

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

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MARGARET A. UME, Appellant )

and )

DEPARTMENT OF THE AIR FORCE, )  
SAN ANTONIO AIR LOGISTICS CENTER, )  
KELLY AIR FORCE BASE, TX, Employer )

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**Docket No. 04-2132  
Issued: April 20, 2005**

*Appearances:*  
*Margaret A. Ume, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
COLLEEN DUFFY KIKO, Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On August 30, 2004 appellant filed a timely appeal of the June 4, 2004 merit decision of the Office of Workers' Compensation Programs, which found that she received an overpayment of benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.<sup>1</sup>

**ISSUES**

The issues are: (1) whether appellant received an overpayment in the amount of \$3,739.75 for the period September 11, 2002 to May 31, 2003; (2) whether the Office properly determined that appellant was at fault in creating the overpayment; and (3) whether the Office properly ordered appellant to repay the debt in full.

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<sup>1</sup> The record on appeal includes evidence the Office received after it issued the June 4, 2004 decision. The Board's review is limited to the evidence in the case record that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

## **FACTUAL HISTORY**

Appellant, a 44-year-old former inventory management specialist, has an accepted claim for bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome arising on or about December 1, 1995. Additionally, the Office authorized bilateral carpal tunnel releases. Because of her injury appellant was only capable of working part-time limited duty. The Office paid appropriate wage-loss compensation for partial disability. Appellant also received two schedule awards. She retired July 7, 2000 and elected to receive a disability retirement annuity from the Office of Personnel Management (OPM) in lieu of workers' compensation benefits. The effective date of her election was September 10, 2000.

In October 2002, appellant asked the Office about the possibility of resuming disability compensation. She subsequently elected to receive wage-loss compensation benefits effective June 1, 2003. OPM stopped paying appellant a retirement disability annuity and the Office resumed payment of wage-loss compensation effective June 1, 2003. On November 7, 2003 appellant requested that she be paid wage-loss compensation retroactive to September 11, 2002. The Office advised OPM of appellant's election and OPM informed the Office that she received \$11,744.67 in civil service benefits during the period September 11, 2002 to June 1, 2003 and this amount would have to be repaid. Additionally, appellant informed the Office that she had worked as a substitute teacher during the period September 1, 2002 to May 31, 2003 and was paid \$5,310.00.

The Office calculated that appellant was entitled to \$24,957.18 for the period September 11, 2002 to May 31, 2003. From this amount the Office deducted \$11,744.67, which was to be repaid to OPM. The Office also deducted \$2,148.45 for other expenses such as health and life insurance premiums. On March 5, 2004 the Office paid appellant \$11,064.06 for the period September 11, 2002 to May 31, 2003. That same day the Office spoke with appellant by telephone and advised her that the March 5, 2004 payment was in error because it neglected to adjust her wage-loss compensation to reflect her \$5,310.00 of earnings during the period September 1, 2002 to May 31, 2003. She should have been paid \$7,324.31 instead of \$11,064.06, which represented an overpayment of \$3,739.75. Appellant reportedly stated that she would return the overpaid monies.

In a letter dated March 9, 2004, the Office explained the circumstances of the March 5, 2004 overpayment. The Office also noted that appellant's average weekly earnings over the 34-week period from September 11, 2002 to May 31, 2003, equaled \$141.87 and for compensation purposes appellant had a wage-earning capacity of \$122.45 per week. Appellant was advised to return the \$3,739.75 overpayment within 15 days or the Office would have to formally declare an overpayment. Appellant did not remit the funds.

On April 30, 2004 the Office issued a preliminary finding that an overpayment existed in the amount of \$3,739.75. The Office also found appellant at fault in creating the overpayment. On June 4, 2004 the Office issued a final overpayment decision.<sup>2</sup>

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<sup>2</sup> Appellant responded to the Office's April 30, 2004 preliminary determination, however, this information was not received until several days after the Office issued the final overpayment decision on June 4, 2004.

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

If an employee returns to work and has earnings, she is not entitled to receipt of temporary total disability benefits and actual earnings for the same time period. The Office, therefore, offsets actual earnings.<sup>3</sup>

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

For the period September 11, 2002 to May 31, 2003, the Office reduced appellant's total disability compensation to reflect her actual earnings. Based on financial information provided, the Office determined that she had actual earnings of \$5,310.00 during the period September 11, 2002 to May 31, 2003. Appellant's average weekly earnings for the period equaled \$141.87, which for compensation purposes represented a wage-earning capacity of \$122.45 per week. The Office took into account appellant's actual earnings during the period September 11, 2002 to May 31, 2003 and properly determined her wage-earning capacity.<sup>4</sup> Based upon her reported earnings appellant was entitled to gross wage-loss compensation of \$21,217.43. However, the March 5, 2004 payment was based on gross compensation of \$24,957.18. The record supports the Office's finding that appellant was overpaid \$3,739.75 for the period September 11, 2002 to May 31, 2003.

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

Under section 8129 of the Federal Employees Compensation Act and the implementing regulations, an overpayment must be recovered unless 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.<sup>5</sup> Section 10.433 of the implementing regulations specifically provide that the Office may consider waving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>6</sup> The regulation further provides that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.<sup>7</sup> Under the regulations a recipient will be found to be at fault with respect to creating an

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<sup>3</sup> *Daniel Renard*, 51 ECAB 466, 469 (2000); 20 C.F.R. § 10.403(c) (1999).

<sup>4</sup> The Office did not issue a formal wage-earning capacity determination, but instead reduced appellant's compensation using the *Shadrick* formula. See *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(c) (1999). When an employee returns to work and has earnings, she is not entitled to receipt of temporary total disability benefits and actual earnings for the same time period. *Daniel Renard*, *supra* note 3. Under these circumstances, the Office offsets actual earnings pursuant to the *Shadrick* formula. If a reduction of benefits based upon actual earnings is not accompanied by a determination that actual earnings "fairly and reasonably" represent wage-earning capacity, an informal reduction of benefits utilizing the *Shadrick* formula is proper rather than a formal loss of wage-earning capacity determination. As the Office in this case did not find that appellant's actual earnings fairly and reasonably represented her wage-earning capacity, the informal reduction of benefits was proper.

<sup>5</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437 (1999).

<sup>6</sup> 20 C.F.R. § 10.433(a) (1999).

<sup>7</sup> *Id.*

overpayment if the recipient “[a]ccepted a payment which he or she knew or should have known to be incorrect.”<sup>8</sup>

### **ANALYSIS -- ISSUE 2**

The Office found that appellant was at fault in accepting the overpayment because she knew that the amount paid on March 5, 2004 was incorrect. The Office contacted her by telephone on March 5, 2004 and informed her that the payment was made in error and that it was too late to stop the electronic funds transfer. Additionally, the Office informed appellant that she would have to return \$3,795.75. She reportedly understood the situation and stated that she would return the money. The Office followed-up its March 5, 2004 telephone conversation with a written explanation dated March 9, 2004. The Office’s correspondence fully explained how the overpayment occurred and the amount that was to be remitted to the Office. Although appellant had verbally agreed to return the funds, she did not comply with the Office’s March 9, 2004 written request to repay the funds within 15 days. The record establishes that appellant accepted a payment that she knew or should have known to be incorrect.<sup>9</sup> Therefore, the Board finds that she was not without fault in accepting the overpayment.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441(a) of the regulations authorizes the Office to recover an overpayment by decreasing later payments of compensation.<sup>10</sup> In exercising its authority under section 10.441(a), the Office must take into account the “probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”<sup>11</sup>

Section 10.438 of the regulations provides that “the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office].”<sup>12</sup> As the regulation indicates, this information is necessary to determine whether or not recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.<sup>13</sup> Appellant’s financial information is also used to determine any necessary repayment schedule.<sup>14</sup>

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<sup>8</sup> 20 C.F.R. § 10.433(a)(3) (1999).

<sup>9</sup> *Id.*

<sup>10</sup> 20 C.F.R. § 10.441(a) (1999).

<sup>11</sup> *Id.*

<sup>12</sup> 20 C.F.R. § 10.438(a) (1999).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

**ANALYSIS -- ISSUE 3**

Appellant is entitled to receive continuing compensation. The Office advised appellant that the \$3,739.75 debt was due and owing and provided 30 days to make repayment without interest accruing. Appellant did not timely respond to the Office's April 30, 2004 preliminary overpayment determination. Consequently, the Office did not have any information regarding appellant's personal finances that might otherwise mitigate the demand for repayment in full.<sup>15</sup> If a claimant is being paid compensation and does not respond to the preliminary overpayment decision, the debt should be recovered from such benefits as quickly as possible.<sup>16</sup> The Board finds that the Office did not abuse its discretion in determining that the overpayment sum of \$3,739.75 was due.

**CONCLUSION**

The Board finds that appellant received an overpayment in the amount of \$3,739.75 and she was at fault in accepting the overpayment. The Board further finds that the Office properly found the overpayment due and owing.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 4, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member

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<sup>15</sup> See *Frederick Arters*, 53 ECAB 397, 399-400 (2002).

<sup>16</sup> *Id.* See also Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (May 2004).