appellant with a copy of its Form CA-816, including the attachment.[17]

The mistake appellant makes in his calculations on appeal is taking 75 percent of the current pay of his date-of-injury job, $48,356.00, or what he would have made had he not been injured. Before multiplying anything by the compensation rate of 75 percent, he needs to divide his current weekly pay of $635.07 by what he would have made, $929.92, to find his wage-earning capacity. Subtracting the percentage from one tells him his loss of wage-earning capacity and that percentage times his pay rate at the time of injury, $506.40 per week, will show the lost wages resulting from his injury, $162.05. Appellant may then multiply this amount by 75 percent to see how much compensation he would be entitled to in 1989. With cost-of-living increases, this comes to $200.25 per week effective July 21, 2008, or $801.00 in gross compensation every 28 days, which the Office began paying.

LEGAL PRECEDENT -- ISSUE 2

The Act places limitations on the right to receive compensation: While an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, with certain exceptions.[18] It is therefore well established that an employee is not entitled to compensation for temporary total disability after returning to work.[19] "Temporary

[17] On the form, "Weekly Compensation Amount" means weekly compensation after application of cost-of-living increases, shown at the bottom of the page.

[18] 5 U.S.C. § 8116(a).

[19] *E.g., Tammi L. Wright*, 51 ECAB 463, 465 (2000) (where the record established that the employee returned to work at the employing establishment for four hours per day from August 7, 1996 to January 8, 1997 but received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

total disability" is defined as the inability to return to the position held at the time of injury or earn equivalent wages or perform other gainful employment.[20]

When an overpayment of compensation has been made 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 8129(b) describes the only exception:

> "Adjustment or recovery by the United States may not be made when incorrect payment had 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."[21]

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 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 knew or should have known to be incorrect; or (2) Failed to provide information which he knew or should have known to be material; or (3) Accepted a payment which he knew or should have known to be incorrect.[22]

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he is being overpaid.[23]

ANALYSIS -- ISSUE 2

There is no question that an overpayment occurred. Appellant returned to work on July 21, 2008 but received wage-loss compensation for total disability through August 30, 2008. No employee is entitled to compensation for total disability after returning to work. Appellant received more compensation than he should have from July 21 to August 30, 2008. The Board will therefore affirm the Office's December 1, 2008 decision on the issue of fact of overpayment.

In its September 12, 2008 preliminary determination, the Office found that the overpayment was $3,310.69, or every dollar of compensation paid from July 21 to August 30, 2008. This amount assumed that appellant returned to work with no loss of wage-earning capacity. In other words, the Office assumed that he was earning at least as much in his

[20] 20 C.F.R. § 10.400(b).

[21] 5 U.S.C. § 8129(b).

[22] 20 C.F.R. § 10.433(a).

[23] *Id*. at § 10.433(b).

new position as the current pay of his date-of-injury position. This was not the case. As the Office found in its November 5, 2008 decision, appellant still had a 32 percent loss of wage-earning capacity resulting from the accepted injury and was still entitled to $801.00 in gross compensation every 28 days, notwithstanding his actual earnings as a pharmacy technician. So while he was not entitled to the entire $3,310.69 in compensation he did receive, he was entitled to some portion of it.

Normally, the amount of the overpayment would be the $3,310.69 in compensation appellant did receive minus the compensation he should have received over the same period. But on November 14, 2008 the Office paid appellant the compensation he should have received beginning July 22, 2008.[24] The amount of the overpayment from July 22 to August 30, 2008, therefore, is equal to the compensation he originally received for that period: $2,260.96 every 28 days divided by 28 times 40 days, or $3,229.94.

The Office's November 14, 2008 payment did not cover July 21, 2008, so the overpayment that day is the compensation appellant did receive ($2,260.96 divided by 28, or $80.75) minus the compensation he should have received ($801.00 divided by 28, or $28.61). The total overpayment from July 21 to August 30, 2008 is $3,229.94 plus $52.14, or $3,282.08, which is what the Office found. The Board will affirm the Office's December 1, 2008 decision on the issue of amount of overpayment.

The Office found that appellant was at fault in creating the overpayment because he: (1) should have known that he could not receive wage-loss compensation and employment earnings for the same period and (2) should have requested that his compensation payments be adjusted after he returned to work on July 21, 2008. The first reason, addressing receipt, suggests that appellant accepted a payment which he knew or should have known to be incorrect. As noted, however, appellant was entitled to wage-loss compensation and employment earnings for the same period due to his loss of wage-earning capacity. So the circumstances are more complex than the Office's finding suggests.

Further, there are three incorrect payments at issue in this $3,282.08 overpayment: the August 2 and 30, 2008 payments for $3,310.69 in total disability and the November 14, 2008 payment for partial loss of wage-earning capacity beginning July 22, 2008. To establish fault for accepting these payments, the Office must show in each case that appellant knew or should have

[24] Having already paid appellant too much compensation with the August 2 and 30, 2008 deposits, the Office owed appellant nothing more from July 21 to August 30, 2008. The November 14, 2008 payment only increased the overpayment by again paying compensation for loss of wage-earning capacity from July 22 to August 30, 2008.

known at the time of deposit that the payment was incorrect.[25] The Office has not made this showing.

The second reason cited in the Office's December 1, 2008 decision suggests that appellant failed to provide information which he knew or should have known to be material. The Office did not give appellant notice in its preliminary determination that it would be basing its finding of fault on these grounds. So the Office deprived him of an opportunity to be heard on the matter. The Board has held that this a violation of due process.[26]

The Board will set aside the Office's December 1, 2008 decision on the issue of fault. The Office has failed to establish that appellant did not exercise the degree of care expected given the complexity of the circumstances and his capacity to realize that he was being overpaid.

The Office decided to recover the overpayment by deducting $50.00 from appellant's continuing compensation payments. Because it has not established that he was at fault in creating the overpayment, appellant may be eligible for consideration of waiver. For this reason, the Board will set aside the Office's December 1, 2008 decision on the issue of recovery from continuing compensation.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation for wage loss to reflect his wage-earning capacity as a pharmacy technician. The Board also finds that a $3,282.08 overpayment in compensation arose from July 21 to August 30, 2008. The Office did not properly determine that appellant was at fault in creating the overpayment or that recovery should be made from continuing compensation payments.

[25] *Tammy Craven*, 57 ECAB (2006) (*order granting petition for recon., denying the Director's request for oral argument and reaffirming prior Board decision*) (holding that acceptance occurs in direct deposit cases when the funds are placed in the employee's account and that fault for acceptance must be judged by what the employee knew or should have known at the time of deposit).

[26] *Dorothy F. Ellis*, 41 ECAB 296 (1989).

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2008 decision of the Office of Workers' Compensation Programs is affirmed. The Office's December 1, 2008 decision is affirmed on the issues of fact and amount of overpayment but is otherwise set aside. The case is returned for further proceedings conforming to this decision.

Issued: April 12, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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