

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

L.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Sonora, CA, Employer**

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**Docket No. 07-1961
Issued: February 14, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 18, 2007 appellant filed a timely appeal from an April 13, 2007 merit decision of the Office of Workers' Compensation Programs finding that she received an overpayment of compensation and denying waiver.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether appellant received a \$3,233.32 overpayment of compensation for the period July 16, 1998 through October 31, 1999; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly determined that the overpayment should be collected by withholding \$90.00 from her continuing compensation payments.

¹ The record also contains an August 21, 2006 decision reducing her compensation based on the Office's finding that she had the capacity to earn wages as a receptionist effective September 3, 2006 and an October 31, 2006 decision denying her request for an oral hearing on the wage-earning capacity determination as untimely. Appellant has not appealed these decisions and thus they are not before the Board at this time. See 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On July 17, 1996 appellant, then a 51-year-old casual clerk, filed a claim alleging that she injured her left foot and toe on July 15, 1996 when a heavy parcel fell on her foot. The Office accepted her claim for a contusion of the left foot. Appellant worked with restrictions following her employment injury until June 1997, when she was terminated from the employing establishment because she had worked the maximum allowable time in her casual appointment.

The Office paid appellant compensation for total disability beginning June 30, 1997. In a decision dated January 25, 2000, the Office denied authorization for surgery as not causally related to the accepted employment injury. Appellant requested a hearing, which was held on July 18, 2000. At the hearing, she related that she worked for a year as a paid caretaker for her father prior to his death on November 3, 1999. The money that appellant earned was paid by the state and was subsequently reimbursed to the state from her father's estate.² In an EN-1032 form, she related that she earned minimum wage from July 1998 to October 1999 as a caretaker to her father. The state subsequently claimed \$7,542.94 from the father's estate as repayment of caretaker expenses which the estate paid. Appellant did not repay any of the caretaker pay

In a memorandum to the file dated July 25, 2002, the Office determined that appellant's actual earnings from July 16, 1998 to October 31, 1999 were \$7,542.94. The earnings occurred over 67.86 weeks and resulted in average actual earnings of \$111.15 per week. The Office calculated appellant's wage-earning capacity using the formula in *Albert C. Shadrick*,³ to find that she was entitled to compensation of \$906.00 every four weeks based on her actual earnings. The Office determined that she received \$17,348.97 but should have received \$14,115.65 in compensation, resulting in an overpayment of \$3,233.32. The Office noted that the work appellant performed was not available on the open market and thus did not issue a formal wage-earning capacity determination.

On July 31, 2002 the Office advised appellant of its preliminary finding that she received an overpayment of compensation of \$3,233.32 for the period July 16, 1998 to October 31, 1999 as she received wages as a caretaker while also receiving compensation for total disability. The Office further advised her of its preliminary determination that she was without fault in the creation of the overpayment and requested that she complete and submit an enclosed overpayment recovery questionnaire.

On August 29, 2002 appellant requested waiver of the overpayment and a decision based on the written evidence. She submitted a completed overpayment recovery questionnaire. In a letter dated September 8, 2002, appellant informed the Office that she had overestimated her husband's income.

² By decision dated September 29, 2000, the hearing representative affirmed the January 25, 2000 decision denying authorization for surgery.

³ See *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(c).

By decision dated April 13, 2007, the Office finalized its finding that appellant received a \$3,233.32 overpayment because she earned wages as a caretaker from July 16, 1998 to October 31, 1999 while in the receipt of compensation for total disability. The Office further finalized its finding that she was without fault in the creation of the overpayment. The Office found that, based on appellant's 2002 financial information, her monthly income of \$2,170.00 per month exceeded her monthly expenses of \$2,007.00 per month by \$163.00. The Office further noted that she had \$3,000.00 in a checking account, \$2,256.00 in a savings account and \$6,000.00 in investments. The Office indicated that it would withhold \$90.00 per month from appellant's continuing compensation payments to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁴ A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period.⁵ Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁶

Section 8106(a) provides in pertinent part:

“If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between [her] monthly pay and [her] monthly wage-earning capacity after the beginning of the partial disability, which is known as [her] basic compensation for partial disability.”⁷

ANALYSIS -- ISSUE 1

The record establishes that appellant received an overpayment of compensation in the amount of \$3,233.32 for the period July 16, 1998 through October 31, 1999 because she had actual earnings during a period for which she received total disability compensation. When an employee has earnings from employment, she is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁸ 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 the actual earnings “fairly and reasonably” represent wage-earning capacity, an informal reduction of benefits utilizing the

⁴ 5 U.S.C. § 8102(a).

⁵ *Danny E. Haley*, 56 ECAB 393 (2005).

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁷ 5 U.S.C. § 8106(a).

⁸ *Daniel Renard*, 51 ECAB 466 (2000); 20 C.F.R. § 10.403(c).

Shadrick formula is proper rather than a formal loss of wage-earning capacity determination. The Office did not find that appellant's actual earnings as a caretaker for her father fairly and reasonably represented her wage-earning capacity and thus properly provided an informal determination of the amount owed based on her actual earnings using the *Shadrick* formula.⁹

In determining the amount of the overpayment, the Office found that appellant's actual earnings from July 16, 1998 to October 31, 1999 were \$7,542.94 or \$111.15 per week. Using the *Shadrick* formula, the Office found that she was entitled to compensation during this period based on her actual earnings in the amount of \$14,115.65.¹⁰ The Office subtracted the amount of compensation owed, \$14,115.65, from the amount of compensation received, \$17,348.97, to find an overpayment of \$3,233.32. Appellant has not submitted any evidence showing that she did not receive an overpayment of compensation or contesting the amount of overpayment. The Office thus properly determined that she received an overpayment of compensation in the amount of \$3,233.32.

Appellant contends that she did not receive an overpayment of compensation as the state received reimbursement from her father's estate. Appellant did not reimburse the state. A claimant, however, is not entitled to receive compensation for temporary total disability and actual earnings for the same period.¹¹ As appellant had actual earnings for the period July 16, 1998 through October 31, 1999, she is not entitled to compensation for total disability. Additionally, she did not reimburse the state for her salary earned as caretaker to her father, instead, the money came from her father's estate.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act¹² provides that 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." (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.¹³

⁹ *Supra* note 7; *see id.*

¹⁰ The Office divided appellant's current actual earnings of \$111.15 a week by her current pay rate of the position held when injured of \$393.14 to find a 28 percent wage-earning capacity. The Office multiplied the pay rate at the time disability began of \$383.66 by the 28 percent wage-earning capacity percentage. The resulting amount of \$107.42 was subtracted from appellant's date-of-disability pay rate of \$383.66 which provided a loss of wage-earning capacity of \$276.24 per week. The Office then multiplied this amount by the appropriate compensation rate of three-fourths which yielded \$207.18. The Office found that cost-of-living adjustments increased this amount to \$226.40 or \$906.00 every four weeks.

¹¹ *Donna M. Rowan*, 54 ECAB 698 (2003).

¹² 5 U.S.C. § 8129.

¹³ *Wade Baker*, 54 ECAB 198 (2002).

Section 10.436 of the implementing federal regulations¹⁴ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to “defeat the purpose of the Act.”

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁵

ANALYSIS -- ISSUE 2

In its April 13, 2007 overpayment decision, the Office determined that recovery of the overpayment would not defeat the purpose of the Act as appellant’s monthly income exceeded her expenses by \$163.00 per month. The Office further noted that she had assets in checking and saving accounts and investments. The Office, however, relied upon information provided by appellant in an August 29, 2002 overpayment recovery questionnaire. There is no indication that the Office attempted to secure current financial information from appellant in order to make a determination on eligibility for waiver of the overpayment. Since the only financial information in the record was almost five years old, the Office should have attempted to obtain current information regarding her income, expenses and assets. It is appellant’s current financial situation at the time of the waiver determination that must be considered.¹⁶

The case will be remanded for the Office to obtain current financial information from appellant and to determine whether waiver of recovery of the overpayment is warranted. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that appellant received a \$3,233.32 overpayment of compensation for the period July 16, 1998 through October 31, 1999. The Board further finds that the case is not in posture for decision on the issue of waiver of the overpayment.¹⁷

¹⁴ 20 C.F.R. § 10.436.

¹⁵ *Id.* at § 10.437.

¹⁶ *See Ronald E. Smith*, 36 ECAB 652 (1985).

¹⁷ In view of the Board’s finding that the case is not in posture for decision on the issue of waiver, it is premature to consider the issue of whether the Office properly required repayment of the overpayment by withholding \$90.00 from appellant’s continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 13, 2007 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: February 14, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board