

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

N.M., Appellant)

and)

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Tucson, AZ, Employer**

**Docket No. 05-1973
Issued: September 21, 2006**

Appearances:
N.M., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On September 26, 2005 appellant filed a timely appeal of a June 20, 2005 decision of the Office of Workers' Compensation Programs regarding an overpayment of compensation. Pursuant to 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 the Office properly reduced appellant's compensation pursuant to 5 U.S.C. § 8115 on the grounds that the selected position of telephone solicitor/order clerk represented his wage-earning capacity; (2) whether the Office properly determined that an overpayment of \$2,096.14 was created; (3) whether the Office properly denied waiver on the grounds that appellant was not without fault in creating the overpayment; and (4) whether the Office properly held that the overpayment should be recovered by deducting \$100.00 from appellant's continuing compensation payments.

FACTUAL HISTORY

On May 18, 2003 appellant filed a traumatic injury claim (Form CA-1) alleging that he sustained injury while lifting baggage in the performance of duty as a security screener. The Office accepted the claim for aggravated low back strain and lumbar herniated disc. Appellant stopped working and began receiving compensation for temporary total disability.

The Office referred appellant for a second opinion examination by Dr. Robert Dunn, a neurologist. In a report dated July 29, 2004, Dr. Dunn provided a history and results on examination. He diagnosed L4-5 herniated disc and in a work capacity evaluation (Form OWCP-5c) indicated that appellant could work 8 hours per day with a 40-pound lifting restriction (25 pounds on a continuous basis). An attending neurosurgeon, Dr. Eric Sipos, provided an OWCP-5c form dated August 20, 2004 stating that appellant could work 8 hours per day with a 40-pound lifting restriction, 20 pounds on a frequent basis. Dr. Sipos indicated that appellant should be able to alternate sitting and standing as needed. In a report dated November 19, 2004, Dr. Sipos stated that appellant should not lift more than 40 pounds infrequently or 25 pounds on a frequent basis.

As part of vocational rehabilitation services provided to appellant, a rehabilitation specialist identified appropriate positions available in appellant's area. In a job classification (Form OWCP-66) dated December 14, 2004, the specialist identified the position of telephone solicitor (Department of Labor's *Dictionary of Occupational Titles* No. 299.357-014). The position was sedentary with occasional lifting of 10 pounds. The specialist indicated that the position was performed in sufficient numbers to make it reasonably available in appellant's commuting area, with wages of \$8.00 per hour. The record also contains an OWCP-66 form for the position of Order Clerk (No. 249.362-026). The physical requirements and wage information were similar to the telephone solicitor position and the specialist also confirmed the position was reasonably available in appellant's commuting area.

By letter dated January 20, 2005, the Office indicated that appellant had expressed an unwillingness to participate in the job placement program because he believed he was disabled for work. The Office stated that the medical evidence showed that he was capable of performing the duties of telephone solicitor or order clerk. Appellant was advised that he had 30 days to resume a good faith effort in the placement program or action would be taken to reduce his compensation to reflect his wage-earning capacity.

Appellant submitted a February 15, 2005 report from an attending family practitioner, Dr. Rinly Gecosala, who provided a history and results on examination. He diagnosed chronic low back pain and status post microdiscectomy. Dr. Gecosala stated that appellant could not lift more than 10 pounds and had difficulty bending and twisting, with no stooping.

In a decision dated March 3, 2005, the Office stated that it was reducing appellant's compensation to zero for failure to participate in vocational rehabilitation. By decision dated May 18, 2005, the Office stated that effective March 3, 2005 it was reducing appellant's compensation to reflect his ability to earn wages as a telephone solicitor/order clerk. The Office

stated that the decision superceded the March 3 and May 13, 2005 decisions.¹ The decision indicated that appellant was capable of earning \$320.00 per week, with a current pay rate for the date-of-injury job as of March 3, 2005 of \$600.11. Appellant was advised his net compensation would be \$631.32 every 28 days.

By letter dated May 18, 2005, the Office advised appellant of a preliminary determination that he was overpaid \$2,096.14 from March 3 to May 14, 2005. The Office stated that he had received compensation for temporary total disability during the period, but was only entitled to compensation based on loss of wage-earning capacity. The Office further stated that appellant was at fault in creating the overpayment as he accepted payments he knew or should have known were incorrect.

In a decision dated June 20, 2005, the Office finalized its determination that an overpayment of \$2,096.14 was created and appellant was not entitled to waiver as he was at fault in creating the overpayment. The Office further found that the overpayment would be recovered by deducting \$100.00 from appellant's continuing compensation payments.²

LEGAL PRECEDENT -- ISSUE 1

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.³

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, appellant's degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect appellant's wage-earning capacity in his disabled condition.⁴

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office 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 market, that fits the employees capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact

¹ The Office issued a May 13, 2005 wage-earning capacity determination using a current pay rate for the date-of-injury job as of February 20, 2005.

² The record also contains a May 6, 2005 decision with respect to an emotional condition; appellant did not request review of this decision.

³ *Carla Letcher*, 46 ECAB 452 (1995).

⁴ *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

with the state employment service or other applicable service.⁵ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁶

ANALYSIS -- ISSUE 1

The overpayment in this case was based on the Office's determination that appellant's compensation was properly reduced as of March 3, 2005 to reflect his wage-earning capacity in the constructed position of telephone solicitor/order clerk. The initial question is whether the position is within appellant's work restrictions. Although the Office referred to the August 20, 2004 OWCP-5c from Dr. Sipos, which provided a lifting restriction of 40 pounds occasionally and 25 pounds frequently, there is a more current report from Dr. Gecosala dated February 15, 2005. In that report Dr. Gecosala restricted appellant to 10 pounds lifting. The selected position, however, did not require more than 10 pounds lifting. It is a sedentary position with no stooping or other activity such as kneeling or crouching. There is no indication that the selected position would violate any of the restrictions noted from Dr. Gecosala, Dr. Sipos or the second opinion physician, Dr. Dunn. The record, therefore, indicates that the selected position was within appellant's work restrictions.

In addition, the Office properly followed its procedures in securing information from the rehabilitation specialist that the position was reasonably available with wages of \$320.00 per week for a full-time position. The Board finds that the Office properly determined that appellant was capable of performing the position as of March 3, 2005 and, therefore, his compensation should be reduced to reflect his wage-earning capacity. The Office determined appellant's current pay rate for the date-of-injury job and established the loss of wage-earning capacity in accord with 20 C.F.R. § 10.403.

LEGAL PRECEDENT -- ISSUE 2

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous remuneration of any type from the United States, except in limited circumstances.⁷ Absent such a modification, a claimant is entitled only to compensation for the partial loss of wage-earning capacity as determined in the prior decision.⁸

⁵ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁶ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.403.

⁷ 5 U.S.C. § 8116(a).

⁸ See *Duane C. Rawlings*, 55 ECAB ____ (Docket No. 02-2172, issued March 8, 2004).

ANALYSIS -- ISSUE 2

Since appellant was entitled to compensation based on his loss of wage-earning capacity, he was not entitled to compensation based on temporary total disability as of March 3, 2005. With respect to the overpayment issues in this case, however, the record is not sufficient to make a proper adjudication. The Office stated that appellant was paid compensation for temporary total disability from March 3 to May 14, 2005, but the record transmitted to the Board contains no evidence regarding the compensation received. Moreover, there is no indication when the payments were issued and whether they were directly deposited into a bank account. This information is necessary to make a proper adjudication of the overpayment issues, including the denial of waiver based on a finding of fault. The case will accordingly be remanded to the Office for proper assemblage of the case record to include all relevant evidence.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to reflect his ability to perform the constructed position of telephone solicitor/order clerk. With respect to the overpayment issues, the case record is incomplete and the case must be remanded to the Office.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 18, 2005 is affirmed; the June 20, 2005 overpayment decision is set aside and remanded for further action consistent with this decision of the Board.

Issued: September 21, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board