

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

C.S., Appellant)

and)

DEPARTMENT OF THE TREASURY,)
INTERNAL REVENUE SERVICE,)
Richmond, VA, Employer)

**Docket No. 12-313
Issued: October 23, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 8, 2011 appellant filed a timely appeal from the October 31, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 OWCP properly reduced appellant's compensation effective January 18, 2009 based on her capacity to earn wages as a receptionist; (2) whether appellant received a \$2,890.00 overpayment of compensation; and (3) whether OWCP abused its discretion by refusing to waive recovery of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on March 11 and 15, 2004 appellant, then a 41-year-old clerk/machinist, sustained aggravation of left brachial plexopathy while lifting and handling mail trays. Appellant stopped work in June 2004 due to a lack of work within her restrictions.

In an October 16, 2006 report, Dr. Ausim Azizi, an attending Board-certified neurologist, stated that appellant first reported experiencing brachial plexus problems in January 2002. He posited that she aggravated her brachial plexus condition on March 11, 2004 and became unable to perform continuous work duties with her arms. Dr. Azizi did not provide any current medical findings.

In a February 13, 2007 report, Dr. Steven Mandel, a Board certified-neurologist serving as an OWCP referral physician, noted that on examination appellant had intrinsic left hand weakness, reduced sensation in her left C8 nerve distribution and a positive Tinel's sign over her left supraclavicular area.² He diagnosed left brachial plexopathy as confirmed by recent electromyogram, but stated that he could find no evidence of cervical radiculopathy. Dr. Mandel noted that appellant had left-sided carpal tunnel symptoms but indicated that he would not be able to state that the left carpal tunnel syndrome was attributable to the reported trauma at work. In an accompanying work restriction form, he indicated that appellant could work eight hours per day with restrictions. Appellant could lift up to five pounds for eight hours per day, engage in reaching and repetitive wrist movements for four hours per day and reach above her shoulders for two hours per day. She could not climb ladders.

On May 2, 2007 Dr. Azizi discussed appellant's brachial plexus injury and stated that her condition had worsened as a result of repetitive lifting at work. He noted, "Currently, she has carpal tunnel syndrome in both wrists in addition to the brachial plexus traction injury. This condition is work related. This may have occurred at the wrist from the repetitive stress."

In August 2007, appellant began participating in an OWCP-sponsored vocational rehabilitation program designed to return her to work.

On August 5, 2008 Dr. Azizi noted that appellant had bilateral carpal tunnel syndrome that was confirmed by an electromyogram and a nerve conduction study performed on March 27, 2007. He indicated that carpal tunnel syndrome usually occurred subsequent to repetitive and recurrent micro injury to the wrists and noted that appellant advised that her work involved repetitive use of her hands and wrists to lift, collate and sort documents and to operate computers and adding machines. Dr. Azizi stated that appellant did not report problems with her wrists prior to performing this repetitive work and he posited that her work duties were the cause of her carpal tunnel syndrome.

On August 6, 2008 appellant's rehabilitation counselor determined that appellant was capable of earning wages in the constructed position of receptionist. The position was sedentary in nature and involved answering telephone calls, greeting visitors and directing visitors to their

² In discussing appellant's factual and medical history, Dr. Mandel indicated that it had been reported that appellant engaged in crocheting in the past but that she no longer did so.

destinations. It required frequent reaching, but did not require climbing, stooping or kneeling. The position was found to be reasonably available in appellant's commuting area and the average wage was \$494.40 per week.

In a December 11, 2008 letter, OWCP advised appellant that it proposed to reduce her compensation based on its determination that she could earn wages in the constructed position of receptionist. It noted that appellant's rehabilitation counselor had approved the position and that the opinion of Dr. Mandel showed that she was physically able to perform the position. OWCP provided appellant 30 days from the date of the letter to submit evidence and argument challenging the proposed action.

In a January 7, 2009 letter, appellant's counsel argued that the proposed reduction of compensation was improper because Dr. Mandel's opinion was inaccurate. He asserted that Dr. Mandel's opinion was ambiguous about the cause of appellant's left-hand gripping problem, incorrectly indicated that she engaged in knitting and crocheting and failed to mention that she took Neurotin, a prescription drug with serious side effects. Counsel indicated that appellant's claim for carpal tunnel syndrome had not been denied and asserted that he and appellant had not seen the document in which appellant's rehabilitation counselor approved the receptionist position.

In a January 16, 2009 decision, OWCP reduced appellant's compensation effective January 18, 2009 due to its determination that the constructed position of receptionist represented her wage-earning capacity. It addressed appellant's arguments regarding Dr. Mandel's opinion but found that the opinion supported a finding that appellant could perform the receptionist position.

In a March 24, 2009 notice, OWCP advised appellant of its preliminary determination that she received a \$2,890.00 overpayment of compensation for the period January 18 to March 14, 2009.³ It stated that the overpayment occurred because appellant was paid compensation for the period January 18 to March 14, 2009 for temporary total disability despite the issuance of a January 16, 2009 wage-earning capacity decision reducing her compensation effective January 18, 2009. OWCP also made a preliminary finding that appellant was not at fault in creating the overpayment. It advised her that she could submit evidence challenging the fact or amount of the overpayment and request waiver of recovery of the overpayment. OWCP requested that she complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment.

In an April 29, 2009 decision, OWCP determined that appellant received a \$2,890.00 overpayment of compensation and found that she was not at fault in the creation of the overpayment but that the overpayment was not subject to waiver. It stated, "No response has been received to the preliminary decision. The claimant has not contested the finding and it should be finalized as correct for the reasons set forth in the preliminary decision. Since the claimant has not shown that recovery would defeat the purpose of [FECA] or be against equity and good conscience, the entire overpayment will be collected...."

³ OWCP noted that appellant received \$2,995.48 in compensation for the period January 18 to March 14, 2009 but was only entitled to receive \$105.48 for this period.

Appellant appealed OWCP's April 29, 2009 decision to the Board. In a May 24, 2010 order,⁴ the Board set aside the April 29, 2009 decision and remanded the case to OWCP for further development. The Board found that OWCP did not review evidence received prior to the issuance of its April 29, 2009 decision, *i.e.*, the Form OWCP-20 completed by appellant on April 23, 2009, which contained information about income and expenses as well as arguments regarding why she felt that the amount of the overpayment was incorrect and why the overpayment should be waived.⁵ The Board remanded the case to OWCP for it to fully consider the evidence that was properly submitted by appellant prior to the issuance of the April 29, 2009 decision. OWCP was directed to develop the claim as it deemed necessary and to issue an appropriate decision regarding its overpayment determination.

On remand, OWCP issued a June 7, 2010 decision finding that appellant received a \$2,890.00 overpayment of compensation and that, given the circumstances of her case, waiver of recovery of the overpayment was not warranted. It indicated that the March 24, 2009 preliminary determination was incorporated by reference into its June 7, 2010 decision and noted that appellant was not at fault in the creation of the overpayment. OWCP stated that the Form OWCP-20 completed by appellant provided her expenses and assets, but noted that she did not provide any documentation to support the information. It found that, since the supporting financial documentation was not provided, appellant had not provided justification for it to waive recovery of the overpayment. OWCP stated:

“Furthermore, you noted ‘there is no set-off for the increase due pursuant to the letter from [William] Ernst dated February 19, 2009. In that letter, you were advised you should have been paid at the 75 percent compensation rate instead of 66 2/3 percent due to your dependent son for the period May 16, 2004 to January 17, 2009. This payment processed on or about May 4, 2009. It is important to note in a letter dated May 5, 2009 you were advised you were entitled to approximately \$11,000[.00] due to the difference in compensation rates. You were also advised that the outstanding overpayment in the amount of \$2,890[.00] was deducted from the compensation due.

“Thus, the overpayment of compensation previously identified in your case in the amount of \$2,890[.00] has been repaid in full. Your overpayment account has been fully liquidated and closed.”

In a June 22, 2011 decision,⁶ the Board set aside OWCP's June 7, 2010 OWCP decision and remanded the case to OWCP for further consideration of the issues of fact, amount and waiver of the claimed overpayment. The Board noted that OWCP rejected the financial information appellant provided in her Form OWCP-20 completed on April 23, 2009 by indicating that the figures were not adequately documented. However, it found that OWCP did not provide a sufficient explanation of how it made this determination. The Board noted that

⁴ Docket No. 09-2070 (issued May 24, 2010).

⁵ Appellant reported monthly income of \$56.00, monthly expenses of \$1,125.00 and no assets.

⁶ Docket No. 10-2389 (issued June 22, 2011).

OWCP procedure provides that, in such a situation, OWCP's examiner should conference the case and request that additional documentation be submitted.⁷ The Board found that it was premature for OWCP to determine that waiver of the overpayment was not warranted and remanded the case to OWCP for conferencing and further consideration of the matters of fact, amount and waiver of the claimed overpayment.

On August 9, 2011 a conference was held between appellant and an OWCP senior claims examiner to discuss appellant's financial situation for the purpose of evaluating whether appellant was entitled to waiver of recovery of the overpayment. In an August 11, 2011 memorandum, the claims examiner discussed the conference:

"A conference was held on August 9, 2011 to make a determination regarding the overpayment in this case; specifically waiver. During the discussion, all the information on the [Form OWCP-20] was discussed. The claimant was advised that she must submit supporting financial documentation for all the expenses she noted in 2009. She also stated that she had additional evidence regarding a tax bill from 2009 in the approximate amount of \$3,000[.00]. I told her I would send her a copy of the [Form] OWCP-20 she completed in 2009. I also told her to submit the financial documentation from 2009 including any additional financial information she had."

Appellant submitted letters dated August 10, 15 and 17, 2011 in which she again challenged the wage-earning capacity determination and asserted that the financial information she submitted had not been properly considered. She submitted additional financial documents, including copies of salary checks dated from 2009 and an apparent \$321.200 bill from an unnamed entity. Some of the documents had previously been submitted.

In a September 1, 2011 letter, OWCP indicated that it was responding to appellant's August 10, 15 and 17, 2011 letters. It noted that she received compensation from January 18 to March 14, 2009 in the amount of \$2,995.48 for total disability minus health benefit, basic life and optional life insurance premiums. However, appellant should have received compensation from January 18 to March 14, 2009 in the amount of \$105.48 based on her ability to earn wages as a receptionist minus health benefit, basic life and optional life insurance premiums.⁸ OWCP stated that the difference between these two amounts constituted the \$2,890.00 overpayment of compensation. It noted that, pursuant to the Board's June 22, 2011 decision, a conference was held with appellant on August 9, 2011, and additional documentation was requested. The financial information in appellant's Form OWCP-20 was discussed at the conference and, on August 11, 2011, appellant was given 15 days to provide additional supporting financial evidence. OWCP indicated that, on her Form OWCP-20, appellant reported monthly income of \$56.00 and monthly expenses of \$2,025.00 and no assets. It stated that appellant submitted a \$2,000.71 real estate tax bill for 2010 and 2011 (noting that this constituted "information outside of overpayment period"), a \$822.43 real estate bill for 2009, a \$773.30 Verizon bill with a

⁷ Federal (FECA) Procedure manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200a(4) (October 2004).

⁸ The record contains documents supporting the figures listed by OWCP.

minimum payment of \$80.00, a \$1,016.04 water/sewer bill (billing date July 9, 2009), a \$93.44 Direct TV bill (monthly amount due), and a \$176.31 Pennsylvania Electric Company bill. OWCP noted that appellant had submitted a completed Form OWCP-20 and stated:

“However, you were also required to submit ‘support documents including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records which support the income and expenses listed.’ Although you submitted additional evidence, the evidence submitted is still insufficient to support waiver. You have an additional 14 days from the date of this letter to submit the above-mentioned evidence. After that time, a decision will be made regarding the overpayment.”

In a September 7, 2011 letter, appellant asserted that the determination that she could earn wages as a receptionist was based on a “falsified status report” from the rehabilitation counselor stating that the opinion of Dr. Mandel supported that she could perform the job. She claimed that she was not asked to submit documents regarding her monthly income and she described the documentation she submitted immediately after the August 9, 2011 conference.

In an October 31, 2011 decision, OWCP found that appellant received a \$2,890.00 overpayment of compensation. It found that, even though appellant was not at fault in creating the overpayment, she did not submit financial documentation to support her reported income and expenses and therefore she was not entitled to waiver of recovery of the overpayment. OWCP noted that it had instructed appellant to submit a completed Form OWCP-20 and to attach financial documents to support the income and expenses listed. Appellant provided expenses but did not provide proof of income or copies of bank statements.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁹ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁰

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 her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.¹¹ Wage-earning capacity is a measure of the employee’s ability to earn wages in the

⁹ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

¹⁰ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹¹ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

open labor market under normal employment conditions.¹² 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.¹³ The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in her commuting area.¹⁴

In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.¹⁵ In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.¹⁶

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 her 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.¹⁷

ANALYSIS -- ISSUE 1

In the present case, OWCP received information from Dr. Mandel, a Board-certified neurologist serving as an OWCP referral physician, who found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours per day subject to specified work restrictions. Dr. Mandel determined that appellant could work eight hours per day with restrictions. She could lift up to five pounds for eight hours per day, engage in reaching and repetitive wrist movements for four hours per day and reach above her shoulders for two hours per day. Appellant could not climb ladders.

Appellant's vocational rehabilitation counselor then determined that appellant was able to perform the position of receptionist and that state employment services showed the position was

¹² *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

¹³ *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. See *Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

¹⁴ See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

¹⁵ See *Jess D. Todd*, 34 ECAB 798, 804 (1983).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

¹⁷ 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).

available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The position was sedentary in nature and involved answering telephone calls, greeting visitors and directing visitors to their destinations. It required frequent reaching, but did not require climbing, stooping or kneeling. OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the receptionist position and a review of the evidence reveals that appellant is physically capable of performing the position.¹⁸ The Board notes that the work restrictions provided by Dr. Mandel would allow appellant to perform the duties of the sedentary receptionist position.

Appellant did not submit evidence or argument showing that she could not vocationally or physically perform the receptionist position. She claimed that Dr. Mandel's opinion was ambiguous about the cause of her left-hand gripping problem, incorrectly indicated that she engaged in knitting and crocheting and failed to mention that she took Neurotin, a prescription drug with serious side effects. However, Dr. Mandel provided work restrictions that took appellant's hand problems into consideration and he did not base his opinion on any knitting or crocheting activities.¹⁹ There is medical evidence in the record clearly showing that appellant took medication which limited her ability to work. Dr. Azizi, an attending Board-certified neurologist, indicated that appellant had bilateral carpal tunnel syndrome, but he did not provide a rationalized opinion that this condition was work related or that it would prevent appellant from working as a receptionist.

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 position of receptionist represented appellant's wage-earning capacity.²⁰ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of receptionist and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, OWCP properly reduced appellant's compensation effective January 18, 2009 based on her capacity to earn wages as a receptionist.

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.²¹ 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

¹⁸ On appeal and before OWCP, appellant asserted that the determination that she could earn wages as a receptionist was based on a falsified status report from the rehabilitation counselor. She did not provide evidence to support this assertion.

¹⁹ *Supra* note 2.

²⁰ See *Clayton Varner*, 37 ECAB 248, 256 (1985).

²¹ 5 U.S.C. § 8102(a).

law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”²²

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.²³

ANALYSIS -- ISSUE 2

The Board finds that appellant received a \$2,890.00 overpayment of compensation. For the reasons explained above, OWCP properly reduced appellant’s compensation effective January 18, 2009 based on her capacity to earn wages as a receptionist. The evidence reflects that appellant received compensation from January 18 to March 14, 2009 in the amount of \$2,995.48 for total disability minus health benefit, basic life and optional life insurance premiums. However, she should have received compensation from January 18 to March 14, 2009 in the amount of \$105.48 based on her ability to earn wages as a receptionist minus health benefit, basic life and optional life insurance premiums. The difference between these two amounts constitutes the \$2,890.00 overpayment of compensation. Therefore, OWCP properly found that appellant received a \$2,890.00 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 3

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP’s discretion pursuant to statutory guidelines.²⁴ These statutory guidelines are found in section 8129(b) of FECA which states: “Adjustment or recovery [of an overpayment] 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.”²⁵ If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his 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

²² *Id.* at § 8129(a).

²³ *Id.* at § 8116(a).

²⁴ *See Robert Atchison*, 41 ECAB 83, 87 (1989).

²⁵ 5 U.S.C. § 8129(b).

OWCP from data provided by the Bureau of Labor Statistics.²⁶ According to 20 C.F.R. § 10.437, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.²⁷

The Board has held that OWCP must rely on current financial information when determining eligibility for waiver of an overpayment.²⁸

ANALYSIS -- ISSUE 3

In a June 22, 2011 decision, the Board remanded the case to OWCP for further consideration of appellant's overpayment, including the matter of waiver of recovery. The Board found that it was premature for OWCP to determine that waiver of the overpayment was not warranted and remanded the case to OWCP for conferencing to be followed by an appropriate decision on the matter. On August 9, 2011 a conference was held between appellant and an OWCP senior claims examiner to discuss appellant's financial situation for the purpose of evaluating whether appellant was entitled to waiver of recovery of the overpayment. However, in an August 11, 2011 memorandum, an OWCP senior claims examiner indicated that she requested during the conference that appellant submit financial information from 2009 regarding her expenses.²⁹ Appellant's waiver request was later denied by OWCP because appellant did not submit sufficient financial information, particularly with regard to her monthly income.

As noted above, the Board has held that OWCP must rely on current financial information when determining eligibility for waiver of an overpayment. At the August 2011 conference, the senior claims examiner improperly asked appellant to submit financial information from 2009. Therefore, the case shall be remanded to OWCP so that it can request that appellant provide current financial information on her monthly income, monthly expenses and assets for the purpose of evaluating whether she qualifies for waiver of recovery of the

²⁶ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). OWCP procedure provides that 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).

²⁷ 20 C.F.R. § 10.437(a), (b).

²⁸ *Thomas E. Ray*, 51 ECAB 344 (2000) (the Board remanded the case for further development on the issue of waiver where OWCP relied on three-year-old financial information in its waiver determination); *Carol R. Graham*, Docket No. 02-2198 (issued February 4, 2003) (the Board remanded the case for further development on the issue of waiver as OWCP relied on financial information that was 16 months old in determining the claimant's eligibility for waiver of the overpayment); *Ronald E. Smith*, 36 ECAB 652 (1985) (the Board found that OWCP should have attempted to obtain current financial information prior to determining the claimant's eligibility for waiver).

²⁹ It is unclear whether any request was made to submit documents regarding monthly income.

\$2,890.00 overpayment. After such development it deems necessary, OWCP shall issue an appropriate decision on this matter.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective January 18, 2009 based on her capacity to earn wages as a receptionist. The Board further finds that appellant received a \$2,890.00 overpayment of compensation and that the case is not in posture for decision regarding whether OWCP abused its discretion by refusing to waive recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the October 31, 2011 decision of the Office of Workers' Compensation Programs is affirmed with respect to wage-earning capacity determination and the fact and amount of the overpayment. The October 31, 2011 decision is set aside with respect to waiver of recovery of the overpayment and remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: October 23, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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