

FACTUAL HISTORY

OWCP accepted that on March 1, 1997 appellant, then a 42-year-old materials handler, sustained a lumbar strain, right hamstring strain and herniated discs at C5-6 and L5-S1 when he stepped into a hole in a pallet.² He stopped work on March 1, 1997 and did not return.

On October 5, 2000 Dr. Michael Slomka, a Board-certified orthopedic surgeon serving as an OWCP referral physician, determined that appellant was capable of performing sedentary work on a full-time basis and recommended training. He provided work restrictions, including no lifting, pushing or pulling more than 25 pounds and no walking or standing for more than four hours. In late October 2000, appellant began participating in an OWCP-sponsored vocational rehabilitation program designed to return him to work.

In a November 21, 2000 report, Dr. Fred Turner, an attending Board-certified orthopedic surgeon, noted that appellant stated that he was being placed in a vocational rehabilitation program for retraining into a sedentary occupation. He recommended that appellant return to work in a light-duty capacity with no lifting, no driving over two hours, no overhead reaching and limited computer work in a job that would allow frequent position changes. Dr. Turner advised that appellant was not a surgical candidate.

An Individual Placement Plan was developed with the goal of locating appellant with a new employer in the customer service field. Appellant attended training as a customer service representative at the Leahy Technical Center and completed training on June 27, 2001. He was provided 90 days of placement assistance but was unsuccessful in returning to work. In October 2001, appellant's rehabilitation counselor determined that appellant could perform the position of customer-complaint clerk. The labor market surveys showed that such work was reasonably available in his commuting area at a salary of \$360.00 a week. The position was sedentary in nature and involved investigating and resolving issues that customers had with merchandise and services. It required occasional lifting of up to 10 pounds and occasional reaching and allowed accommodation for taking breaks.

Dr. Stanley Dennison, an attending Board-certified anesthesiologist, referred appellant to Dr. Thomas Newman, a Board-certified neurologist. On October 8, 2001 Dr. Newman reported a normal motor and sensory examination and advised that appellant should be capable of light-duty employment.

OWCP mailed Dr. Dennison copies of the description of the customer-complaint clerk position and asked him to complete a work restrictions form. In a January 9, 2002 work restrictions form, Dr. Dennison stated that appellant could work 8 hours a day with the limitations of no lifting over 20 pounds and 15-minute breaks twice per day with a lunch break.

In a February 13, 2002 letter, OWCP advised appellant that it proposed to reduce his compensation based on its determination that his wage-earning capacity was represented by the

² OWCP had previously accepted that appellant sustained a left ankle strain at work on June 12, 1995. It was later accepted that he had an adjustment disorder and psychogenic pain as a consequence of the March 1, 1997 injury.

constructed position of customer-complaint clerk. It provided him 30 days to submit evidence and argument challenging the proposed action. Appellant submitted several medical reports but they did not address his ability to work.

In a March 20, 2002 decision, OWCP reduced appellant's compensation effective March 24, 2002 based on its finding that his wage-earning capacity was represented by the constructed position of customer-complaint clerk. The decision included an attached description of his appeal rights and was mailed to his address of record.

In a March 26, 2002 letter, appellant requested a hearing. In a November 1, 2002 decision, OWCP determined that he had abandoned his request for a hearing.

In a May 20, 2010 letter, OWCP advised appellant of its preliminary determination that he received a \$134,838.03 overpayment of compensation. It noted that he was advised by a March 20, 2002 decision that his compensation was being reduced effective March 24, 2002 based on his ability to work in the constructed position of customer-complaint clerk; but he received compensation at the total disability rate until April 10, 2010 when his compensation was reduced in accordance with the March 20, 2002 decision. OWCP made a preliminary determination that he was at fault in creating the overpayment because he accepted payments that he knew or reasonably should have known were incorrect. It provided appellant an opportunity to challenge the overpayment and directed him to complete an attached financial information questionnaire.³

In a February 25, 2011 report, Dr. Robert Guirguis, an attending osteopath and Board-certified physiatrist, noted treating appellant since January 2009. Appellant was being treated for lumbar radiculopathy secondary to an L5-S1 annular tear and extrusion as well as cervical radiculopathy secondary to paracentral cervical disc herniation. Dr. Guirguis stated, "These above injuries are functionally limiting [appellant's] abilities and his overall activities of daily living and hence, disabling. The current pain being treated is related to the industrial injury dated March 1, 1997. Appellant's current pain is not secondary to any preexisting conditions nor are there any such conditions to my knowledge.... His work status is disabled."

In a March 9, 2011 report, Dr. Harold Linde, an attending clinical psychologist, noted Dr. Guirguis' February 25, 2011 opinion that appellant's L5-S1 annular tear and extrusion of his cervical radiculopathy secondary to paracentral cervical disc herniation were the limiting factors for him not being able to work. He advised that over the years appellant had made several attempts to try and return to active employment through retraining and education, but these attempts failed due to his chronic pain condition. Dr. Linde stated, "Therefore, it is my opinion also that [appellant] is disabled from returning to active employment."

On August 25, 2011 appellant participated in a precoupment hearing regarding the May 20, 2010 preliminary overpayment determination. He testified that he never received a final

³ The record contains documents showing that appellant was paid \$220,667.76 in compensation between March 24, 2002 and April 10, 2010. The documents further show that, due to the March 20, 2002 wage-earning capacity decision, he was only entitled to receive \$85,829.73 for this period. The difference between these two figures is the overpayment of \$134,838.03.

decision with appeal rights regarding the proposed reduction of his compensation in 2002 based on his ability to work as a customer-complaint clerk. Appellant claimed that he did not learn of this reduction in his compensation until May 2010.⁴

In a November 8, 2011 decision, an OWCP hearing representative finalized OWCP's preliminary determination that appellant received a \$134,838.03 overpayment of compensation. He also finalized OWCP's preliminary finding that appellant was at fault in creating the overpayment, thereby precluding waiver of recovery. The hearing representative indicated that the record clearly showed that the March 20, 2002 decision reducing appellant's compensation contained appeal rights and was mailed to his proper address.⁵

In a December 5, 2011 letter, appellant alleged that his work-related condition had worsened and that he could not perform the constructed customer-complaint clerk position. He requested that the March 20, 2002 wage-earning capacity decision be modified.

In a December 20, 2011 letter, OWCP advised appellant of the standards for modifying a wage-earning capacity determination and afforded him 30 days to submit additional evidence.

Appellant submitted a number of medical documents, including several reports of Dr. Guirguis. In a January 4, 2012 report, Dr. Guirguis diagnosed lumbalgia, lumbar facet arthropathy, cervical radiculopathy, left arm radiculitis, cervical facet joint disease, muscle spasm and bilateral sacroiliitis. He stated that appellant's condition had worsened and he reported increased pain associated with more myospasm in the cervical and lumbar regions as well as increased generalized allodynia. Dr. Guirguis stated that appellant had reduced upper extremity strength compared to previous examinations.

In December 27, 2011 and January 31, 2012 reports, Dr. Linde stated that on several office visits in December 2011 and January 2012 appellant reported flare-ups of his lumbar and cervical pain. He noted that appellant appeared depressed and anxious at a number of these visits.

In a February 8, 2012 decision, OWCP denied modification of its March 20, 2002 wage-earning capacity decision. It found that the evidence did not establish that appellant sustained a material change in his condition, that he was retrained or vocationally rehabilitated or that the original wage-earning capacity decision was erroneous. OWCP determined that the medical evidence did not show that the injury-related condition had materially worsened.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity decision is a determination that, a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn

⁴ Appellant advised that he paid a monthly mortgage of about \$700.00 and received compensation of about \$475.00 every 28 days. The record shows that he actually was entitled to receive about \$551.00 in compensation each month, but that \$75.00 was deducted each 28 days for court-ordered support payments.

⁵ The hearing representative indicated that he was unable to determine an equitable repayment schedule for the overpayment.

wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁶ OWCP's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless appellant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."⁷

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.¹⁰ When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP or to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹¹

⁶ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁸ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁹ *Id.*

¹⁰ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a). Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives. *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

¹¹ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953). See also Federal (FECA) Procedure Manual, *supra* note 7, Chapter 2.814.8 (December 1993).

ANALYSIS -- ISSUE 1

OWCP accepted that on March 1, 1997 appellant sustained a lumbar strain, right hamstring strain and herniated discs at C5-6 and L5-S1 when he stepped into a hole in a pallet.¹² In a March 20, 2002 decision, it reduced his compensation effective March 24, 2002 based on its determination that his wage-earning capacity was represented by the constructed position of customer-complaint clerk. In a December 5, 2011 letter, appellant alleged that his work-related condition had worsened and that he was no longer able to perform the constructed position of customer-complaint clerk. He requested that the March 20, 2002 wage-earning capacity determination be modified.

OWCP based appellant's loss of wage-earning capacity on a determination that his wage-earning capacity was represented by wages he could earn in the constructed position of customer-complaint clerk. Appellant did not submit evidence showing that OWCP's original determination with regard to his wage-earning capacity was erroneous. His vocational rehabilitation counselor determined that he was able to perform the position of customer-complaint clerk and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within his commuting area.¹³ OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the customer-complaint clerk position. A review of the medical evidence, including the reports of Dr. Dennison, an attending Board-certified anesthesiologist, reveals that appellant was physically capable of performing the position.¹⁴ Appellant did not submit any evidence or argument showing that he could not vocationally or physically perform the customer-complaint clerk position.

OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the customer-complaint clerk position represented his wage-earning capacity.¹⁵ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the customer-complaint clerk position and that such a position was reasonably available within the general labor market of his commuting area. Therefore, OWCP properly based his wage-earning capacity effective March 24, 2002 on the customer-complaint clerk position. For these reasons, appellant has not shown that OWCP's original determination with regard to his wage-earning capacity was erroneous.

¹² OWCP previously accepted that appellant had a left ankle strain at work on June 12, 1995. It later accepted that appellant had an adjustment disorder and psychogenic pain as a consequence of the March 1, 1997 injury.

¹³ The position of customer-complaint clerk was sedentary in nature and involved investigating and resolving issues that customers had with merchandise and services. It required engaging in occasional lifting of up to 10 pounds and occasional reaching and allowed accommodation for taking breaks.

¹⁴ In a January 9, 2002 work restrictions form, Dr. Dennison stated that appellant could work 8 hours a day with the limitations of no lifting over 20 pounds and 15-minute breaks twice per day with a lunch break. These restrictions would allow appellant to perform the position of customer-complaint clerk.

¹⁵ See *Clayton Varner*, 37 ECAB 248, 256 (1985).

Appellant alleged that there was a material change in the nature and extent of his employment-related condition. However, the medical evidence of record does not show such a material change in his injury-related condition. The medical evidence does not contain a rationalized medical opinion showing that an employment-related condition prevented appellant from performing the customer-complaint clerk position or otherwise establish that OWCP improperly determined his wage-earning capacity.¹⁶

In a February 25, 2011 report, Dr. Guirguis, an attending physician, indicated that appellant was being treated for lumbar radiculopathy secondary to an L5-S1 annular tear and extrusion as well as cervical radiculopathy secondary to paracentral cervical disc herniation. He stated, "These above injuries are functionally limiting [appellant's] abilities and his overall activities of daily living and hence, disabling.... [Appellant's] work status is disabled." However, Dr. Guirguis did not describe any objective worsening of appellant's injury-related condition at this time or explain why he could not perform the extremely limited duties of a sedentary position like the consumer-complaint clerk position.

In a January 4, 2012 report, Dr. Guirguis diagnosed lumbalgia, lumbar facet arthropathy, cervical radiculopathy, left arm radiculitis, cervical facet joint disease, muscle spasm and bilateral sacroiliitis. He stated that appellant's condition had worsened and that he reported increased pain associated with more myospasm in the cervical and lumbar regions as well as increased generalized allodynia. Dr. Guirguis essentially reported an increase in reported symptoms, but he did not provide objective evidence of a material worsening in appellant's injury-related condition. He did not provide a clear opinion that the accepted work injuries stemming from the March 1, 1997 accident or other work-related injuries contributed to appellant's condition at this time such that he could not work as a customer-complaint clerk.¹⁷

Moreover, appellant has not been retrained or otherwise vocationally rehabilitated such that the customer-complaint clerk position would not be representative of his wage-earning capacity.

For these reasons, the Board finds that appellant did not meet his burden of proof to establish that modification of OWCP's wage-earning capacity decision was warranted.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

¹⁶ See *Norman F. Bligh*, 41 ECAB 230, 237-38 (1989).

¹⁷ Dr. Guirguis stated that appellant had reduced upper extremity strength compared to previous examinations, but it is not clear that this was due to the injury-related condition or that such a diminishment of strength would have prevented him from working in the sedentary position of a customer-complaint clerk. In reports dated March 9, December 27, 2011 and January 31, 2012, Dr. Linde, an attending clinical psychologist, discussed appellant's emotional condition. He did not provide any indication that appellant suffered a material worsening of his accepted emotional conditions, which would have prevented him from working as customer-complaint clerk.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA 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.¹⁸ Section 8129(a) of FECA provides, in pertinent part, “When an overpayment has been made to an individual under this subchapter 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.”¹⁹

Section 8116(a) of FECA provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.²⁰

ANALYSIS -- ISSUE 2

OWCP’s March 20, 2002 decision properly reduced appellant’s compensation effective March 24, 2002 based on a determination that his wage-earning capacity was represented by the constructed position of customer-complaint clerk. The record documents that appellant was paid \$220,667.76 in compensation between March 24, 2002 and April 10, 2010. The evidence further shows that, due to the March 20, 2002 wage-earning capacity decision, he was only entitled to receive \$85,829.73 for this period. The difference represents an overpayment of \$134,838.03. The record establishes that appellant received a \$134,838.03 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of FECA provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.²¹ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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 this subchapter or would be against equity and good conscience.”²² No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.²³

¹⁸ 5 U.S.C. § 8102(a).

¹⁹ *Id.* at § 8129(a).

²⁰ *Id.* at § 8116(a).

²¹ *Id.* at § 8129(a).

²² *Id.* at § 8129(b).

²³ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who--

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect....²⁴

Section 10.433(c) of OWCP’s regulations provide:

“Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”²⁵

ANALYSIS -- ISSUE 3

OWCP found appellant at fault in the creation of the \$134,838.03 overpayment because he accepted payments which he knew or should have known to be incorrect. It properly determined that he was at fault in the creation of the overpayment.

Appellant received \$220,667.76 in compensation between March 24, 2002 and April 10, 2010, but was only entitled to receive \$85,829.73 for this period. He claimed that he never received a final decision with appeal rights regarding the proposed reduction of his compensation in 2002 based on his ability to work as a customer-complaint clerk. Appellant asserted that he did not learn of the reduction in his compensation until May 2010. However, the record contains a March 20, 2002 final decision informing him of the specific details of the reduction of his compensation effective March 24, 2002. The decision contained attached appeal rights and was mailed to appellant’s address of record. In a March 26, 2002 letter, appellant requested a hearing before an OWCP hearing representative to challenge OWCP’s decision to reduce his compensation. In a November 1, 2002 decision, OWCP determined that appellant had abandoned his request for a hearing. On appeal, appellant suggested that he was not mentally competent to understand that he received an overpayment, but he did not present evidence to support this assertion.

Appellant’s contention that he was not aware of the reduction of his compensation effective March 24, 2002 is without merit. He received total disability compensation after

²⁴ 20 C.F.R. § 10.433(a).

²⁵ *Id.* at § 10.433(c).

March 24, 2002 and knew or should have known that this was incorrect. OWCP made a mistake by not reducing his compensation in accordance with its March 20, 2002 decision. Even though it may have been negligent in continuing to issue wage loss for total disability after it reduced his compensation due to a wage-earning capacity determination, this does not excuse his acceptance of such checks which he knew or should have been expected to know were incorrect.²⁶ Given the extremely large amount of compensation appellant received to which he was not entitled, as well the lengthy period he received these payments, he accepted payments between March 24, 2002 and April 10, 2010, which he knew or should have known were incorrect. Because he was at fault in the creation of the \$134,838.03 overpayment, OWCP properly determined that he would not be entitled to waiver of recovery of the overpayment.²⁷

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that modification of OWCP's March 20, 2002 wage-earning capacity decision was warranted. The Board further finds that he received a \$134,838.03 overpayment of compensation and that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

²⁶ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

²⁷ *See supra* notes 22 and 23.

ORDER

IT IS HEREBY ORDERED THAT the February 8, 2012 and November 8, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 5, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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