



## **FACTUAL HISTORY**

OWCP initially accepted that on November 1, 2006 appellant, then a 41-year-old investigator, sustained a medial meniscus tear of her left knee due to a fall from a ladder at work. She stopped work on November 6, 2006 and underwent OWCP-authorized anterior cruciate ligament reconstruction and medial/lateral meniscus debridement of her left knee on December 12, 2006. Appellant received disability compensation on the daily rolls beginning December 27, 2006 and on the periodic rolls beginning January 21, 2007. She returned to light-duty work on February 10, 2007 and stopped work shortly thereafter. Appellant was terminated by the employing establishment on May 22, 2007 because she did not return to available light-duty work despite the fact that an attending physician had released her to such work. OWCP accepted appellant's claim for a recurrence of disability (Form CA-2a) effective May 23, 2007 and paid her disability compensation on the periodic rolls.

On June 10, 2009 appellant underwent OWCP-authorized left knee surgery, including meniscectomy and anterior cruciate ligament revision surgery. In September 2009 OWCP expanded the accepted conditions to include sprain of the acromioclavicular joint of the right shoulder and several additional left knee conditions -- bone contusion, cruciate ligament sprain, re-tear of the medial meniscus, re-tear of the lateral meniscus, and anterior cruciate ligament disruption.

By decision dated February 25, 2010, OWCP terminated appellant's wage-loss compensation benefits effective March 14, 2010. It based its termination action on an October 6, 2009 report of Dr. John L. Vander Schilden, an attending Board-certified orthopedic surgeon. Appellant requested reconsideration.

By decision dated July 26, 2010, OWCP denied modification of its February 25, 2010 termination decision, finding that the medical evidence submitted was insufficient to establish that appellant continued to be totally disabled from all work due to the accepted conditions.

Appellant again requested reconsideration. In a February 28, 2011 decision, OWCP denied modification of its July 26, 2010 decision. Appellant filed an appeal with the Board.

In a June 6, 2012 decision,<sup>2</sup> the Board reversed OWCP's February 28, 2011 decision and thereby reversed OWCP's termination of appellant's wage-loss compensation effective March 14, 2010. The Board found that Dr. Vander Schilden's October 6, 2009 report was not sufficiently well rationalized to justify the termination of appellant's wage-loss compensation effective March 14, 2010. Appellant was returned to the periodic rolls.

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<sup>2</sup> Docket No. 11-1988 (issued June 6, 2012).

On a Form EN1032, signed on February 4, 2013,<sup>3</sup> appellant reported that she had been employed since April 19, 2012 by the Department of Veterans Affairs as a clinical pastoral education resident (student chaplain) at a rate of pay of \$13.17 per hour.<sup>4</sup>

In an April 3, 2013 e-mail to an OWCP claims examiner, appellant indicated that she participated in the clinical pastoral education resident program at the Department of Veterans Affairs for 40 hours per week and she took both clinical and educational seminars. She advised that the program was accredited through the Association for Clinical Pastoral Education (ACPE) but was not considered a degree program.

In accordance with the Board's June 6, 2012 decision, OWCP made supplemental payments to appellant to effectively reinstate her wage-loss compensation to the date of the March 14, 2010 termination. Based on appellant's wages as a clinical pastoral education resident beginning April 19, 2012 and continuing, OWCP determined her percentage of wage-earning capacity under the principles of the *Albert C. Shadrick* case.<sup>5</sup> OWCP characterized the pay appellant received in this job as a stipend. In making these payments, it deducted HBI premiums for Blue Cross Blue Shield (BCBS) health insurance coverage for the period March 14, 2010 to April 16, 2013.

In a November 6, 2013 letter to OWCP, appellant noted that her HBI plan through BCBS was terminated after her wage-loss compensation was terminated effective March 14, 2010. She indicated that, after the Board reversed the termination of her wage-loss compensation, OWCP deducted HBI premiums for BCBS coverage from the wage-loss compensation it paid her for a three-year period that she could not use her HBI plan. Appellant asserted that OWCP improperly deducted these HBI premiums from her wage-loss compensation and requested that it refund them to her.

On December 20, 2013 OWCP paid appellant \$6,830.63 through an electronic funds transfer in order to reimburse her for the HBI premiums for BCBS health insurance that were deducted from her compensation payments during the period March 14, 2010 to April 16, 2013. In a payment record for this transaction, OWCP noted that appellant's HBI plan had been terminated on March 14, 2010 but reinstated as of April 17, 2013. OWCP indicated that HBI premium deductions (code 104 for the BCBS plan) were made for the period March 14, 2010 to April 16, 2013 despite the termination of the HBI plan. It advised that it had been confirmed that appellant could not use her HBI plan for this period and that the refund was appropriate given her inability to use the HBI plan.

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<sup>3</sup> Each Form EN1032 requested information about earnings and employment activity for the 15 months prior to the signing of each form.

<sup>4</sup> Appellant indicated that the job was located at the Louis A. Johnson Veterans Affairs Medical Center in Clarksburg, West Virginia. She reported that she had actual gross earnings of "\$18,964.80 gross year 2012." In a Form EN1032, signed on July 10, 2013, appellant advised that she continued to work for the Department of Veterans Affairs as a clinical pastoral education resident at a rate of pay of \$13.55 per hour. Appellant indicated that she had actual earnings of "\$13,591.44 to date."

<sup>5</sup> See *infra* note 22.

Appellant telephoned OWCP on January 3, 2014 and advised that, despite being refunded the HBI premiums deducted for the period March 14, 2010 to April 16, 2013, she still was unable to use her HBI plan.

In a January 7, 2014 letter, appellant requested that OWCP pay her wage-loss compensation for total disability because her job as a clinical pastoral education resident for the Department of Veterans Affairs ended on December 29, 2013. She indicated that she did not have any income other than her wage-loss compensation. Appellant advised OWCP that she had accepted a job as a chaplain with the Veterans Administration pending the completion of a background check and noted that the tentative start date for the job was no later than February 26, 2014.

In a January 9, 2014 letter to an OWCP regional director, appellant again indicated that the Board, in its June 6, 2012 decision, had reversed the termination of her wage-loss compensation, effective March 14, 2010, but noted that OWCP had failed to reinstate her HBI coverage with BCBS. She asserted that OWCP had informed her that her HBI coverage would be reinstated, effective June 2, 2013 but appellant confirmed with BCBS that her HBI coverage had not been reinstated despite the fact that OWCP continued to deduct HBI premiums from her wage-loss compensation. Appellant indicated that her participation in the clinical pastoral education resident program had concluded on December 20, 2013 and that her wage-loss compensation should return to total disability effective December 20, 2013.

In a January 14, 2014 letter, OWCP advised appellant that it was enclosing a Health Benefits Election Form (Standard Form 2809) that she needed to complete and return with her selection of an HBI plan. In making this selection, it requested that appellant use an effective date of January 12, 2014. OWCP informed appellant that her HBI coverage would remain in a cancelled status until such time as the Standard Form 2809 was completed and returned.

In a January 23, 2014 letter, appellant requested that OWCP refund her for the HBI premiums from April 17, 2013 to “whatever date in January 2014 the insurance actually become[s] effective.” She indicated that she mailed the Standard Form 2809 to OWCP on January 21, 2014 and noted that she was requesting reinstatement of the same HBI plan she had when her compensation benefits were terminated in 2010.<sup>6</sup>

In a January 28, 2014 letter, an OWCP district director responded to appellant’s January 9, 2014 letter. She indicated that appellant’s wage-loss compensation was terminated effective March 14, 2010, but was later reinstated per the Board’s June 6, 2012 decision. The district director acknowledged that appellant’s HBI coverage was not reinstated at the same time as her wage-loss compensation due to an oversight. She indicated that it had been confirmed that appellant’s HBI coverage had not been reinstated during the period March 14, 2010 to April 16, 2013. The district director advised that BCBS confirmed that appellant had not used her HBI coverage during the period March 14, 2010 to April 16, 2013 and, therefore, OWCP reimbursed her for the HBI premiums that were deducted from her compensation payments during that period by issuing her a \$6,830.63 check on December 20, 2013. She noted that, because appellant had not been using the HBI coverage, she had the option of reinstating her

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<sup>6</sup> Appellant indicated that she previously had the standard federal plan with BCBS.

HBI coverage retroactive to April 17, 2013, or requesting a reimbursement of the HBI deductions for the period April 17, 2013 to the present. The district director noted that, by letter dated January 23, 2014, appellant requested reimbursement of the health insurance premiums from April 17, 2013 through January 2014 and she advised that this reimbursement was currently being processed. She further noted that, in the January 23, 2014 letter, appellant had requested enrollment in the same BCBS plan in which she previously had been enrolled, but advised that she still needed to complete and return a Standard Form 2809 which identified the code for the plan she wished to select. The district director indicated that appellant had previously been enrolled with BCBS under code 104.

On January 30, 2014 OWCP received the completed Standard Form 2809 in which appellant elected to have HBI coverage with the Federal Employees Health Benefits (FEHB) Program under BCBS (code 104) effective January 12, 2014. A portion of the form was completed by an OWCP official as OWCP was designated as the entity administering the coverage.

Also on January 30, 2014 OWCP issued appellant a \$1,656.84 check in order to reimburse her for the HBI premiums for BCBS health insurance that were deducted from her compensation payments during the period April 17, 2013 to January 11, 2014. In payment records for this transaction, it noted that, for the period April 17, 2013 to January 11, 2014, appellant had HBI premium deductions (code 104 for the BCBS plan) taken from her wage-loss compensation despite not having access to HBI coverage. Therefore, appellant was entitled to reimbursement for HBI premium deductions for this period. It was noted that appellant chose to have coverage under BCBS (code 104) effective January 12, 2014.

In a February 4, 2014 letter, appellant advised OWCP that her HBI coverage still had not been restarted even though she submitted a Standard Form 2809 making an election of FEHB coverage.

In an April 16, 2015 letter, appellant advised OWCP that her problems with HBI coverage had not been resolved despite inquiries she made to BCBS and the Office of Personnel Management (OPM). She argued that she should not be liable for HBI premiums given that OWCP had failed to notify BCBS of the termination of her HBI coverage.

In a May 21, 2015 letter, OWCP advised appellant that she had been reimbursed the HBI benefits for the appropriate period. It noted that appellant's HBI enrollment had been transferred back to her former employing establishment, U.S. Courts, Office of the Public Defender, and advised her that, if any HBI deductions for BCBS were made from February 9, 2014 to the present, then she had to address the issue with her former employing establishment.

On July 9, 2015 OWCP received a FECA Health Benefits Transmittal Sheet which was signed by an OWCP health benefits technician on July 9, 2015. The portion of the form to be completed by an OWCP claims examiner (Part A) contained the name of a claims examiner, but no signature of that claims examiner. In Part A of the form, the HBI code was listed as 104 and the "Transfer Effective Date" for HBI coverage was listed as February 9, 2014. OWCP also received a Notice of Change in Health Benefits Enrollment (Standard Form 2810) which was

signed by an OWCP official on July 9, 2015, it was noted that OWCP had accepted transfer of appellant's HBI enrollment with BCBS under code 104.

OWCP had also been developing the evidence as to whether appellant continued to be disabled from all work. Based on the medical evidence, on January 28, 2014, OWCP terminated appellant's wage-loss compensation effective February 9, 2014. It based its termination action on October 17 and November 16, 2013 medical reports of Dr. Peter K. Thrush, a Board-certified orthopedic surgeon. Appellant appealed this decision to the Board.

In a May 5, 2015 decision,<sup>7</sup> the Board reversed OWCP's January 28, 2014 termination of appellant's wage-loss compensation effective February 9, 2014. The Board found that OWCP's conversion of Dr. Thrush from an impartial medical specialist to an OWCP referral physician deprived appellant of the opportunity to exercise her right, under section 8123(a) of FECA, to have a physician of her choosing present at the examination by Dr. Thrush. Therefore, OWCP could not rely on the opinion of Dr. Thrush to justify its termination action.

In a May 9, 2015 letter, appellant reiterated her request for total disability beginning December 21, 2013 as she had completed the clinical pastoral education residency program on December 20, 2013 and that wage-loss compensation continued to be paid at the reduced amount from December 21, 2013 through February 8, 2014 when benefits had been terminated. She noted that, from December 21, 2013 through February 8, 2014, she was not employed and had no other source of income.

In a June 8, 2015 letter, appellant again advised OWCP that her stipend in the clinical pastoral education residency program ended on December 20, 2013 and that she had not received any pay in connection with the program after that date. Appellant submitted an Internal Revenue Service (IRS) Form 1099G showing that she received \$7,514.00 in unemployment compensation in 2014.<sup>8</sup>

In a Form EN1032 signed on June 7, 2015, appellant indicated that she had \$2,466.26 in income during the 15 months prior to June 7, 2015 due to selling various items through the ebay.com and craigslist.com websites and through yard sales.<sup>9</sup>

In a June 12, 2015 letter, OWCP noted that, in order to evaluate whether she was underpaid for this period, it needed copies of her 2013 and 2014 tax returns. It indicated that the compensation reduction was calculated on appellant's annual earnings from the stipend she received for the year 2013. It advised that, upon receipt of her tax returns, a decision would be made regarding whether she was underpaid wage-loss compensation for the period December 21, 2013 to February 8, 2014.

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<sup>7</sup> Docket No. 14-1302 (issued May 5, 2015).

<sup>8</sup> In a July 2, 2015 e-mail, appellant advised OWCP that an IRS official told her that her taxable income in 2014 did not meet the minimum threshold for filing a tax return.

<sup>9</sup> In a June 16, 2015 letter, appellant indicated that she also had an online store on the zazzle.com website since 2009 but that she had not made any sales.

Following the Board's reversal of the February 9, 2014 termination of appellant's wage-loss compensation, OWCP made a payment to appellant on July 10, 2015 which reinstated her total wage-loss compensation effective February 9, 2014. The amount of reinstated wage-loss compensation beginning February 9, 2014 was reduced by periodic deductions for HBI premiums under code 104.<sup>10</sup>

On August 13, 2015 appellant received a Standard Form 2809 which she completed on May 15, 2006 in order to elect HBI coverage with BCBS under code 104. The portion of the form to be completed by the relevant agency was initially completed on May 16, 2006 by an official of appellant's former employing establishment, U.S. Courts, Office of the Federal Public Defender. However, an unidentified individual had struck out the "Effective date of action" which had been listed as May 16, 2006 and replaced it with the date February 9, 2014. The document was submitted in response to a July 9, 2015 letter in which OWCP asked the former employing establishment to submit any HBI enrollment forms completed by appellant that it had in its possession. OWCP advised the former employing establishment that it was deducting HBI premiums from appellant's continuing wage-earning compensation payments and that OWCP would "now be the employing office for health insurance purposes."

In a September 17, 2015 letter, OWCP advised appellant that it had previously asked her to submit her tax returns from 2013 and 2014 but that it had not received them. It again requested that she submit a copy of her tax return from 2013. OWCP also requested a statement from the IRS official who had advised her that she did not have to file a tax return for 2014.

In an October 8, 2015 letter, appellant indicated that she only had a brief conversation with the IRS official and would not be able to obtain a statement from the official.<sup>11</sup> She asserted that she should be refunded for the HBI premium deductions for the period February 9, 2014 to May 4, 2015 because her HBI coverage had been terminated for that period.

In a November 29, 2015 letter, appellant again advised OWCP of her belief that she was still due reimbursement of HBI premiums deducted from her wage-loss compensation for the period February 9, 2014 to May 4, 2015. She argued that her request for reimbursement was properly directed to OWCP because the deductions were made by OWCP. Appellant also argued that she was entitled to total wage-loss compensation for the period December 21, 2013 to February 8, 2014. She indicated that her stipend from the clinical pastoral education residency program ended on December 20, 2013 and that she was not in receipt of any wages from any form of employment.

In a December 31, 2015 letter, OWCP advised appellant that HBI premium deductions for the period February 9 to May 4, 2015 were correct and were done in accordance with her Standard Form 2809 signed on January 12, 2014 and her January 23, 2014 letter requesting reinstatement of HBI coverage. It noted that the evidence of record showed that HBI premium

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<sup>10</sup> On July 10, 2015 OWCP paid appellant \$52,565.75 in wage-loss compensation for the period February 9, 2014 to June 27, 2015 through an electronic transfer. Before arriving at this amount, OWCP deducted \$3,200.04 for HBI coverage under code 104.

<sup>11</sup> Appellant also submitted documents of general application regarding the filing of tax returns.

refunds issued to her were proper and complete and that there was no pending HBI premium refund. OWCP informed appellant that if she had evidence showing that she was due an HBI premium refund from OWCP, rather than from her employing establishment, she should submit the evidence within 30 days. It indicated that appellant had not submitted her tax return from 2013 or a signed statement listing the total monetary amount of the stipend she was paid in 2013. Moreover, she had not submitted a statement detailing any other source of income in 2013 (such as from selling items online). OWCP informed appellant that she had 30 days to submit the requested information, after which it would issue a formal decision regarding these matters.

In a December 31, 2015 letter received on January 5, 2016, appellant again expressed her belief that she was underpaid wage-loss compensation due to matters relating to her HBI coverage and her receipt of a stipend in 2013.

In a February 4, 2016 decision, OWCP determined that appellant was not entitled to reimbursement of HBI premiums for the period February 9, 2014 through May 4, 2015. It noted that, when appellant's FECA benefits were terminated, a transfer of her HBI enrollment package was made to her employing establishment. OWCP indicated that, in order for appellant to keep her HBI coverage, regardless of whether she was receiving FECA or OPM benefits, she was required to pay premiums for HBI. It noted that there was no evidence explaining why appellant was entitled to any HBI reimbursement from OWCP for the period February 9, 2014 to May 4, 2015. OWCP indicated that it advised appellant that all reimbursements regarding HBI premiums had been processed. It noted that, in a December 31, 2015 letter, it informed her that she had 30 days to submit additional evidence regarding the matter. It indicated that no new evidence had been submitted by appellant and that, to date, sufficient evidence had not been received to establish that she was entitled to a reimbursement of HBI premiums for the period February 9, 2014 to May 4, 2015 from OWCP.

On February 12, 2016 OWCP made a supplemental payment to appellant for the period January 1 to February 8, 2014 to reflect 100 percent loss of wage-earning capacity for that period.<sup>12</sup>

In an April 7, 2016 decision, OWCP determined that appellant had not been underpaid wage-loss compensation for the period December 20 to 31, 2013. It noted that, in an April 3, 2013 e-mail and May 9, 2015 letter, appellant advised that she was in the clinical pastoral education resident program with the Department of Veterans Affairs for 40 hours a week and that she received a stipend for her participation in this program. OWCP indicated that the evidence of record revealed that she completed the program on December 20, 2013. It noted that, on several occasions, it had requested that appellant submit a copy of her 2013 income tax return, as well as a statement identifying the stipend pay she received in 2013. OWCP indicated that appellant had not provided the information requested. It noted that appellant was advised that she was entitled to any underpayment from December 20 to 31, 2013 if she documented her earnings for this period.<sup>13</sup> OWCP indicated that, on numerous occasions, it afforded appellant 30

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<sup>12</sup> Appellant had previously received compensation reflecting a 100 percent loss of wage-earning capacity for the period February 9, 2014 and continuing.

<sup>13</sup> OWCP indicated that it compensated appellant for wage loss from January 1, to February 8, 2014 because she had not received any stipend or earnings for 2014.

days to submit the evidence requested, but that she did not submit such evidence. Appellant also had not submitted evidence supporting that she received a stipend in 2013. OWCP noted that, regardless of whether appellant completed the program on December 20, 2013, it was unclear whether the stipend she received was paid for all of 2013, including the period December 20 to 31, 2013. This information was needed to determine whether any amount paid to appellant for the period December 20 to 31, 2013 needed to be applied to her monthly wage-loss benefits in order to evaluate whether any underpayment was due to her for this period. OWCP indicated that appellant failed to submit the requested information and found insufficient evidence to support authorization for an underpayment of wage-loss compensation for that period.

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

An employee entitled to disability compensation may continue his or her health benefits under the Federal Employees Health Benefits (FEHB) Program. The regulations of the Office of Personnel Management (OPM), which administers the FEHB Program, provide guidelines for the registration, enrollment, and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(a) provides that employees and annuitants are responsible for paying the enrollee share of the cost of enrollment for every pay period during which they are enrolled. An employee or annuitant incurs a debt to the United States in the amount of the proper employee or annuitant withholding required for each pay period during which they are enrolled if the appropriate health benefits withholdings or direct premium payments are not made.<sup>14</sup>

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

OWCP accepted that on November 1, 2006 appellant sustained multiple left knee and right shoulder conditions due to a fall from a ladder at work. Appellant stopped work and received wage-loss compensation benefits. She was terminated by the employing establishment on May 22, 2007, but continued to receive wage-loss compensation on the periodic rolls. By decision dated February 25, 2010, OWCP terminated appellant's wage-loss compensation benefits effective March 14, 2010. In a June 6, 2012 decision, the Board reversed OWCP's termination of appellant's wage-loss compensation effective March 14, 2010 and OWCP later reinstated her wage-loss compensation retroactive to March 14, 2010. In December 2013 and January 2014 OWCP reimbursed appellant for the HBI premiums for BCBS coverage that were deducted from her compensation payments during the period March 14, 2010 to January 11, 2013. It noted that appellant's HBI plan had been terminated on March 14, 2010 and indicated that HBI premium deductions (under code 104) were made for the period March 14, 2010 to January 11, 2013 despite the termination of the HBI plan. OWCP advised that it had been confirmed that appellant could not use her HBI plan for this period and that the refund was appropriate given her inability to use the HBI plan.

In a January 28, 2014 decision, OWCP again terminated appellant's wage-loss compensation effective February 9, 2014. In a May 5, 2015 decision, the Board reversed OWCP's termination of appellant's wage-loss compensation effective February 9, 2014.

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<sup>14</sup> 5 C.F.R. § 890.502(a).

Following the Board's reversal of the termination action, OWCP made a payment to appellant on July 10, 2015 which reinstated her total wage-loss compensation effective February 9, 2014. The amount of reinstated wage-loss compensation beginning February 9, 2014, however, was reduced by periodic deductions for HBI premiums in the amount of \$3,200.04 under code 104. Appellant claimed that she was entitled to reimbursement of those HBI premium deductions for the period February 9, 2014 to May 4, 2015 because she had no access to health insurance during that period. In a February 4, 2016 decision, OWCP denied appellant's claim for reimbursement of HBI premium deductions for the period February 9, 2014 to May 4, 2015.

The Board finds the case is not in posture for decision regarding whether appellant is entitled to reimbursement of HBI premiums for the period February 9, 2014 to May 4, 2015.

In its February 4, 2016 decision denying reimbursement of HBI premiums for the period February 9, 2014 to May 4, 2015, OWCP noted that a transfer of appellant's HBI enrollment package was made to her former employing establishment, U.S. Courts, Office of the Federal Public Defender. It indicated that, in order for appellant to keep her HBI coverage, regardless of whether she was receiving FECA or OPM benefits, she was required to pay premiums for HBI. OWCP noted that, to date, sufficient evidence had not been received to support that she was entitled to a reimbursement from OWCP of HBI premiums for the period February 9, 2014 to May 4, 2015.

However, in denying appellant's claim for reimbursement of HBI premiums for the period February 9, 2014 to May 4, 2015, OWCP did not adequately explain the basis for its denial. In deciding matters pertaining to a given claimant's entitlement to compensation benefits, OWCP is required by statute and regulation to make findings of fact.<sup>15</sup> OWCP procedures further specify that a final decision of OWCP "should be clear and detailed so that the reader understands the reason for the disallowance of the benefit and the evidence necessary to overcome the defect of the claim."<sup>16</sup> These requirements are supported by Board precedent.<sup>17</sup>

In its February 4, 2016 decision and prior communications to appellant,<sup>18</sup> OWCP suggested that appellant's former employing establishment, U.S. Courts, Office of the Federal Public Defender, was the only entity responsible for reimbursing her HBI premiums for the period beginning February 9, 2014. The Board notes that appellant was terminated from her former employing establishment on May 22, 2007 and that OWCP did not provide support for its suggestion that her former employing establishment was responsible for reimbursing her HBI

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<sup>15</sup> 5 U.S.C. § 8124(a) provides that OWCP "shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP "shall contain findings of fact and a statement of reasons."

<sup>16</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5c(3)(e) (February 2013).

<sup>17</sup> See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

<sup>18</sup> In a May 21, 2015 letter, OWCP noted that appellant's HBI enrollment had been transferred back to her employing establishment, U.S. Courts, Office of the Public Defender, and advised her that, if any HBI deductions for BCBS were made from February 9, 2014 to the present, then she had to address the issue with her employing establishment.

premiums for the claimed period. It did not cite to relevant statutes, procedures, regulations, or Board precedent to support this ostensible position. OWCP indicated that appellant's HBI coverage had been transferred to her former employing establishment, but it did not provide adequate support for this statement.<sup>19</sup> Moreover, OWCP failed to articulate a reason for not reimbursing HBI premiums for the period February 9, 2014 to May 4, 2015 (the second period appellant's benefits had been terminated and during which the termination was reversed by the Board) for the same reason that it previously reimbursed her for HBI premiums deducted for the previous period of termination (March 14, 2010 to January 11, 2014), which was reversed by the Board.

For these reasons, OWCP's decision denying reimbursement of HBI premium deductions for the period February 9, 2014 to May 4, 2015 would not allow appellant to understand the reason for the disallowance and the evidence necessary to overcome the defect of her claim.<sup>20</sup> Therefore, the case shall be remanded to OWCP for further consideration of this matter, to be followed by the issuance of a *de novo* decision containing adequate facts and findings.

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

Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>21</sup> The formula for determining loss of wage-earning capacity, developed in the case of *Albert C. Shadrick*,<sup>22</sup> has been codified at section 10.403(c)-(e) of OWCP's regulations.<sup>23</sup> Under the *Shadrick* formula, OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's actual earnings (or constructed earnings) by the current or updated pay rate for the position held at the time of injury.<sup>24</sup> The employee's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes, defined in 20 C.F.R. § 10.5(a) as the pay rate at the time of injury, the time disability begins or the time disability

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<sup>19</sup> On January 30, 2014 OWCP received a Standard Form 2809 in which appellant elected to have HBI coverage under BCBS (code 104) effective January 12, 2014. A portion of the form was completed by an OWCP official as OWCP was designated as the entity administering the coverage. On August 13, 2015 OWCP received a Standard Form 2809 which appellant completed on May 15, 2006 in order to elect HBI coverage with BCBS under code 104. The portion of the form to be completed by the relevant agency was initially completed on May 16, 2006 by an official of appellant's former employing establishment, U.S. Courts, Office of the Federal Public Defender. However, an unidentified individual had struck out the "Effective date of action" which had been listed as May 16, 2006 and replaced it with the date February 9, 2014. The Board notes that, given the manner in which the form was altered, it would not effectuate a transfer of HBI coverage to appellant's former employing establishment.

<sup>20</sup> See *supra* note 16.

<sup>21</sup> *E. W.*, Docket No. 14-584 (issued July 29, 2014); *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

<sup>22</sup> 5 ECAB 376 (1953).

<sup>23</sup> 20 C.F.R. § 10.403(c)-(e).

<sup>24</sup> *Id.* at § 10.403(c)-(d).

recurs, whichever is greater, by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity.<sup>25</sup> The regulations further provide that the employee's wage-earning capacity in terms of percentage is computed by dividing the employee's earnings by the current pay rate.<sup>26</sup>

### ANALYSIS -- ISSUE 2

In early-2013 appellant reported to OWCP that she had been employed since April 19, 2012 by the Department of Veterans Affairs as a resident in a clinical pastoral education residency program and that she had received a stipend while she was participating in this program. She later advised that the program ended December 20, 2013 and claimed that she should have received total wage-loss compensation (rather than partial wage-loss compensation) for the period December 20 to 31, 2013 because she did not have income for this period which OWCP had included when calculating her loss of wage-earning capacity.<sup>27</sup> In an April 7, 2016 decision, OWCP determined that it had properly calculated appellant's wage-loss compensation for the period December 20 to 31, 2013.

In its April 7, 2016 decision denying appellant's claim for increased wage-loss compensation from December 20 to 31, 2013, OWCP noted that it had requested that appellant submit a copy of her 2013 income tax return, as well as a statement identifying the stipend pay she received in 2013. It advised appellant that it needed this information so that it could determine whether her claim for increased wage-loss compensation from December 20 to 31, 2013 was valid.<sup>28</sup>

The Board finds that OWCP properly explained that it needed specific information regarding the payment of the stipend, either through a copy of appellant's 2013 tax return or any other proof establishing the period covered by the stipend. OWCP believed it was likely the stipend went through the end of the calendar year even though the actual program ended on December 20, 2013. Despite the numerous requests by OWCP, appellant failed to provide the requested information. OWCP properly explained the basis for its reasoning that appellant had earnings during the period December 20 to 31, 2013, such that she would only be entitled to partial wage-loss compensation for this period.

The Board finds that OWCP properly denied the findings of an underpayment of wage-loss compensation benefits under the wage-earning capacity determination.

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<sup>25</sup> 20 C.F.R. § 10.403(e).

<sup>26</sup> *Id.* at § 10.403(d).

<sup>27</sup> In determining the percentage of appellant's loss of wage-earning capacity from April 12, 2012 through December 31, 2013, OWCP applied the principles of the *Albert C. Shadrick* case, *supra* note 22, and determined that she had partial wage loss during this period. Effective January 1, 2014, OWCP paid appellant total wage-loss compensation on the periodic rolls.

<sup>28</sup> See *supra* notes 22 through 26 explaining how earned wages are incorporated into the *Shadrick* calculation for determining loss of wage-earning capacity.

**CONCLUSION**

The Board finds the case is not in posture for decision regarding whether appellant is entitled to reimbursement of HBI premiums for the period February 9, 2014 to May 4, 2015. The Board also finds that OWCP properly calculated her wage-loss compensation for the period December 20 to 31, 2013.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 7 decision of the Office of Workers' Compensation Programs is affirmed and the February 4, 2016 decision of OWCP is set aside, and the case is remanded to OWCP for further action consistent with this decision.

Issued: October 6, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board