

FACTUAL HISTORY

The Office accepted that on June 21, 2001 appellant, then a 54-year-old single engine tank manager in a seasonal employment status,¹ sustained a right humerus fracture, closed scapular fracture and cervical intervertebral displacement in a fall from a collapsing fire escape. He underwent open reduction of the right humerus on June 22, 2001 and a repeat open reduction with fixation and bone graft on July 2, 2002. Appellant remained under medical care.² He received wage-loss compensation on the daily rolls beginning on approximately February 10, 2002.

Appellant resigned from federal employment effective September 16, 2002. He received wage-loss compensation on the periodic rolls beginning in October 2002.³

The Office obtained a second opinion report on November 26, 2002 from Dr. Harry H. Kretzler, Jr., a Board-certified orthopedic surgeon, who found that appellant was able to work full time with restrictions on use of the right arm. Appellant's physicians submitted December 17, 2002 and March 18, 2003 reports approving a trial of restricted duty.

As the medical evidence indicated that appellant was no longer totally disabled for work, the Office referred appellant for vocational rehabilitation on April 11, 2003. Following vocational aptitude testing and a placement effort, in January 2004, the vocational rehabilitation counselor identified the position of telephone solicitor (Department of Labor's *Dictionary of Occupational Titles* #299.357.014) as commensurate with appellant's background and medical limitations. The position was described as sedentary. A 2002 labor market survey showed that positions were reasonably available in appellant's commuting area with entry-level wages of \$267.60 a week.

By notice dated February 26, 2004, the Office advised appellant that it proposed to reduce his wage-loss compensation based on his ability to earn \$267.60 a week as a telephone solicitor. The Office noted that, effective January 1, 2004, appellant's current pay rate for his date-of-injury position was \$238.65 a week, less than the wages of the selected position.

In response, appellant submitted a March 10, 2004 letter asserting that the proposed reduction was improper as he had already accepted a position with the employing establishment. He submitted a September 3, 2003 report from Dr. Frederick L. Surbaugh, an attending Board-certified orthopedic surgeon, who opined that appellant was able to return to full-time work and could lift up to 75 pounds with his right arm. The employing establishment offered appellant a seasonal job as a range technician/dispatcher for the 2004 fire season. The job would begin effective approximately May 15, 2004 at the beginning of the fire season. The position was

¹ Appellant was a seasonal employee working only during the annual summer fire season from approximately mid-May to August each year. As appellant was a seasonal employee, the Office appropriately calculated his compensation using the "150 formula" under 5 U.S.C. § 8114(d)(3).

² Appellant received medical nurse management services from December 2001 through June 27, 2002.

³ The record indicates that the Office paid appellant compensation through mailed checks, not direct deposit electronic funds transfers.

described as sedentary. Appellant accepted the position on December 19, 2003. There is no evidence of record that he had any actual earnings in the range technician/dispatcher position prior to May 17, 2004.

By decision dated April 1, 2004, the Office reduced appellant's wage-loss compensation to zero effective that day, based on his ability to earn wages in the selected position of telephone solicitor. The Office found that appellant had no loss of wage-earning capacity as his earnings in the selected position would exceed his current earnings in his date-of-injury job. The decision was mailed to appellant's address of record.

Appellant worked from May 17 to 24, 2004 in the range technician/dispatcher position at the employing establishment. He resigned voluntarily on May 24, 2004.

Following the reduction of appellant's wage-loss compensation to zero on April 1, 2004, the Office continued to issue compensation checks in the amount of \$903.00 every four weeks beginning on April 17, 2004. Compensation logs demonstrate that appellant was paid \$17,912.29 in wage-loss compensation for the period April 1, 2004 through September 3, 2005.

By notice dated October 19, 2005, the Office advised appellant of its preliminary determination that an overpayment of compensation was created in his case in the amount of \$17,912.29 as he received wage-loss compensation through September 3, 2005 after his compensation was reduced to zero on April 1, 2004. The Office made the preliminary finding that appellant was at fault in creation of the overpayment as he knew or should have known he was not entitled to further compensation after his monetary benefits were reduced to zero.

In a November 14, 2005 letter, appellant requested a prerecoupment hearing. He noted that he was then paying \$200.00 a month toward the prior overpayment and was financially unable to repay another. During the hearing, held October 31, 2006, appellant contended that he thought he was entitled to the compensation he received from April 1, 2004 to September 3, 2005. He asserted that he did not know his monetary compensation benefits were reduced to zero as he did not receive the April 1, 2004 decision. Appellant acknowledged the Office's job placement effort and that the vocational rehabilitation counselor explained that his compensation would be reduced when he returned to work or a position was selected and found suitable. He described medical problems including a pelvic fracture, lumbar compression and neuropathy sustained in a nonoccupational all-terrain vehicle accident.

After the hearing, appellant submitted financial information. In a November 1, 2006 overpayment recovery questionnaire, he indicated that he no longer had any of the incorrectly paid checks. Appellant listed \$2,315.00 in monthly household income and \$146,169.00 in stocks, bonds and miscellaneous valuable personality. He listed monthly expenses of \$1,906.00 including food, clothing, automotive, medical and insurance expenses and debt repayment. Appellant noted paying \$100.00 a month toward the prior overpayment with \$700.00 to \$800.00 left to pay off.

By decision dated and finalized January 12, 2007, the Office hearing representative finalized the October 19, 2005 preliminary notice of overpayment. The hearing representative found that appellant was at fault in creating the \$17,912.29 overpayment as he knew or should

have known he was not entitled to wage-loss compensation after his benefits were reduced to zero effective April 1, 2004. Therefore, the hearing representative denied waiver of recovery. The hearing representative noted that the Office's decisions were addressed to appellant at his address of record and there was no evidence that he did not receive any decisions. The hearing representative found that, during the hearing, appellant acknowledged that he was aware that his compensation benefits would be reduced after the job placement effort. The hearing representative found that the financial information submitted documented assets of \$146,169.00, exceeding the allowable asset base of \$5,000.00 for an individual and spouse. Also, his household income of \$2,315.00 a month exceeded his monthly expenses of \$1,906.00 by \$409.00. The hearing representative therefore found that recovery of the overpayment would not defeat the purpose of the Act. Repayment was directed by submitting monthly payments of \$250.00.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employee's Compensation 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.⁴ If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to $66 \frac{2}{3}$ percent of his monthly pay, which is known as his basic compensation for total disability.⁵ Under section 8110⁶ of the Act, an employee is entitled to compensation at the augmented rate of $\frac{3}{4}$ of his weekly pay if he has one or more dependents. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.⁷ Thus, wage-loss compensation paid during a period where a claimant had no wage loss constitutes an overpayment.⁸

ANALYSIS -- ISSUE 1

As appellant's injuries left him incapable of performing his date-of-injury position, the Office undertook a vocational rehabilitation effort, including a period of placement assistance. The Office selected the position of telephone solicitor and reduced appellant's monetary

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8105(a). See also *Duane C. Rawlings*, 55 ECAB 366 (2004).

⁶ 5 U.S.C. § 8110.

⁷ 20 C.F.R. § 10.500(a).

⁸ *Id.* See also *Judith A. Cariddo*, 55 ECAB 348 (2004).

compensation benefits to zero effective April 1, 2004.⁹ However, the Office continued to pay appellant wage-loss compensation from April 1, 2004 through September 3, 2005. Thus, appellant received \$17,912.29 in compensation from April 1, 2004 through September 3, 2005 while he had no loss of wage-earning capacity. The Board therefore finds that the \$17,912.29 constitutes an overpayment of compensation.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office 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.¹¹

Section 10.433(a) of the Office's regulations provides:

“[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. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect.”¹²

ANALYSIS -- ISSUE 2

In finding appellant at fault in the creation of the \$17,912.29 overpayment, the Office relied on the third standard. The Office found that appellant knew or should have known that he was not entitled to receive compensation from April 1, 2004 through September 3, 2005 as his wage-loss compensation was reduced to zero effective April 1, 2004. Even though the Office

⁹ The evidence demonstrates that, on December 19, 2003, appellant accepted a job as a range technician/dispatcher with the employing establishment. However, appellant did not begin work until May 17, 2004, the beginning of the fire season. There is no evidence that appellant had actual earnings in the range technician/dispatcher position prior to the April 1, 2004 wage-earning capacity determination. Therefore, section 2.814(7) of the Office's procedure manual, concerning determining wage-earning capacity based on actual earnings, does not apply, as appellant had no actual earnings prior to the wage-earning capacity determination. Federal (FECA) Procedure Manual, Part 2 -- *Claims*, Chapter 2.0814(7), *Determining Wage-Earning Capacity Based on Actual Earnings* (October 2005).

¹⁰ The Board notes that appellant does not contest the amount of the overpayment or how it was calculated.

¹¹ 5 U.S.C. § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

¹² 20 C.F.R. § 10.433; see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he knew or should have known to be incorrect.¹³

In this case, appellant continued to receive wage-loss compensation after April 1, 2004 when the Office reduced his compensation to zero based on his ability to perform the selected position of telephone solicitor. By his own admission at the hearing, appellant stated that he knew the Office's job placement effort would result in the eventual reduction of his compensation.

The Office's April 1, 2004 decision clearly stated that appellant's compensation was reduced to zero effective that day. Appellant, however, contended that he did not receive the Office's April 1, 2004 decision and thus did not know his benefits were reduced to zero. The Office mailed the April 1, 2004 decision to appellant's address of record. The Board notes that appellant responded to the February 26, 2004 notice, mailed to him at the same address. Appellant did not assert that his address changed or that the address used by the Office was otherwise incorrect. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course. This is known as the "mailbox rule."¹⁴ Appellant submitted no evidence substantiating that he did not receive the Office's April 1, 2004 decision. The Board finds that there is no error on the part of the Office in mailing the April 1, 2004 decision to the address provided by appellant.¹⁵ Thus, the Board finds that appellant knew or should have known that he was not entitled to wage-loss compensation on and after April 1, 2004.

Lastly, with respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.¹⁶ As appellant 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 found a \$17,912.29 overpayment of compensation in appellant's case for the period April 1, 2004 through September 3, 2005 as he received compensation after he no longer had any wage loss. The Board further finds that the Office properly found appellant at fault in creation of the overpayment and that he was therefore not entitled to waiver.

¹³ *William E. McCarty*, 54 ECAB 525 (2003).

¹⁴ *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004).

¹⁵ *Id.*

¹⁶ *Cheryl Thomas*, 55 ECAB 610 (2004).

¹⁷ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 12, 2007 is affirmed.

Issued: December 11, 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