United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 08-1584**
	)	**Issued: January 2, 2009**
DEPARTMENT OF DEFENSE,	)	
Fort Belvior, VA, Employer	)	

Appearances:
Appellant, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 15, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' Branch of Hearings and Review's merit decision dated April 23, 2008, finding that he had received 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 appellant received an overpayment in the amount of $2,554.88 for the period August 7 to September 2, 2006 for which he was not at fault; and (2) whether the overpayment is subject to waiver.

FACTUAL HISTORY

On April 18, 2005 appellant, then a 38-year-old distribution process worker, filed a traumatic injury claim alleging that on March 24, 2005 a cart struck his right knee while he was in the performance of his federal job duties. The Office accepted appellant's claim for right knee contusion on September 16, 2005. It authorized surgery on September 23, 2005 and expanded

appellant's claim to include right medial meniscal tear. Appellant underwent a right knee arthroscopy with partial medial and lateral meniscectomies and chondroplasty of the lateral tibial plateau on September 28, 2005. He returned to light-duty work on December 16, 2005. Appellant underwent a second arthroscopy on June 19, 2006 with a partial medial meniscectomy and excision of symptomatic medial plica.

Appellant filed a notice of recurrence of disability on July 14, 2006 and indicated that he sustained a recurrence of total disability on June 19, 2006 due to his accepted March 24, 2005 employment injury. He returned to light-duty work on August 7, 2006. On June 28, 2007 the Office granted appellant a schedule award for 13 percent impairment of the right lower extremity.[1]

In a letter dated June 18, 2007, the Office requested that the employing establishment clarify appellant's leave usage. The employing establishment report noted that appellant used leave without pay from June 19 through August 4, 2006 and that he returned to full-time work on August 7, 2006. The Office noted that appellant received compensation from August 6 through September 2, 2006 in the amount of $2,650.05 but that he was only entitled to compensation for August 6, 2006 in the amount of $94.65 as he returned to full-time work on August 7, 2006. It calculated that appellant had received an overpayment in the amount of $2,554.88.

The Office issued a preliminary determination of overpayment on August 28, 2007 and stated that appellant had received an overpayment of $2,554.88 for the period August 7 to September 2, 2006 as he returned to full-time work on August 7, 2008. It found that appellant was without fault in the creation of the overpayment. The Office further informed appellant that in order for the Office to consider the question of waiver, he must complete the overpayment recovery questionnaire. It stated that appellant was required to:

> "Attach supporting documents … including copies of income tax returns, back account statements, bill and canceled checks, pay slips and any other records which support the income and expenses listed."

The Office also informed appellant that under the Office's regulations failure to submit the requested information within 30 days would result in the denial of waiver.

Appellant requested waiver of the overpayment and a prerecoupment hearing. He submitted an overpayment recovery questionnaire dated September 5, 2007 and indicated that his monthly income was $2,470.40. Appellant stated that his monthly expenses were $5,074.72 and indicated that he had no assets. He did not submit any other financial information. The Branch of Hearings and Review scheduled the oral hearing for February 15, 2008. Appellant responded on January 28, 2008 and stated that due to circumstances beyond his control he was unable to appear at the scheduled hearing and requested a later date. On February 4, 2008 he requested to change his oral hearing to a review of the written record. Appellant stated that he did not disagree with the determination of the overpayment, only that he requested waiver of the overpayment.

[1] In his letter to the Board, appellant limited his appeal to the issue of overpayment of compensation. Therefore, the Board will address only that issue in this decision. 20 C.F.R. § 501.2(c).

By decision dated April 23, 2008, the hearing representative found that appellant had received an overpayment of compensation in the amount of $2,554.88 for the period August 7 through September 2, 2006, that he was not at fault in the creation of the overpayment, and that the overpayment was not subject to waiver as he had failed to provide the necessary factual evidence to support his inability to repay the overpayment.[2]

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act[3] 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. A claimant, however, is not entitled to receive temporary total disability 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

Appellant has conceded that he received an overpayment of compensation as he returned to full-time work and received a payment from the Office for a period after he returned to work. He has not disputed the amount of the overpayment and the Board notes that the Office provided the calculations explaining how the amount of $2,554.88 was derived. Therefore, the Office has met its burden of proof in determining that appellant received an overpayment of compensation in the amount of $2,554.88 for the period August 7 through September 2, 2006.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act[6] provides: "Adjustment or recovery by the United States may not be made when 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."[7] If a claimant is without fault in the creation of an 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 10.434 through 10.437 of the Office's regulations.

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[2] Following the Office's April 23, 2008 decision, appellant submitted additional new evidence on appeal to the Board. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[3] 5 U.S.C. §§ 8101-8193, 8102(a).

[4] 5 U.S.C. § 8116(a).

[5] *Danney E. Haley*, 56 ECAB 393,400 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

[6] 5 U.S.C. §§ 8101-8193, § 8129(b).

[7] 5 U.S.C. § 8129(b).

According to section 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current, ordinary and necessary living expenses and, also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.[8] For waiver under the defeat the purpose of the Act standard, an appellant must meet the two-pronged test and show that that she both needs substantially all of her current income to meet current ordinary and necessary living expenses,[9] and that her assets do not exceed the resource base.[10]

The burden is on the claimant to show that the expenses are reasonable and needed for a legitimate purpose.[11] The Office's regulations provide:

> "(a) The individual who received the overpayment is responsible for provid[ing] 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….
>
> "(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished."[12]

ANALYSIS -- ISSUE 2

In this case, the Office found that appellant was not at fault in the creation of the overpayment. However, appellant did not provide any financial information[13] to show that recovery of the overpayment would defeat the purpose of the Act. He likewise has not alleged and the evidence does not demonstrate that he relinquished a valuable right or changed his position for the worse due to the payment of the erroneous amount of compensation. Because appellant has not shown that recovery would "defeat the purpose of the Act" or would "be against equity and good conscience" the Board finds that the Office properly denied waiver of recovery of the overpayment.

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[8] Office procedures provide that the assets must not exceed a resource base of $4,800.00 for an individual or $8,000.00 for an individual with a spouse or dependent, plus $960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

[9] An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than $50.00. *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

[10] *W.F.*, 57 ECAB 705, 708 (2006).

[11] *Id.*

[12] 20 C.F.R. § 10.438.

[13] *D.B.*, (Docket No. 08-601, issued August 6, 2008).

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of $2,554.88 and that he failed to submit the necessary financial information to establish that he was entitled to waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 2, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board