

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

_____)
H.Q., Appellant)

and)

DEPARTMENT OF THE NAVY,)
PHILADELPHIA NAVAL SHIPYARD,)
Philadelphia, PA, Employer)
_____)

Docket No. 22-1101
Issued: March 29, 2023

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

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 19, 2022 appellant filed a timely appeal from a May 9, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$63,739.81 for the period January 1, 1990 through May 18, 2002, for which he was

¹ The Board notes that following the May 9, 2022 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

² 5 U.S.C. § 8101 *et seq.*

without fault, because he continued to receive compensation for total disability following his return to part-time private sector work; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$302.20 beginning May 22, 2022 from appellant's continuing compensation payments, every 28 days.

FACTUAL HISTORY

On June 16, 1986 appellant, then a 44-year-old pipe insulator, filed a traumatic injury claim (Form CA-1) alleging that on June 10, 1986 he injured his back, left hip, and leg lifting a pipe over his head and out of a tank while in the performance of duty. He stopped work on June 16, 1986. OWCP accepted the claim for left sciatic neuralgia, L4-5 herniated disc, and chemonucleolysis and paid appellant wage-loss compensation on the supplemental rolls. Appellant returned to work on July 5, 1988 and sustained a recurrence of disability on July 6, 1988. OWCP thereafter, paid wage-loss compensation on the supplemental rolls.

On February 5, 1990 appellant began working 20 hours a week, earning \$3.35 an hour as a real estate appraiser trainee following OWCP-directed vocational rehabilitation. On April 19 and May 31, 1990 OWCP applied the *Shadrick*³ formula, and reduced his wage-loss compensation based on his actual earnings as a real estate appraiser trainee beginning April 8, 1990. In a June 15, 1990 wage-earning capacity memorandum, it found that appellant's appropriate payrate was the date of injury, June 10, 1986, applied the *Shadrick* formula and determined that appellant had 13 percent wage-earning capacity based on his actual earnings of \$67.00 per week.

By decision dated August 29, 1990, OWCP determined that appellant received an overpayment of compensation in the amount of \$198.45 for the period February 5 through March 10, 1990, for which he was at fault, as he returned to part-time work on February 5, 1990 and continued to receive wage-loss compensation based on total disability. It recovered this overpayment from his continuing compensation benefits.

In a letter dated October 22, 1990, appellant's employer withdrew his vocational rehabilitation position as real estate appraiser trainee effective October 19, 1990.

OWCP calculated appellant's wage-earning capacity on November 28, 1990 and applied the *Shadrick* formula to find that he had seven percent wage-earning capacity and was entitled to compensation every 28 days in the amount of \$1,674.00. On November 29, 1990 it noted that as there was no formal loss of wage-earning capacity (LWEC) determination in place, he was entitled to wage-loss compensation for total disability effective October 19, 1990.

In a letter dated December 7, 1990, OWCP informed appellant that his wage-loss compensation payments would increase effective November 18, 1990 and that he would receive a supplemental check covering the period October 19 through November 17, 1990. Appellant continued to participate in vocational rehabilitation counseling through February 8, 1991.

³ *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d); *C.G.*, Docket No. 21-0495 (issued April 13, 2022).

In a Form EN-1032 dated March 20, 1992, appellant first reported his self-employment as a real estate appraiser beginning July 15, 1991 and continuing. On April 15, 1992 and June 2, 1993 OWCP found that his claim was in an LWEC status. In a July 22, 1996 memorandum, it found that appellant had received an overpayment due to actual earnings in 1991, 1992, and 1994.

On February 15, 1998 appellant completed a Form EN-1032 and indicated that he was employed as a court recorder beginning January 1997.⁴ He continued to report his employment and self-employment through August 6, 2002.

OWCP provided benefit statements indicating that from December 30, 2001 through January 26, 2002, it paid wage-loss compensation in the net amount of \$1,799.82 for the 28-day period. For the period January 27 through March 23, 2002, it paid wage-loss compensation in the net amount of \$1,810.86 every 28 days. For the period March 24 through April 20, 2002, OWCP paid net compensation in the amount of \$1,836.86. For the period April 21 through May 18, 2002, it paid net compensation in the amount of \$1,836.86. On June 6, 2002 OWCP paid wage-loss compensation for the period May 19 through June 15, 2002 in the net amount of \$1,682.86.

By decision dated July 19, 2002, OWCP suspended appellant's wage-loss compensation effective July 14, 2002, due to his failure to complete a March 25, 2002 Form CA-1032, as requested. It noted that, if he completed and returned an enclosed copy of the Form CA-1032, his compensation benefits would be restored retroactively to the date they were suspended. Appellant submitted a completed Form EN-1032 on August 6, 2002.

On August 12, 2002 appellant reported that he had continued to work part time as a court recorder from August 1994 and as a real estate appraiser from 1990. He provided his tax returns from 1991 through 2001.

For the periods July 14, 2002 through July 13, 2003, OWCP calculated appellant's wage-earning capacity based on his actual earnings during the preceding 14- to 28-day period, applied the *Shadrick* formula, and paid wage-loss compensation based on these specific calculations in accordance with its procedures in amounts varying from \$746.38 through \$2,464.14.

In a memorandum to file dated July 16, 2003, OWCP reported that appellant had submitted biweekly statements since July 1, 2002 listing wages earned in his self-employment as a real estate appraiser, and in his employment as a court recording monitor.

On July 17, 2003 OWCP provided appellant with an informal wage-earning capacity placement based on his actual earnings from July 14, 2002 through July 13, 2003. It found that he had average weekly earnings of \$97.06. OWCP applied the *Shadrick* formula and determined that appellant had 13 percent wage-earning capacity and that he was entitled to gross compensation in the amount of \$1,199.60 every 28 days.

By decision dated July 31, 2003, OWCP issued a formal LWEC determination. It found that appellant's employment as a real estate appraiser and court recording monitor fairly and reasonably represented his wage-earning capacity, based on the wages actually earned beginning

⁴ The record indicates that appellant had earnings in 1994 from the Borough of Barrington in the amount of \$592.92.

July 14, 2002, and reduced his compensation effective June 1, 2003. OWCP found that the position was suitable as he had demonstrated the ability to perform the duties of that job for 60 days or more. A computation of compensation worksheet was included which documented the required application of the *Shadrick* formula used to determine appellant's wage-earning capacity of 13 percent. Based on the LWEC, OWCP determined that appellant would receive net compensation of \$1,642.76 every 28 days.⁵

On February 11, 2004 appellant completed a Form EN-1032 and indicated effective September 31, 2003 he was no longer self-employed as a real estate appraiser, but continued to be employed as a court recording monitor.

In a January 27, 2005 letter, OWCP noted that appellant's benefits were suspended on July 19, 2002 for failure to complete a Form CA-1032 and that payments resumed on September 6, 2002. It reported that beginning with payments issued on May 19, 2002 through July 12, 2003, it had manually calculated deductions from his actual wages earned and his wage-earning capacity from his gross wage-loss compensation. Beginning on July 14, 2003, appellant's payments on the periodic rolls were reduced automatically. OWCP reported that it had not calculated the overpayment of compensation that accrued due to the failure to calculate his wage-earning capacity for the entire period he had worked as a real estate appraiser and a court recorder.

On July 16, 2007, July 17, 2009, February 15, 2011, and January 3, 2013 OWCP noted that appellant was entitled to wage-loss compensation based on his actual earnings, that he was receiving net compensation in the amount of \$1,642.88 for the period July 8 through August 4, 2007; \$1,568.42 for the period July 5 through August 1, 2009; \$1,811.48 for the period February 13 through March 12, 2011 and that he was receiving gross and net compensation in the amount of \$2,449.00 for the period January 13 through February 9, 2013 including cost-of-living increases.

In a letter dated September 8, 2014, appellant informed OWCP that beginning in 2004 he was no longer self-employed as a real estate appraiser and that he was no longer employed as a court recording monitor. He requested that his wage-loss compensation be reinstated, or a modification of the July 31, 2003 LWEC determination.

In a letter dated October 7, 2014, OWCP acknowledged that appellant's position as a court recording monitor was eliminated effective August 29, 2014.

On February 17, 2022 OWCP made a preliminary determination that appellant had received an overpayment of compensation in the amount of \$63,739.81 for the period January 1, 1990 through May 18, 2002, for which he was without fault, because he had private sector earnings from working as a real estate appraiser and then as a court reporter since 1990, without appropriate adjustment of his compensation benefits due to these earnings. It found that he received net wage-loss compensation in the amount of \$248,197.18 for the period January 1, 1990 through May 18, 2002. OWCP determined that appellant had actual net earnings of \$99,874.49 during that period of 643.7 weeks, resulting in average weekly earnings of \$155.16. It applied the *Shadrick*

⁵ OWCP paid appellant \$1,642.76 for the periods July 13 through August 9, 2003 and September 7 through October 4, 2003.

formula and determined that appellant had 21 percent wage-earning capacity. OWCP found that he should have received wage-loss compensation in the amount of \$184,457.37 resulting in an overpayment of \$63,739.81. It provided appellant with an overpayment action request form and informed him that within 30 days he could request a final decision based on the written evidence, or a preresoupment hearing. OWCP requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Appellant did not respond.

By decision dated May 9, 2022, OWCP finalized the preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$63,739.81 for the period January 1, 1990 through May 19, 2002, for which he was without fault, because he continued to receive wage-loss compensation for total disability following his return to part-time private sector work. It determined that it would recover the overpayment by withholding \$302.20 from appellant's continuing compensation benefits, every 28 days.

LEGAL PRECEDENT

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 or her duty.⁶

OWCP's regulations provide in pertinent part: "Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."⁷ A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same period.⁸ OWCP's procedures also provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁹

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,¹⁰ has been codified at section 10.403 of OWCP's regulations. If the claimant is entitled to compensation for partial wage loss after returning to work, the claims examiner should compute entitlement using the *Shadrick* formula. If the injured employee's earnings are fixed, the claims examiner may authorize compensation on a 28-day payment cycle. If the injured employee's earnings are variable, the claims examiner may authorize

⁶ *Supra* note 2 at § 8102(a).

⁷ 20 C.F.R. § 10.500.

⁸ *See Q.V.*, Docket No. 21-1188 (issued May 26, 2022); *J.L.*, Docket No. 18-1266 (issued February 15, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *M.S.*, Docket No. 16-0289 (issued April 21, 2016); *L.S.*, 59 ECAB 350, 352-53 (2008).

⁹ *See J.S.*, Docket No. 17-0260 (issued December 28, 2017); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.1 (September 2020).

¹⁰ 5 ECAB 376 (1953); 20 C.F.R. §§ 10.403(d)-(e).

payment on the daily roll as earnings records are received.¹¹ Where OWCP learns of actual earnings that span a lengthy period of time (*e.g.*, several months or more), the compensation entitlement should be determined by averaging the earnings for the entire period, determining the average pay rate, and applying the *Shadrick* formula (comparing the average pay rate for the entire period to the pay rate of the date-of-injury job in effect at the end of the period of actual earnings).¹²

ANALYSIS

The Board finds that appellant received an overpayment of compensation for which he was without fault, because he continued to receive compensation for total disability following his return to part-time private sector work.

Appellant returned to part-time private sector work as a real estate appraiser beginning on July 15, 1991. OWCP continued to pay him for total disability through April 15, 1992 after he had returned to work. As noted above, a claimant is not entitled to receive compensation for total disability during a period in which he had actual earnings.¹³ The record indicates that OWCP paid wage-loss compensation for total disability during the period July 15, 1991 through April 15, 1992, when it found that the case was in an LWEC posture.¹⁴ Therefore, an overpayment of compensation was created in this case.¹⁵

The Board further finds, however, that this case is not in posture for decision with regard to the period and amount of the overpayment. OWCP determined that the period of overpayment was from January 1, 1990 through May 18, 2002. It failed to consider that appellant did not return to work until February 5, 1990. OWCP also failed to consider its August 29, 1990 overpayment decision for the period February 5 through March 10, 1990 for which it recovered the overpayment. It, furthermore, did not discuss its April 8, 1990 application of the *Shadrick* formula, and its finding of an additional period of total disability beginning October 19, 1990. As such, the period and amount of the overpayment are not in posture for decision.¹⁶

The case will be remanded to OWCP for recalculation of the period and amount of the overpayment, to be followed by a new preliminary overpayment determination and a *de novo* overpayment decision.¹⁷

¹¹ *Supra* note 9 at Chapter 2.815.3b (June 2013). *Albert C. Shadrick, id.; P.B.*, Docket No. 19-0329 (issued December 31, 2019); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

¹² *Id.*

¹³ *Q.V.*, *supra* note 8; *supra* note 9.

¹⁴ The record is unclear regarding whether appellant was paid for total disability or based on his actual earnings after this period.

¹⁵ *Supra* note 8.

¹⁶ *Z.D.*, Docket No. 19-0662 (issued December 5, 2019); *D.W.*, Docket No. 10-0361 (issued December 23, 2010).

¹⁷ In light of the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation, for which he was without fault, because he continued to receive compensation for total disability following his return to part-time private sector work. The Board further finds, however, that the case is not in posture for decision regarding the period and amount of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2022 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 29, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board