U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANNA E. EACKER and DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, Fort Bliss, TX

Docket No. 98-935; Submitted on the Record;
Issued May 3, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's actual earnings in the position of case worker assistant fairly and reasonably represented her wage-earning capacity; (2) whether the Office properly determined that appellant received an overpayment in the amount of $4,831.82 for the period January 2 through October 11, 1997 inasmuch as appellant failed to give timely notice of her wages; (3) whether the Office properly found that appellant was with fault in the creation of the overpayment in the amount of $4,831.82; and (4) whether the Office abused its discretion in requiring repayment of the overpayment in the amount of $50.00 every 28 days.

On December 11, 1991 appellant, then a 30-year-old cashier, filed a traumatic injury claim (Form CA-1) alleging that on that date she sprained her knee. Appellant stopped work on December 12, 1991 and returned to work on December 17, 1991.[1] The Office accepted appellant's claim for a right and left knee sprain, bilateral strain of the medial lateral collateral ligament and bilateral degenerative joint disease.

By decision dated October 15, 1997, the Office found that appellant's reemployment with Communities in School as a case worker assistant with wages of $230.77 per week fairly and reasonably represented her wage-earning capacity effective January 2, 1997.

In an October 29, 1997 letter, the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of $4,831.82 during the period January 2 through October 11, 1997 because appellant continued to receive compensation after she became employed full time on January 2, 1997. The Office advised appellant that she was at fault in the creation of the overpayment because she failed to furnish information about her employment and earnings, which she knew or should have known was material. In addition, the

[1] The record reveals that appellant was separated from the employing establishment effective February 26, 1993 due to her disability.

Office advised appellant that she could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of this letter if she disagreed that the overpayment occurred, if she disagreed with the amount of the overpayment, if she believed that the overpayment occurred through no fault of her own and if she believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

By decision dated December 12, 1997, the Office finalized its preliminary overpayment determination and finding of fault.

The Board has duly reviewed the case record in this appeal and finds that the Office properly determined that appellant's actual earnings in the position of case worker assistant fairly and reasonably represented her wage-earning capacity.

When an individual sustains an employment-related injury that prevents return to the employment held at the time of injury, but that does not render the employee totally disabled for all gainful employment, the employee is considered partially disabled and is entitled to compensation for her loss of wage-earning capacity as provided for under section 8115 of the Federal Employees' Compensation Act.[2]

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity.[3] Generally, wages actually earned are the best measure of a 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.[4]

In the present case, Virginia Aleman, Director of Administration of Communities in Schools, indicated in an August 7, 1997 letter that effective September 1, 1997 appellant was going from a full-time employee to 25 hours per week and that appellant's annual salary was going to be $8,000.00. In an undated letter received by the Office on August 14, 1997, appellant stated that her full-time job at a high school was going to become a part-time job effective September 1, 1997 in that she was going to work five hours per day, five days per week, thus, earning $8,000.00 per year. Appellant explained that she could not work full time due to great pain in her legs. Appellant's letter was accompanied by *inter alia*, a Form CA-1032 indicating that she had not worked for any employer in the past 15 months. Based on its receipt of appellant's letter and Form CA-1032, the Office telephoned Ms. Aleman on August 20, 1997. An Office memorandum of the same date regarding this telephone conversation revealed that Ms. Aleman stated appellant began work on January 2, 1997 in a full-time position as a case worker assistant for Communities in Schools -- El Paso, Inc. This memorandum also revealed that appellant earned $12,000.00 per year in this full-time position. Ms. Aleman stated that

[2] 5 U.S.C. § 8115.

[3] 5 U.S.C. § 8115(a).

[4] *Dennis E. Maddy,* 47 ECAB 259 (1995).

appellant voluntarily reduced her work hours to five hours per day effective September 1, 1997 so that she could return to school. Ms. Aleman also stated that appellant did not have any difficulty performing the physical requirements of her job on a full-time basis. Appellant indicated in a September 20, 1997 Form CA-1032 that she had been working since January 2, 1997 at the Communities in Schools, Hanks High School. Appellant also indicated that she earned $12,000.00 per year, but that her salary was reduced to $8,000.00 per year because her legs and arms were hurting too much and they were swollen. Under the Office's procedures, after a claimant has been working in a position for 60 days, the Office will make a determination as to whether the actual earnings fairly and reasonably represent the claimant's wage-earning capacity.[5]

In this case, the Office determined that actual earnings did fairly and reasonably represent appellant's wage-earning capacity and there is no contrary evidence. Although appellant stated that she reduced her work hours to five hours per day due to her physical condition, there is no medical evidence of record establishing that appellant was unable to work full time due to her accepted employment injuries. As noted above, wages earned are generally the best measure of wage-earning capacity. The Board, therefore, finds that the position of case worker assistant fairly and reasonably represented appellant's wage-earning capacity.

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[6] has been codified at 20 C.F.R. § 10.303. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate.[7] In this case, the Office properly used earnings of $230.77 per week and a current pay rate for the date-of-injury job of $343.60 per week, for a 67 percent wage-earning capacity. The pay rate at the time of injury, which was $306.00, is multiplied by the wage-earning capacity percentage, resulting in $205.02. This resultant dollar amount is subtracted from the pay rate at the time of injury to determine the loss of wage-earning capacity, which results in $100.98. This amount is multiplied by the appropriate compensation rate, which is three-fourths in this case and applicable cost-of-living adjustments are added to total $84.50.

The Board finds that the Office properly determined that appellant's actual earnings in the position of case worker assistant represented her wage-earning capacity and properly reduced her compensation according to the *Shadrick* principles.

The Board further finds that the Office properly determined that appellant received an overpayment in the amount of $4,831.82 for the period January 2 through October 11, 1997 inasmuch as appellant failed to give timely notice of her wages.

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[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[6] 5 ECAB 376 (1953).

[7] 20 C.F.R. § 10.303(b). According to this section, current pay rate means the current pay rate for the job held at the time of injury.

In the present case, the record reveals that appellant received compensation for temporary total disability for the period January 2 through October 11, 1997 while she was working full time and then part time as a case worker assistant for Communities in Schools. Therefore, an overpayment was created in the amount of $4,831.82.

Additionally, the Board finds that the Office properly found that appellant was with fault in the creation of the overpayment in the amount of $4,831.82.

Section 8129(a) of the Act 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.[8] The only exception to this requirement is a situation, which meets the test set forth as follows in section 8129(b): "[A]djustment 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 the Act or would be against equity and good conscience."[9] Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.[10] In evaluation of whether appellant is without fault, the Office will consider whether appellant's receipt of the overpayment occurred because she relied on misinformation given by an official source within the Office or another government agency, which appellant had reason to believe was connected with administration of benefits as to the interpretation of the Act or applicable regulations.[11]

In determining whether an individual is at fault, section 10.320(b) 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 the individual knew or should have known to be incorrect; or
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> (2) Failed to furnish information, which the individual knew or should have known to be material; or
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> (3) With respect to the overpaid individual only, accepted a payment, which the individual knew or should have been expected to know was incorrect."[12]

In this case, the Office applied the second standard -- appellant failed to furnish information, which she knew or should have known to be material. The Board finds that the

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[8] 5 U.S.C. § 8129.

[9] 5 U.S.C. § 8129(b).

[10] *Harold W. Steele*, 38 ECAB 245 (1986).

[11] 20 C.F.R. § 10.320(c)(1).

[12] 20 C.F.R. § 10.320(b).

Office was correct in determining that appellant failed to furnish information, which she knew or should have known to be material about her employment with Communities in Schools since the Office advised appellant to immediately report when she returned to work to avoid overpayment of compensation by letter dated March 2, 1993. Appellant indicated in her completed Form OWCP-20, that she was not at fault in the creation of the overpayment because she advised the Office by letters and telephone calls, but that she never received a response until her compensation was stopped. Specifically, appellant noted that she contacted the Office on December 18, 1996. However, there is no evidence of record to substantiate appellant's contention. Appellant also indicated that at the time she started receiving compensation in 1991, she did not receive any explanation. The Board notes that Office regulations provide that an individual's understanding of the reporting requirements, efforts, opportunities, or ability to comply with reporting requirements will be considered by the Office in determining whether an individual is with fault in creating the overpayment.[13] As the previous discussion of "knowingly" illustrates, while appellant claimed she did not know about the reporting requirements, the evidence does not substantiate her lack of knowledge, as she did report that she was employed by Communities in Schools. The failure of appellant to disclose her employment activities for the period January 2 through October 11, 1997 renders her "with fault" in the creation of the overpayment under section 10.320(b)(2). Inasmuch as appellant is "with fault" in the creation of the overpayment, recovery of the overpayment cannot be waived.

Finally, the Board finds that the Office did not abuse its discretion in requiring repayment of the overpayment in the amount of $50.00 every 28 days.

Section 10.321(a) of the Code of Federal Regulations states in relevant part:

> "Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other factors so as to minimize any resulting hardship upon such individual."[14]

The Office procedure manual provides that "[i]n cases where there is not entitlement to waiver and the claimant's assets are insufficient to repay the overpayment in full, the senior claims examiner or hearing representative should evaluate the claimant's financial information to establish the highest reasonable rate of repayment which will collect the debt promptly and at the same time minimize any resulting hardship on the claimant."[15]

In the present case, the Office considered appellant's financial circumstances, finding that, based on appellant's Form OWCP-20, she had a household monthly income of $837.78

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[13] 20 C.F.R. § 10.320(c).

[14] 20 C.F.R. § 10.321(a).

[15] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Preliminary and Final Decisions*, Chapter 6.200.4(d)(1)(b) (September 1994).

with monthly expenses of $1,387.00. The Office noted that previously, appellant's earnings were significantly higher, but that she voluntarily reduced the number of hours that she worked. The Office further noted that appellant had a greater wage-earning capacity than her current wages. The Office noted that it must consider a repayment schedule which will liquidate the debt in a reasonable time while considering appellant's finances. The Office concluded that, although appellant's expenses exceeded her income by several hundred dollars, she intentionally reduced her wages and that the repayment must be small enough for appellant to manage, yet sufficient to exceed the interest accrual. The Office then concluded that appellant could reasonably repay the overpayment by deducting $50.00 from her continuing compensation every 28 days, which would cover the interest and repay the debt in little more than nine years.

The Board finds that the Office gave due regard to the factors enumerated in section 10.321(a) to minimize the financial hardship on appellant in deducting $50.00 every 28 days from appellant's continuing compensation. In so doing, the Office explained why a deduction of $50.00 from appellant's continuing compensation every 28 days was small enough for appellant to manage and provide appellant with a reasonable period of time to repay the overpayment. The Board, therefore, finds that the Office properly determined the rate of repayment in this case

The December 12 and October 15, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
May 3, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member