

contusion. Appellant was placed on limited duty. After appropriate development, the Office accepted appellant's claim for right foot contusion.

On September 20, 2005 appellant underwent a right first metatarsophalangeal joint fusion. Dr. Steven M. Raikin, an orthopedic surgeon specializing in foot and ankle treatment, performed the surgery and recorded preoperative and postoperative diagnoses of right first metatarsophalangeal joint crush injury and arthritis. Appellant stopped work on September 20, 2005 and filed a CA-7 form claiming compensation for leave without pay beginning on the same day. He was placed on the periodic compensation rolls effective September 20, 2005 at a weekly pay rate of \$898.08. Appellant returned to work on November 14, 2005. He received compensation through November 13, 2005.¹

On July 10, 2006 appellant's podiatrist, Dr. Edward L. Chairman, requested authorization for a surgical removal of a support implant from appellant's right foot. The Office authorized the procedure.

Appellant stopped work and underwent the surgery on October 10, 2006. On the same day he filed a CA-7 form claiming compensation for leave without pay from October 10 to 13, 2006. Appellant was placed on the periodic compensation rolls effective October 10, 2006, and was paid compensation for the period October 10 through 28, 2006 in the amount of \$946.52, and for October 29 through November 25, 2006, in the amount of \$946.52. The Office informed appellant that he had been placed on automated compensation rolls on November 20, 2006.

In a field nurse report dated November 30, 2006, Elizabeth Hartshorn, a registered nurse, advised that appellant had returned to full duty effective November 14, 2006. By correspondence also dated November 30, 2006, the employing establishment notified the Office that appellant had returned to work effective November 14, 2006 and requested that he be removed from the periodic compensation rolls. Also submitted was a CA-7 form signed by appellant on November 14, 2006, claiming compensation for intermittent leave without pay taken between November 11 and 14, 2006.

On December 13, 2006 the Office made a preliminary determination that appellant received a \$937.60 overpayment because he returned to work on November 14, 2006 yet continued to collect compensation benefits through November 25, 2006. The Office advised that appellant received compensation in the amount of \$2,466.45 for the period October 29 through November 25, 2006. However, the Office stated that appellant was only entitled to \$1,628.85, for the period October 29 through November 13, 2006, because he returned to work on November 14, 2006. The Office concluded that appellant was overpaid the difference between the actual amount of compensation received, \$2,466.45, and the amount he was entitled to,

¹ Appellant also filed a third-party claim against the driver of the motor vehicle. He recovered \$15,000.00. The record indicates that, thereafter, appellant refunded \$4,346.58 to the Office.

\$1,528.85,² which the Office calculated to be \$937.60. The Office found that appellant was at fault in creating the overpayment because he should reasonably have been aware that he was not entitled to compensation after returning to work.

On January 8, 2007 appellant disagreed with the Office's decision on fault and requested a waiver and a prerecoupment hearing.

A hearing was held on the issues of fault and waiver on April 23, 2007. At the hearing, appellant testified that, prior to his second surgery, he followed the same procedures with regard to collecting compensation as he had followed prior to his first surgery. Specifically, he explained that he submitted a CA-7 form claiming compensation for leave without pay, but did not realize that he was placed on automated compensation rolls or that he was paid in advance. Appellant also explained that he did not question the amount of the check because it had been some time since he had been paid, so he assumed that he was due the entire amount. Regarding his financial situation, he testified that he and his wife owned two rental properties, from which they collected rental income but also paid mortgages. Appellant stated that he and his wife owned two cars: a 2000 Lexus, which had been paid for in full, and a 2006 BMW, for which his wife paid \$450.00 monthly. He stated that his normal monthly salary was \$2,000.00 and his wife's normal monthly salary was \$1,500.00 and they had approximately \$1,300.00 in available funds, but that the amount may have changed because he had paid some recent bills from his checking account. Appellant stated that repaying the overpayment would be a financial hardship "if you want it all at once."

Following the hearing, appellant submitted financial documents in support of his request for waiver. He submitted a monthly budget for 2006, which noted that he received \$2,400.00 in rental income and \$2,200.00 in monthly salary, for a total of \$4,600.00 in total monthly income. Appellant reported housing expenses totaling \$3,613.67, which included mortgage, condominium association fees and repairs. He stated that he spent \$175.00 for electricity and gas, \$60.00 for telephone service, \$30.00 for internet service, \$70.00 for cable, \$122.00 for cellular telephone service, and \$330.00 in utilities for his rental properties. Appellant reported automotive expenses of \$324.66, which included transportation passes and tokens, parking, gasoline and repairs but which did not include the \$450.00 monthly payments on his wife's BMW. He reported \$593.00 in monthly insurance payments and \$1,250.00 in monthly credit card payments. In a miscellaneous category, appellant allotted \$200.00 for groceries, \$200.00 for eating out, \$200.00 for household supplies, \$200.00 for clothing, \$250.00 for travel, \$100.00 for grooming and \$240.00 for entertainment, for total miscellaneous expenses of \$1,390.00. His monthly budget listed total expenses of \$7,958.33, which did not include his wife's \$450.00 monthly car payments. In an overpayment recovery questionnaire, appellant stated that he no longer had the incorrectly paid monies in his possession. He reported that he had \$1,300.00 in available funds and that his rental properties, which he reported as assets, were worth

² The Board notes that the Office's preliminary overpayment decision stated that appellant was entitled to \$1,628.85 in compensation for the period October 29 to November 13, 2006. However, the periodic rolls compensation worksheet provided established that appellant was in fact entitled to \$1,528.85 for that period. Because the difference between \$2,466.45 and \$1,528.85 is \$937.60, the figure by which the Office concluded that appellant was overpaid, the Board concludes that the \$1,628.85 figure in the Office's preliminary overpayment decision is an inadvertent typographical error and that the figure should correctly read \$1,528.85.

\$120,000.00 and \$140,000.00 respectively. Appellant did not indicate that either property was subject to a mortgage.

Appellant also submitted credit card statements illustrating his typical monthly payments. He provided: a Home Depot credit card statement showing a balance of \$482.18 and a minimum monthly payment of \$10.00; a Countrywide Visa statement noting a balance of \$7,411.43 and a minimum payment of \$148; a Philadelphia federal credit union statement showing a balance of \$3,804.81 and a minimum payment of \$68.00; a Citi Mastercard statement noting a balance of \$7,135.82 and a minimum payment of \$107.00; an AT&T Universal Mastercard statement showing a balance of \$11,085.08 and a minimum payment of \$166.00; a Citi Dividend Platinum Select credit card statement noting a balance of \$7,135.82 and a minimum payment of \$107.00; an Orchard Bank credit card statement showing a balance of \$1,524.30 and a minimum payment of \$58.00; and an earlier Home Depot credit card statement noting a balance of \$2,578.72 and a minimum payment of \$48.00.

By decision dated July 11, 2007, the hearing representative affirmed the Office's overpayment calculation but modified the decision to find that appellant was without fault in the creation of the overpayment. She denied appellant's request for waiver of the overpayment based on appellant's nonliquid assets, namely, his ownership of two rental properties of significant value.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the 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 his duty.³ A claimant, however, is not entitled to receive temporary total disability compensation and actual earnings for the same period.⁴ Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁵

ANALYSIS -- ISSUE 1

The Office found that appellant received an overpayment of compensation in the amount of \$937.60 when he returned to work on November 14, 2006, after having undergone surgery, but continued to receive compensation benefits through November 25, 2006. He contested neither the fact nor the amount of the overpayment. The Board finds that the Office properly calculated that appellant was overpaid in the amount of \$937.60.

Appellant stopped work on October 10, 2006 and underwent authorized surgery for his accepted condition. He filed a CA-7 form claiming compensation for leave without pay for the time he was off work. Appellant was placed on the periodic compensation rolls at a weekly pay

³ 5 U.S.C. § 8102(a).

⁴ *Donna M. Rowan*, 54 ECAB 698 (2003).

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

rate of \$946.52. He was paid for the periods October 10 to 28, 2006 and October 29 to November 25, 2006. Appellant returned to work on November 14, 2006, according to a November 30, 2006 nursing report from Ms. Hartshorn and correspondence from the employing establishment dated the same day. However, he received a check in the amount of \$2,466.45 to cover the period October 29 to November 25, 2006. According to an overpayment calculation worksheet, as noted, appellant was entitled to \$1,528.85 of the payment. The difference between \$2,466.45 and \$1,528.85, or the amount by which appellant was overpaid, is \$937.60. Accordingly, the Board finds that the Office properly determined that appellant received an overpayment in compensation in the amount of \$937.60.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment of compensation only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁶ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Act, or; (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁷

Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (1) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.⁸ Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.⁹ Recovery of an overpayment is also considered to be against equity and good conscience when any 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

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹¹

⁶ 20 C.F.R. § 10.433(a).

⁷ 20 C.F.R. § 10.434.

⁸ 20 C.F.R. § 10.436.

⁹ 20 C.F.R. § 10.437(a).

¹⁰ 20 C.F.R. § 10.437(b).

¹¹ 20 C.F.R. § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

ANALYSIS -- ISSUE 2

The hearing representative denied appellant's claim for waiver on the grounds that his nonliquid assets, two rental properties worth \$120,000.00 and \$140,000.00 respectively, exceeded the allowable asset base as determined by the Bureau of Labor Statistics. As noted above, the Office shall require repayment of an overpayment even if the appellant was without fault in the creation of the overpayment if repayment would neither cause severe financial hardship to appellant such that it would defeat the purposes of the Act nor would be against equity and good conscience. Repayment defeats the purpose of the Act by causing severe financial hardship when a claimant needs substantially all of his monthly income to pay his monthly expenses, with an income that does not exceed expenses by more than \$50.00, and when appellant's liquid and nonliquid asset base does not exceed the specified amount set by the Bureau of Labor Statistics.¹² An individual's liquid assets include but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds and certificate of deposits.¹³ 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.¹⁴ The Board notes that the allowable asset base for waiver is \$4,800.00 for an individual and \$8,000.00 for claimant and spouse.¹⁵ Because appellant is married, his allowable asset base is \$8,000.00. Appellant listed his two rental properties, valued at \$120,000.00 and \$140,000.00 respectively, as assets on his overpayment recovery questionnaire. Although he testified at the hearing that the properties were subject to mortgages, he did not indicate in his overpayment recovery questionnaire that the properties were subject to a mortgage. Consequently, appellant has not provided evidence to show that his equity in the two properties is less than \$8,000.00. As real estate not being used as a primary residence is a nonliquid asset pursuant to the Office's procedures and as the value of appellant's two rental properties exceeds the allowable asset base of \$8,000.00 for appellant and his spouse, the Board finds that requiring repayment of appellant's overpayment obligation would not defeat the purpose of the Act.

The Board notes that appellant did not argue that requiring repayment of the overpaid compensation would be against equity and good conscience. As noted above, recovery of an overpayment is considered to be against equity and good conscience when an individual would incur severe financial hardship in repaying the debt or when an individual has relied to his detriment on the overpaid compensation. Appellant, as established above, would not incur severe financial hardship in repaying the debt because he owns significant nonliquid assets, specifically, rental properties valued at \$120,000.00 and \$140,000.00 respectively. He has not made any assertion, nor does the record show, that he relied to his detriment on the fact and amount of his compensation by changing his position for the worse or giving up a valuable right. Therefore the Board finds that requiring recovery of the overpaid compensation would not be against equity and good conscience.

¹² See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (October 2004).

¹³ *Id.* at Chapter 6.200.6(a)(4). See also *W.F.*, 57 ECAB __ (Docket No. 06-79, issued August 11, 2006).

¹⁴ *Id.*

¹⁵ *Id.* at Chapter 6.200 6(a)(1).

With regard to the method of collection of repayment of the overpaid compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.¹⁶ Where, as in this case, a claimant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.¹⁷

CONCLUSION

The Board finds that the Office properly calculated the fact and amount of the overpayment of compensation at \$937.60, that appellant was not at fault in the creation of the overpayment, and that the Office properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 7, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹⁶ *Robert K. Swett*, 53 ECAB 615 (2002).

¹⁷ *Id.*, citing *Robert S. Luciano*, 47 ECAB 793 (1996).