

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

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<b>K.D., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 23-0982</b>
	)	<b>Issued: June 5, 2024</b>
<b>DEPARTMENT OF THE NAVY, PUGET</b>	)	
<b>SOUND NAVAL SHIPYARD, Bremerton, WA,</b>	)	
<b>Employer</b>	)	
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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 13, 2023 appellant filed a timely appeal from a January 25, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,038.67 for the period January 3 through

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the January 25, 2023 decision, OWCP received additional evidence. However, the Board's *Rules of Procedures* 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.*

March 6, 2022, for which he was without fault, because he received wage-loss compensation at an incorrect pay rate; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On April 10, 2018 appellant, then a 33-year-old electrician, filed an occupational disease claim (Form CA-2) alleging that he developed a sore back and shooting pain down his right leg due to factors of his federal employment.<sup>3</sup> He stopped work on February 5, 2018. OWCP accepted the claim for lumbar strain and temporary aggravation of spinal stenosis, lumbar region. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing January 5, 2018. He returned to part-time modified duty on April 23, 2018. OWCP subsequently expanded the acceptance of the claim to include temporary aggravation of nerve root impairment and temporary aggravation of degenerative disc disease L4-5.

By decision dated August 5, 2021, OWCP accepted that appellant sustained a recurrence of disability commencing November 30, 2020.<sup>4</sup> It paid wage-loss compensation for total disability from work commencing December 10, 2020. Appellant returned to full-time modified-duty work on February 2, 2021 and stopped working on June 21, 2021. OWCP accepted that appellant sustained an additional recurrence of total disability on June 21, 2021 and paid wage-loss compensation on the supplemental rolls commencing that date. On October 26, 2021 he underwent an OWCP-authorized L4-5 laminectomy, bilateral partial facetectomy, and foraminotomies, L4-5 transforaminal lumbar interbody fusion, L4-5 posterolateral arthrodesis, and posterior instrumented stabilization. Appellant returned to full-time light-duty work on January 3, 2022 and full-time full-duty work on February 18, 2022.

On March 8, 2022 appellant filed a claim for compensation (Form CA-7) from January 3 through March 6, 2022 due to the loss of night differential pay.

On March 11, 2022 OWCP requested that the employing establishment provide the current pay rate for appellant's date-of-injury position,<sup>5</sup> the current pay rate for his full-time light-duty position, and his actual total gross earnings for the entire period from January 3 through March 6, 2022.

In a March 11, 2022 e-mail, the employing establishment reported that the current pay rate for appellant's date-of-injury position was \$31.98 per hour, that the current pay rate for his full-time light-duty position was \$36.54. In a supplemental e-mail dated March 16, 2022, the employing establishment reported appellant's gross earnings of \$10,265.47 for 306 hours from January 3 through March 6, 2022.

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<sup>3</sup> Appellant has a prior accepted claim for a June 24, 2015 lumbar strain, under OWCP File No. xxxxxx295. Appellant's claims have not been administratively combined by OWCP.

<sup>4</sup> OWCP's decision explained that appellant felt a tightening in his lumbar spine beginning November 28, 2020 and that he stopped work on November 30, 2020.

<sup>5</sup> On April 19, 2022 OWCP related that appellant worked a rotating or irregular schedule, with rotating shift schedule and second shift work. It calculated that appellant's date-of-recurrence pay rate was \$1,420.77 per week and that he also received \$106.56 for night differential pay for total weekly pay rate of \$1,527.33. Appellant was entitled to the augmented compensation rate of 75 percent.

On April 27, 2022 OWCP calculated appellant's wage-loss compensation effective January 3 through March 6, 2022 based on the formula set forth in *Albert C. Shadrick*.<sup>6</sup> It calculated that his recurrent weekly pay rate as of November 30, 2020 was \$1,527.33 per 40-hour workweek. OWCP determined that appellant's actual earnings from January 3 through March 6, 2022 were \$1,140.61. It then determined that his weekly compensation rate was \$194.74, and that his four-week compensation amount was \$840.00. OWCP paid wage-loss compensation from January 3 through March 6, 2022 in the amount of \$1,765.72 based on these calculations.

On May 24, 2022 appellant asserted that the information provided by the employing establishment regarding his earnings was incorrect.

On June 28, 2022 OWCP expanded the acceptance of the claim to include lumbar radiculopathy and spondylolisthesis.

In a June 2, 2022 e-mail, the employing establishment reported that appellant received gross earnings from January 3 through March 6, 2022 in the amount of \$11,876.70 for 356 hours of work, when he was entitled to only \$10,265.47 for 306 hours of work as previously reported to OWCP. The employing establishment further asserted that he believed his pay rate should be based on his accepted recurrence of disability on June 21, 2021. It noted that it did not appear that appellant had resumed regular full-time work six months prior to the recurrence of disability.

In a worksheet dated October 24, 2022<sup>7</sup>, OWCP determined that appellant was paid incorrectly in this claim through application of the *Shadrick* formula, as he had actual earnings in the amount of \$1,319.63 per week for the period January 3 through March 6, 2022 resulting in wage loss of \$106.91 per week at the augmented 75 percent rate of \$80.18 a week for the 57-day period from January 3 through February 28, 2022. From March 1 through 6, 2022 appellant's compensation pay rate was increased to \$86.50 a week or \$74.14 due to a consumer price index increase. OWCP concluded that he received \$1,765.72 in wage-loss compensation during the period January 3 through March 6, 2022 and was entitled to receive \$727.05 resulting in an overpayment of \$1,038.67. In applying the *Shadrick* formula, OWCP relied upon a pay rate when compensable disability recurred as of November 30, 2020.

On October 25, 2022 OWCP issued a preliminary overpayment determination finding that an overpayment of compensation in the amount of \$1,038.67 had been created for the period January 3 through March 6, 2022 because appellant was paid based on the formula of *Shadrick* using incorrect actual earnings information for the period January 3 through March 6, 2022. It determined that he was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable recovery method, and advised him that he could request waiver of recovery of the overpayment. It further requested that he provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, canceled checks, pay slips, and any other records which supported income and expenses. Additionally, OWCP provided an

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<sup>6</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953); see also 20 C.F.R. §§ 10.402 and 403; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.3.b(1) and 4.b (June 2013) (The method for computing the compensation payable where an injured employee has actual earnings is called the *Shadrick* formula).

<sup>7</sup> OWCP previously completed a worksheet on August 22, 2022.

overpayment action request form and further notified appellant that, within 30 days of the date of the letter, he could request a final decision based on the written evidence, or a precoupment hearing.

On November 2, 2022 appellant submitted an overpayment action request form. He requested that OWCP make a decision based on the written evidence regarding possible waiver of recovery of the overpayment. Appellant did not complete the Form OWCP-20 and provided no financial information.

By decision dated January 25, 2023, OWCP finalized the preliminary overpayment determination finding that appellant had received an overpayment of compensation in the amount of \$1,038.67 for which he was without fault, for the period January 3 through March 6, 2022. It denied waiver of recovery of the overpayment and required that he remit the full amount of \$1,038.67 within 30 days.

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

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of his or her federal employment.<sup>8</sup> Section 8129(a) provides, in pertinent part: “When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”<sup>9</sup> Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation for total disability, he or she may not receive salary, pay, or remuneration of any type from the United States.<sup>10</sup>

Section 8115(a) and FECA and section 10.403 of OWCP’s regulations provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee’s actual earnings if the actual earnings fairly and reasonably represent the employee’s wage-earning capacity.<sup>11</sup> Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of showing that they do not fairly and reasonably represent the injured employee’s wage-earning capacity, must be accepted as such a measure.<sup>12</sup>

When a claimant has actual earnings that span a lengthy period of time (*e.g.*, several months or more) the proper compensation 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 position in effect at the

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<sup>8</sup> 5 U.S.C. § 8102(a).

<sup>9</sup> *Id.* at § 8129(a).

<sup>10</sup> *Id.* at § 8116.

<sup>11</sup> 5 U.S.C. § 8115(a); 20 C.F.R. § 10.403; *V.H.*, Docket No. 20-1012 (issued August 10, 2021); *Loni J. Cleveland*, 52 ECAB 171 (2000); *Z.D.*, Docket No. 19-0662 (issued December 5, 2019).

<sup>12</sup> *D.A.*, Docket No. 21-0267 (issued November 19, 2021); *K.B.*, Docket No. 20-0358 (issued December 10, 2020); *Lottie M. Williams*, 56 ECAB 302 (2005).

end of the period of actual earnings).<sup>13</sup> The wage-earning capacity in terms of percentage is determined by dividing the employee's earnings by the current pay rate of the job held at the time of injury. The computation in dollars is computed by multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity and the resulting dollar amount is subtracted from the pay rate for compensation purposes to obtain the loss of wage-earning capacity (LWEC).<sup>14</sup>

If the claimant is entitled to compensation for partial wage loss after return to work, the claims examiner should compute entitlement using the *Shadrick* formula and authorize compensation on a 28-day payment cycle.<sup>15</sup>

Section 8101(4) of FECA defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater..."<sup>16</sup>

OWCP's procedures provide that once the claimant meets the initial requirement "for entitlement to a recurrence pay rate, subsequent recurrences qualify the claimant for a new recurrent pay rate, without regard for another six-month return-to-work requirement."<sup>17</sup> In *Johnny A. Muro*,<sup>18</sup> the employee sustained a recurrence of disability more than six months after he resumed regular, full-time employment with the employer and the Board found that under 5 U.S.C. § 8101(4) he was entitled to have his compensation increased based on his pay at the time of this first recurrence of disability. In *Muro*, the Board also found that, if an employee had one recurrence of disability which meets the requirements of 5 U.S.C. § 8101(4), any subsequent recurrence of disability would also meet such requirements and would entitle the employee to a new recurrence pay rate.<sup>19</sup>

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

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$1,038.67 for the period January 3 through March 6, 2022.

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<sup>13</sup> *Supra* note 6 at Chapter 2.815.3b(4) (June 2013); *C.G.*, Docket No. 18-1655 (issued June 14, 2019).

<sup>14</sup> *Albert C. Shadrick*, *supra* note 6.

<sup>15</sup> *See C.G.*, Docket No. 23-1074 (issued February 27, 2024); *N.C.*, Docket No. 18-1070 (issued January 9, 2019); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

<sup>16</sup> *Supra* note 1 at § 8101(4).

<sup>17</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5a(6) (March and September 2011); *see also Carolyn E. Sellers*, 50 ECAB 393 (1999).

<sup>18</sup> 19 ECAB 104 (1967).

<sup>19</sup> *Id.*

OWCP determined that appellant received an overpayment of compensation in the amount of \$1,038.67 for the period January 3 through March 6, 2022 for which he was without fault, as he received wage-loss compensation at an incorrect pay rate. It paid him wage-loss compensation effective January 3, 2022 based on a recurrent pay rate date of November 30, 2020.

Pay rate for compensation purposes is defined in section 8101(4) of FECA as the monthly pay at the time of injury, the time disability begins, or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.<sup>20</sup> As appellant sustained a recurrence of disability on November 30, 2020, after he had returned for more than six months to full-time work, he is entitled to a recurrent pay rate.

OWCP calculated appellant's weekly pay rate using information from the employing establishment that he had gross earnings of \$10,265.47 for 306 hours of work from January 3 through March 6, 2022. The employing establishment subsequently advised that it had provided incorrect information to OWCP regarding appellant's earnings during this period. It clarified that he had earned \$11,876.70 for 365 hours of work from January 3 through March 6, 2022. Based on these figures, OWCP applied the *Shadrick* formula and found that he had received an overpayment of compensation. In utilizing the formula set forth in *Shadrick*, OWCP found a recurrent pay rate date of November 30, 2020, the date of appellant's initial recurrence of disability.<sup>21</sup> However, following his November 30, 2020 recurrence of disability, OWCP accepted that appellant sustained a subsequent recurrence of disability on June 21, 2021. As noted, Board case law and OWCP's procedures provide that, if an employee has one recurrence of total disability which meets the requirements of 5 U.S.C. § 8101(4), any subsequent recurrence of total disability would also meet such requirements and would entitle the employee to a new recurrence pay rate.<sup>22</sup> Appellant's November 30, 2020 recurrence of disability, which occurred more than six months after he resumed his full-time usual employment, entitled him to a recurrent pay rate for any subsequent recurrence of disability. OWCP did not use recurrent pay rate date of June 21, 2021 on its determination of his LWEC.<sup>23</sup> The Board thus finds that OWCP did not meet its burden of proof.<sup>24</sup>

### CONCLUSION

The Board finds that this case is not in posture for decision regarding whether appellant received an overpayment of compensation.

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<sup>20</sup> *Supra* note 1 at § 8101(4).

<sup>21</sup> Additionally, the Board notes that in applying the *Shadrick* formula on April 19 and 27, 2022 OWCP included night differential pay in the amount of 7.5 percent. It did not include this element of appellant's pay in its January 25, 2023 overpayment calculation when using the *Shadrick* formula to recalculate his weekly pay rate for the period January 3 through March 6, 2022. When the job held at the time of injury includes elements of pay such as night or shift differential, extra compensation for work performed on Sundays and holidays, or pay for administratively uncontrollable overtime, OWCP must include the additional pay in the base pay. 5 U.S.C. § 8114(e); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.6b(7) (March 2011).

<sup>22</sup> *Supra* note 18; *see also P.M.*, Docket No. 19-1150 (issued January 9, 2020).

<sup>23</sup> *Supra* note 20.

<sup>24</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 25, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 5, 2024  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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