United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
	)	
and	)	**Docket No. 09-2042**
	)	**Issued: August 9, 2010**
DEPARTMENT OF THE INTERIOR,	)	
NATIONAL PARK SERVICE,	)	
Yellowstone Park, WY, Employer	)	
	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 11, 2009 appellant, through his representative, filed a timely appeal from the June 29, 2009 merit decision of the Office of Workers' Compensation Programs, which denied waiver of an overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUES

The issues are: (1) whether appellant received a $16,012.71 overpayment from October 30, 2005 through September 1, 2007 because his weekly pay rate for compensation purposes was $531.32, not $754.54; (2) whether the Office properly denied waiver of the recovery of the overpayment; and (3) whether the Office properly set the rate of recovery from continuing compensation.

FACTUAL HISTORY

On September 14, 2005 appellant, then a 46-year-old motor vehicle operator, sustained an injury in the performance of duty when he slipped and fell while clearing garbage off the top of a packer truck. The Office accepted his claim for unspecified disorder of the bursa tendons in both shoulders, bilateral rotator cuff syndromes, effusion of the right upper arm joint and bilateral knee contusions.

The employing establishment informed the Office that appellant's pay rate was $39,236.00 a year. Appellant worked a fixed 40-hour-per-week compressed schedule Monday through Thursday. He did not work in the position for 11 months prior to the injury and the position would not have afforded employment for 11 months. The employing establishment described appellant as a seasonal employee and noted that he was laid off after October 29, 2005.

Beginning October 30, 2005, the Office paid compensation for wage loss based on the minimum average annual earnings of 150 times appellant's average daily wage or a weekly pay rate of $433.85.[1]

On August 21, 2006 the employing establishment informed the Office that a comparable full-time motor vehicle operator in the same grade and step would make $39,236.00 per year. As appellant was not a career seasonal employee and had no demonstrated ability to work full time at any other job for substantially the entire year preceding the injury, the Office found that he was entitled to a weekly pay rate based on the annual earnings of a comparable federal employee of the same or similar job classification in the same or neighboring locality or $39,236.00 per year or $754.54 per week.[2] It adjusted his compensation effective October 30, 2005 to reflect the higher weekly pay rate.

The employing establishment took exception to the Office's calculation. It explained that appellant had not worked for the employing establishment for substantially the whole year immediately preceding the injury and that his position would not have afforded employment for substantially a whole year. Appellant was instead a seasonal employee or a temporary employee with a seasonal tour of duty, limited to 1039 hours per year with no expectation of ongoing employment or rehire. The employing establishment argued that appellant's pay rate should be either his total pay in the year prior to injury divided by 52 or 150 times his average daily wage earned at the employing establishment within one year immediately preceding his injury.

Appellant advised that he earned $19,588.47 in federal wages for 1150 hours' work from May to October 2005. In April 2005, he earned $1,828.51 in wages as a truck driver in private employment and from September to October 2004 he earned $6,211.20 in federal wages. The employing establishment advised that all seasonal motor vehicle operators earned $19,588.47 for the season and that the earnings it previously provided, $39,236.00, was the annualized figure requested.

[1] ($18.8 per hour x 8 hours a day x 150) / 52.

[2] $18.80 per hour x 2087 hours = $39,236.00 (rounded).

The Office found that appellant's weekly pay rate should be the total compensation he earned in federal employment and same or similar nonfederal employment in the year immediately preceding his injury divided by 52 or $531.32. Effective September 2, 2007, it paid compensation based on that pay rate.

On October 15, 2008 the Office made a preliminary determination that appellant received a $16,012.71 overpayment from October 30, 2005 through September 1, 2007 because it had paid him compensation based on a weekly pay rate of $754.54 instead of the correct figure, $531.32. The Office found appellant without fault in the creation of the overpayment.

Appellant completed an overpayment recovery questionnaire showing $3,570.00 in monthly income, $1,138.00 in usual monthly household expenses and $4,420.00 in monthly installment debt. He listed a savings account balance of $13,000.00.[3] Following a telephonic hearing on March 9, 2009, appellant's representative updated appellant's monthly expenses to $3,715.35.

In a decision dated June 29, 2009, the Office finalized its preliminary determination. It found that appellant was not at fault in the creation of a $16,012.71 overpayment from October 30, 2005 through September 1, 2007.[4] The Office denied waiver on two grounds: (1) his household was currently realizing $64.64 of income over expenses each month; and (2) the evidence presented at the telephonic hearing reflected that appellant had $11,000.00 in his savings account. As appellant was realizing approximately $568.64 in income over accepted expenses,[5] the Office determined that a reasonable repayment plan would deduct $200.00 from his continuing compensation payments.

On appeal, appellant's representative argues the Office gave no rationale for using a pay rate of $531.32. He also argues that appellant's March 9, 2009 financial information is no longer accurate, as his household had drawn down the $11,000.00 in his savings account.

LEGAL PRECEDENT -- ISSUE 1

To determine a weekly pay rate, the Office generally determines the employee's "average annual earnings" and then divides that figure by 52.[6] Section 8114(d) of the Federal Employees' Compensation Act provides four different methods for determining "average annual earnings" based on the character and duration of the employment:

> "(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --

[3] Appellant advised the Office that he was married and that his wife lived with him.

[4] The Office mistakenly noted the beginning of the overpayment as October 20, 2005.

[5] The Office could not accept an undocumented $210.00 per month in automobile maintenance and tires, $504.00 in miscellaneous expenses or $966.00 in credit card bills used to pay monthly expenses.

[6] *See* 5 U.S.C. § 8114(c).

(A) was fixed, the average annual earnings are the annual rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week and 260 if employed on the basis of a 5-day week.

"(2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection.

"(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in [f]ederal employment and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within [one] year immediately preceding his injury.

"(4) If the employee served without pay or at nominal pay, paragraphs (1), (2) and (3) of this subsection apply as far as practicable, but the average annual earnings of the employee may not exceed the minimum rate of basic pay for GS-15. If the average annual earnings cannot be determined reasonably and fairly in the manner otherwise provided by this section, the average annual earnings shall be determined at the reasonable value of the service performed but not in excess of $3,600.[00] a year."[7]

ANALYSIS -- ISSUE 1

Section 8114(d)(1)-(3) of the Act describes three types of employment: full-year employment, anticipated full-year employment and part-year employment. The record establishes that appellant did not work in his date-of-injury position during substantially the whole year immediately preceding the injury. He was hired on May 8, 2005 and was terminated effective October 29, 2005. So section 8114(d)(1), relating to full-year employment, does not apply.

[7] *Id*. at § 8114(d).

Further, appellant's date-of-injury position was not one that would have afforded employment for substantially a whole year. He was hired as a temporary employee with an appointment limited to 1039 regular hours or about half a year. So section 8114(d)(2), relating to anticipated full-year employment, does not apply.

Because neither section 8114(d)(1) nor 8114(d)(2) can be applied reasonably and fairly, the Office properly determined average annual earnings under section 8114(d)(3) as the sum that reasonably represented appellant's annual earning capacity in his date-of-injury position, having regard to his previous earnings in federal employment and of other federal employees in the same or most similar class working in the same or most similar employment in the same or neighboring location, appellant's other previous employment or other relevant factors.

The record shows that appellant earned $19,588.47 in his federal employment from May to October 2005 and $6,211.20 in previous federal employment from September to October 2004. In addition, he earned $1,828.51 as a truck driver in private employment in April 2005. So for the year prior to his injury, appellant had average annual earnings of approximately $27,628.18.[8] This amounts to a weekly pay rate for compensation purposes of $531.31. The Office rounded up to $531.32 and used this figure to calculate the compensation appellant should have received beginning October 30, 2005.

The Board finds that the Office gave due regard to relevant factors under section 8114(d)(3) and reasonably determined appellant's average annual earnings and his weekly pay rate for compensation purposes. The difference between the compensation appellant received ($54,120.32 at the weekly pay rate of $754.54, reflecting full-year employment at his hourly pay rate) and the compensation he should have received ($38,107.61 at the correct weekly pay rate of $531.32) is $16,012.71. The Board will affirm the Office's June 29, 2009 decision on the issues of fact and amount of overpayment.

Appellant's representative argues that the Office gave no rationale for using a pay rate of $531.32, but the Office did explain that section 8114(d)(3) was the most appropriate basis for computing appellant's pay rate and that $531.32 came from the most recent pay information the employing establishment supplied with due consideration of his earnings from nonfederal employment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that when an overpayment of compensation has been made 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.[9] The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.[10] If it finds that the recipient of an

[8] This figure is greater than 150 times his average daily wage earned in the employment during the days employed within one year immediately preceding his injury.

[9] 5 U.S.C. § 8129(a).

[10] 20 C.F.R. § 10.433(a).

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.[11]

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: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed the resource base of $8,000.00 for an individual with a spouse.[12] The employee's contribution to the Thrift Savings Plan and the contribution's earnings, are considered assets for purposes of determining waiver.[13]

Recovery of an overpayment is 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 position for the worse.[14] Conversion of the overpayment into a different form, such as food, consumer goods, real estate, *etc.*, from which the claimant derived some benefit, is not to be considered a loss.[15]

ANALYSIS -- ISSUE 2

The Office found appellant without fault in the creation of the overpayment, so he is eligible for consideration of waiver. As to whether recovery would defeat the purpose of the Act, the Board need not review monthly income and expenses. Waiver under the "defeat the purpose of the Act" clause requires that appellant meet two conditions, one relating to disposable current income and the other relating to the level of his assets. Appellant's overpayment recovery questionnaire showed $13,000.00 in savings. Later, during the telephonic hearing, he testified that he currently had $11,000.00 in savings.

Because appellant's assets exceed the $8,000.00 resource base specified for an individual with a spouse, the Office has administratively determined that recovery will not cause hardship.[16] The Office therefore properly found that recovery will not defeat the purpose of the Act.

Appellant's representative does not argue and the evidence does not establish that recovery would be against equity and good conscience due to detrimental reliance. As recovery will not defeat the purpose of the Act or be against equity and good conscience, the Board finds

[11] *Id*. at § 10.434.

[12] *Id*. at §10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

[13] *Eloise K. Hahn*, Docket No 01-1199 (issued June 25, 2002).

[14] 20 C.F.R. § 10.437(b).

[15] Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 6.200.6.b(3) (October 2004).

[16] If an individual has disposable current income or assets in excess of the allowable amount, a reasonable repayment schedule can be established over a reasonable, specified period of time. *Id*. at Chapter 6.200.6.a(1)(a).

that the Office properly denied waiver. The Board will affirm the Office's June 29, 2009 decision on the issue of waiver.

Appellant's representative argues that appellant's savings account is no longer $11,000.00, but the Board's review of the case is limited to the evidence in the case record that was before the Office at the time of its June 29, 2009 decision[17] and that evidence shows a resource base sufficient for the Office to establish a reasonable repayment schedule. If appellant's financial circumstances have significantly changed since the Office's June 29, 2009 decision, Office regulations suggest that the Office may consider further requests for waiver if he provides information about income, expenses and assets, as requested in the overpayment recovery questionnaire.[18]

LEGAL PRECEDENT -- ISSUE 3

Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship upon such individual.[19]

ANALYSIS -- ISSUE 3

When the Office set the rate of recovery at $200.00 every 28 days, it knew the probable extent of appellant's future compensation payments. It understood his current financial circumstances and considered his disposable monthly income after allowable expenses. Because the Office gave due regard to relevant factors, the Board will affirm the Office's June 29, 2009 decision on the rate of recovery from continuing compensation.

CONCLUSION

The Board finds that appellant received a $16,012.71 overpayment from October 30, 2005 through September 1, 2007 because his weekly pay rate for compensation purposes was $531.32, not $754.54. The Board finds that the Office properly denied waiver. The Board also finds that the Office properly set the rate of recovery from continuing compensation.

[17] 20 C.F.R. § 501.2(c)(1).

[18] *Id*. at § 10.438.

[19] *Id*. at § 10.321(a).

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 9, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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