

accepted his claim for internal derangement of the right knee. Appellant underwent an arthroscopic condroplasty of the right medial femoral condyle on May 17, 1995.

By decision dated August 9, 1996, the Office granted appellant a schedule award for a 31 percent permanent impairment of the right upper extremity.¹ The period of the award ran for 89.28 weeks from October 5, 1995 to June 20, 1997.

On April 4, 2003 appellant underwent a right total knee arthroplasty. The Office placed him on the periodic rolls beginning April 20, 2003. Appellant resumed full-time limited-duty employment on September 20, 2003.

Based on a review of the medical evidence, on June 1, 2004 an Office medical adviser opined that appellant had a 37 percent impairment of his right lower extremity. By decision dated June 18, 2004, the Office granted him a schedule award for a 37 percent permanent impairment of the right lower extremity. The period of the award ran for 106.56 weeks, from September 21, 2003 to October 5, 2005.

Appellant requested an oral hearing, which was held on April 26, 2005.² In a decision dated August 2, 2005, the Office hearing representative affirmed the June 18, 2004 schedule award determination. She noted, however, that the Office paid appellant a schedule award for an additional 37 percent impairment of the right lower extremity even though he had previously received an award for a 31 percent right lower extremity impairment. The hearing representative determined that appellant should have received the difference in these amounts, or an award for an additional six percent right lower extremity impairment.

On August 24, 2005 a claims examiner noted that appellant received a schedule award of \$65,622.62 from September 21, 2003 to August 6, 2005 for the 37 percent permanent impairment of the right lower extremity. He should have received an additional six percent impairment of the right lower extremity, or an additional award of \$11,033.63. The claims examiner subtracted \$11,033.63 from \$65,622.62 and determined that appellant received an overpayment of \$54,588.99. The Office subtracted \$2,554.08 from the amount of the overpayment after noting that records showed a duplicate posting to find a total overpayment of \$52,034.91.

On September 15, 2006 the Office notified appellant of its preliminary determination that he received an overpayment of \$52,034.91 because he received a schedule award for a 37 percent right lower extremity impairment instead of an award for an additional 6 percent right lower extremity impairment. The Office further informed him of its preliminary determination that he was without fault in creating the overpayment and requested that he submit an enclosed overpayment recovery questionnaire and supporting financial information.

¹ In a decision dated June 26, 1996, the Office determined that appellant's actual wages as a modified letter carrier fairly and reasonably represented his wage-earning capacity.

² At the hearing, appellant noted that he had retired from federal employment.

On October 12, 2006 appellant contended that the Office should waive the overpayment and requested a decision based on the written evidence. He did not challenge the finding that an overpayment occurred or the amount of overpayment. Appellant submitted the overpayment recovery questionnaire and supporting financial information. He indicated that he and his spouse had a total monthly income of \$7,365.29. Appellant listed monthly mortgage expenses of \$3,388.67, food expenses of \$400.00, clothing expenses of \$300.00, utility expenses of \$1,303.73 and miscellaneous expenses of \$897.02. He additionally indicated that he had credit card debt of \$1,286.87 per month, for total monthly expenses of \$7,576.29. Appellant specified that he had a checking and savings account balance of \$161.00 and that the value of his household furniture was \$5,000.00. He also listed as an asset a mortgage of \$225,448.68.

Appellant submitted financial documentation showing that he made monthly payments as follows: \$235.00 to Beneficial, \$27.00 to Lowe's, \$144.00 to GE Money, \$113.00 to Military Star, \$16.00 to Catherines, \$225.89 to Home Depot, \$91.00 to an unnamed credit card, \$10.00 to Sears, \$126.13 to Texaco, \$10.00 to Chevron and \$10.00 to Exxon. He also paid \$400.00 monthly to the Internal Revenue Service for back taxes. Appellant further submitted documentation showing that he made a monthly mortgage payment to Countrywide of \$1,671.49 per month. Additionally, he paid property taxes of \$104.19 and made insurance payments of \$270.54 per month and \$151.80 per month.³ Appellant paid \$61.40 monthly for water, \$59.94 for waste removal, \$171.75 for sewer, \$224.93 for electricity, \$72.51 for telephone, \$124.39 for cellular telephone, \$35.00 for lawn care, \$138.25 for pool services and \$89.68 for cable and internet. He further submitted medical bills from his insurance company for himself and his dependents.

On February 23, 2007 the Office verified by telephone that appellant had a primary and secondary residence and paid mortgage expenses of \$1,500.00 per month on the primary residence and \$2,500.00 per month on his secondary house.⁴ The total mortgage was \$225,448.68.

By decision dated February 23, 2007, the Office determined that appellant was not entitled to waiver of the \$52,034.91 overpayment of compensation. The Office reviewed the supporting financial information and noted that he had \$226.16 in assets after excluding his residence and furniture. The Office found that the financial documentation established that appellant had total mortgage expenses, including property taxes and insurance, of \$2,198.03, clothing expenses of \$329.58 and utilities of \$759.84. The Office found that appellant's miscellaneous expenses totaled \$1,594.08 rather than \$897.02. The Office included in miscellaneous expenses \$400.00 to the Internal Revenue Service, \$235.00 to Beneficial Financial, \$569.70 in medical expenses, \$717.13 for transportation expenses and \$138.24 for household expenses. The Office additionally determined that \$400.00 was a reasonable amount for food even though the documentation supported less than that amount. The Office found that appellant had credit card expenses of \$653.89, consisting of minimum payments on a Lowe's credit card of \$27.00, a Home Depot credit card of \$225.89, a Military Star credit card of \$140.00, a GE Money credit card of \$144.00, a Catherine's credit card of \$16.00 and two other

³ It is not clear what the payment of \$151.80 insures.

⁴ Appellant did not submit documentation regarding the mortgage on his second house.

credit cards with minimum payments of \$91.00 and \$10.00. The Office totaled appellant's monthly expenses as \$5,935.42 and found that his reported income was \$7,365.29. The Office concluded that he was not entitled to wavier and that he should submit payments of \$500.00 per month to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act⁵ provides that, if there is a permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function. If a claimant receives a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.⁶

The Office's procedure manual provides that an overpayment of compensation can occur under various circumstances, including when a claimant "is determined to be not entitled to compensation already paid."⁷

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained internal derangement of the right knee due to an October 25, 1994 employment injury. He underwent arthroscopic surgery on May 17, 1995. On August 9, 1996 the Office granted appellant a schedule award for a 31 percent permanent impairment of the right lower extremity. The Office paid him compensation for 89.28 weeks from October 5, 1995 to June 20, 1997. Appellant underwent a right total knee arthroplasty on April 4, 2003. An Office medical adviser determined that he had a 37 percent impairment of the right lower extremity. On June 18, 2004 the Office granted him a schedule award for a 37 percent permanent impairment of the right lower extremity. The Office paid him compensation of \$65,622.62 from September 21, 2003 to August 6, 2005 for the 37 percent permanent impairment of the right lower extremity. Appellant, however, was only entitled to receive compensation for an additional 6 percent right lower extremity impairment, or \$11,033.63, as the Office previously paid him for a 31 percent right lower extremity impairment. The claims examiner subtracted \$11,033.63 from \$65,622.62 and determined that appellant received an overpayment of \$54,588.99. The Office then subtracted \$2,554.08 from \$54,588.99 after noting that records inaccurately showed a duplicate posting and found a total overpayment of \$52,034.91. Appellant does not dispute that he received an overpayment of compensation in the amount of \$52,034.91.

⁵ 5 U.S.C. § 8101-8193.

⁶ See *Richard Saldibar*, 51 ECAB 585 (2000).

⁷ Federal (FECA) Procedure Manual, Part 6 -- Initial Overpayment Actions, *Identification of Overpayments and Debts*, Chapter 6.200.2d (May 2004).

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁸ 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 may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.436 and 10.437 of Title 20 of the Code of Federal Regulations.

According to section 10.436, 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.”⁹

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.¹⁰

ANALYSIS -- ISSUE 2

In order to establish that repayment of the overpayment would defeat the purpose of the Act, appellant must show that he requires substantially all of his income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base as determined by the Office’s procedures.

The Office found that appellant’s assets did not exceed the applicable resource base.¹¹ The Office determined, however, that he did not establish that he needed substantially all of his income to meet ordinary and necessary living expenses. Appellant indicated on the overpayment recovery questionnaire that his monthly expenses of \$7,576.29 exceeded his monthly income of \$7,365.29. He listed expenses of \$3,388.67 for mortgages, \$400.00 for food, \$1,303.73 for

⁸ 5 U.S.C. § 8129.

⁹ 20 C.F.R. § 10.436.

¹⁰ 20 C.F.R. § 10.437.

¹¹ The Office did not assess the equity in appellant’s second home. Nonliquid assets include but are not limited to the fair market value of an owner’s equity in property such as a camper, boat, second home and furnishings/supplies. The value of an income-producing property is not included, however, if income from such property has been included in comparing income and expenses. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (May 2004).

utilities and \$897.02 for miscellaneous expenses. The Office found that \$400.00 for food was reasonable but determined that he paid \$2,198.03 for monthly mortgage expenses according to the financial documentation. The Office further found that he paid utilities of \$759.84, had clothing expenses of \$329.58 and incurred miscellaneous expenses of \$1,594.08, which included \$400.00 monthly as payment of back taxes, \$569.70 for medical expenses and \$235.00 to Beneficial Financial. Appellant indicated that he had credit card debt of \$1,286.87 per month. The Office found, however, that he owed minimum credit card payments of \$654.89. The Office calculated that his expenses totaled \$5,935.42 and his income was \$7,355.29.¹² Documentation submitted by appellant supports that his income exceeded his expenses by over \$50.00 per month.¹³ An individual is deemed to need substantially all of his or her monthly income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁴ Thus, the Office properly found that appellant did not need substantially all of his income for ordinary and necessary expenses.

Additionally, the evidence does not demonstrate that repayment of the overpayment would be against equity and good conscience. He submitted no evidence that he relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt. Consequently, the Office properly denied waiver of the overpayment.

On appeal appellant contends that the Office incorrectly calculated his expenses and overestimated his income. The Office, however, relied upon his disclosure of his income and added his expenses in accordance with the submitted financial documentation. Appellant submitted evidence in support of his contention that his rental income was significantly less than specified. The Board's jurisdiction, however, is limited to a review of final decisions of the Office and the evidence that was before the Office at the time it issued its final decision.¹⁵

With respect to recovery of the overpayment, the Board's jurisdiction is limited to review those cases in which the Office seeks recovery from continuing compensation benefits under the Act.¹⁶

¹² The Office did not determine whether the listed expenses were "ordinary and necessary."

¹³ Appellant submitted evidence that he made monthly mortgage payments to Countrywide of \$1,671.49 per month. Additionally, he paid property taxes of \$104.19, homeowner's policy payments of \$270.54 and insurance payments of \$151.80 per month. Appellant made monthly payments of approximately \$235.00 to Beneficial Financial, \$27.00 to Lowe's, \$144.00 to GE Money, \$113.00 to Military Star, \$16.00 to Catherines, \$225.89 to Home Depot, \$91.00 to an unnamed credit card, \$10.00 to Sears, \$126.13 to Texaco, \$10.00 to Chevron and \$10.00 to Exxon. He also paid \$400.00 monthly to the Internal Revenue Service for back taxes. Appellant paid monthly \$61.40 for water, \$59.94 for waste removal, \$171.75 for sewer, \$224.93 for electricity, \$172.51 for telephone, \$124.39 for cellular telephone and \$89.68 for cable and internet. He further paid approximately \$721.63 per month for medical expenses for himself and his dependents, \$138.25 for pool cleaning and \$35.00 for lawn services, for a total of \$5,253.59.

¹⁴ *Desiderio Martinez*, 55 ECAB 336 (2004).

¹⁵ 20 C.F.R. § 501.2(c).

¹⁶ See *Desiderio Martinez*, *supra* note 14.

CONCLUSION

The Board finds that appellant received an overpayment of \$52,034.91. The Board further finds that the Office properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 23, 2007 is affirmed.

Issued: December 14, 2007
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