United States Department of Labor
Employees' Compensation Appeals Board

G.H., Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Atlanta, GA, Employer**	**Docket Nos. 07-1738 and 07-2333** **Issued: January 5, 2009**

Appearances:
Appellant, pro se
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 June 20, 2007 appellant filed a timely appeal from March 12 and 21, 2007 decisions of the Office of Workers' Compensation Programs. The Board assigned Docket No. 07-1738. Additionally, on September 14, 2007 appellant filed a timely appeal of a June 20, 2007 overpayment decision. The Board assigned Docket No. 07-2333. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether the Office, by decision dated March 12, 2007, properly determined appellant's pay rate for compensation purposes; (2) whether the Office, by decision dated March 21, 2007, properly modified appellant's wage-earning capacity rate of compensation to be consistent with its March 12, 2007 decision and properly denied appellant's request for modification of her wage-earning capacity; (3) whether the Office, by decision dated June 20, 2007, properly found an overpayment in the amount of $12,328.01; and (4) whether the Office properly denied waiver of the recovery of the overpayment.

FACTUAL HISTORY

On November 7, 2001 appellant, then a 48-year-old postal clerk, filed an occupational disease claim alleging that, due to her federal duties, she sustained a lumbar herniated disc. She noted that her disc ruptured and part of her disc fell into her spinal column affecting the sciatic nerve in her right leg, hip and foot.[1] Appellant indicated that she first became aware of her disease or illness in February 1999.

On November 29, 1999 appellant underwent a right L4-5 discectomy with large central extruded fragment. Although she missed time from work commencing the date of her November 29, 1999 surgery, she did not file a claim for compensation for this time period, electing instead to take personal leave. Appellant underwent a lumbar fusion on April 5, 2002. On June 25, 2003 the Office accepted appellant's claim for lumbar herniated nucleus pulposus and lumbar radiculopathy.

On July 3, 2003 appellant filed a claim for compensation for various dates. Although the claim form indicated that she was asking for leave without pay from February 1999 to "present," the first date for which she officially requested leave was March 5, 2001. Appellant's time analysis forms indicate that she was claiming compensation for March 5 through 9, 2001. She claimed another period of total disability from December 16, 2002 through June 27, 2003. Appellant continued to file claims for compensation. On April 9, 2004 the Office referred appellant for vocational rehabilitation.

The employing establishment notified the Office that the first date appellant stopped work as a result of the claim was March 4, 2001. Appellant was paid for intermittent time lost from March 5, 2001 through February 21, 2004 using the $797.78 per week pay rate (effective pay as of March 5, 2001).

On August 20, 2004 the Office referred appellant to Dr. Michael G. Hogan, FRCSC, for an impartial medical examination to resolve the conflict in the medical evidence between appellant's treating Board-certified orthopedic surgeon, Dr. Keith Osborn and the second opinion physician, Dr. Joseph Hoffman, Jr., a Board-certified orthopedic surgeon, with regard to appellant's work capacity. In a September 7, 2004 opinion, Dr. Hogan opined that it would be very difficult for appellant to function effectively and without discomfort in a physically active job. He noted that it might be beneficial for appellant to start a graduated work program, starting at four hours per day increasing gradually as tolerance allows a full working position. Dr. Hogan limited appellant to work for four hours a day with limits of one hour walking, one hour of standing and one hour of twisting. He stated that she could not operate a motor vehicle at work, but could drive ½ hour to and from work. Appellant's restrictions included no squatting, kneeling, climbing, bending and stooping. On February 1, 2005 Dr. Hogan prescribed a work hardening program that would allow appellant to progress from four hours a day to eight hours a day as a mail processor (letter size). In a letter dated February 1, 2005, he indicated that he saw

[1] Appellant later, by letter dated March 10, 2002, noted that her employment duties included repetitive bending, handling heavy sacks of mail, continuous walking and standing on concrete and occasional slippery or uneven surfaces, stretching and reaching.

no reason that appellant should not be able to drive for 34 miles. Dr. Hogan indicated that she could lift for one hour at a time up to 20 pounds.

On March 28, 2005 the employing establishment made an offer of modified a (limited duty) for a position as a modified monitor. The position would start at four hours per day with a gradual progression to eight hours per day over a six-month period. The position was sedentary and involved limited lifting/carrying of zero to five pounds. On March 30, 2005 appellant accepted the position. She returned to work on April 7, 2005.

On April 15, 2005 appellant filed a claim for compensation for the period April 5 through 15, 2005, claiming four hours a day plus night differential and Sunday premium. She continued to file claim forms for lost wages.

In a June 15, 2005 report, Dr. Steven L. Sween, appellant's Board-certified family practitioner, noted persistent right leg pain. He indicated that appellant ambulated with a cane but was unable to walk long distances or stand for any prolonged periods of time. Dr. Sween noted that ambulation with a cane was now compromised by the fact that she has bilateral carpal tunnel, which precluded her from holding a cane firmly. He noted that he was not qualified to provide a disability rating or definitive potential for rehabilitation, but that most likely chronic disability was significant and potential for early retirement with disability may be indicated.

In a decision dated August 10, 2005, the Office found that appellant recently became employed as a monitor for the employing establishment with wages of $510.40 per week and that this employment was effective April 7, 2005. It found that appellant had demonstrated her ability to perform this position for 60 days or more and that this position was considered suitable to her partially disabled condition. The Office further noted that the medical evidence supported that appellant was currently only capable of part-time employment. It found that this position of modified monitor fairly and reasonably represented appellant's wage earning. On August 15, 2005 appellant requested an oral hearing.

In a note dated July 11, 2005, Dr. Osborn indicated that appellant had been treated for a number of years for chronic back and leg pain, which had progressively worsened. He noted that she was under the care of Dr. Sween for pain management but in spite of optimal pain management she had been evaluated as only able to work 2½ hours a day. He noted, "It appears that she has reached the point where disability retirement is her only reasonable option and this is my recommendation."

On July 11, 2005 appellant underwent surgery for left carpal tunnel syndrome and was unable to work.

In a September 28, 2005 decision, the Office found that appellant was paid at an incorrect pay rate from March 5, 2001 through August 7, 2005, which resulted in an overpayment.

On October 4, 2005 the Office made a preliminary determination that appellant received an overpayment. It noted that appellant was paid compensation at an incorrect rate for the period March 5, 2001 through August 7, 2005. Specifically, the Office noted that appellant was paid $95,188.72 for this time period whereas she should have been paid $86,317.86, resulting in an overpayment of $11,870.86.

In an October 24, 2005 medical report, received by the Office on November 4, 2005, Dr. Osborn stated that appellant's symptoms were still consistent with chronic arachnoiditis and lumbar radiculopathy. He noted that appellant has been disabled from work due to her increasing pain.

On November 18, 2005 appellant submitted an election form effective September 3, 2005 choosing retirement benefits.

At a telephonic hearing held on December 5, 2005 appellant stated that when she returned to work she was told that her job duties were more extensive than she was lead to believe. She noted that she had to perform like a security guard, confronting people about badges, stamping hands and monitoring security televisions. However, when questioned by the hearing representative she admitted that she never had to do hand stamping. Appellant noted that she experienced a worsening of her carpal tunnel condition while attempting to perform these duties. She noted that ultimately she was not able to continue these duties at all.

By decision dated February 23, 2006, the Office hearing representative found that appellant had not established that the loss of wage-earning capacity decision of August 10, 2005 should be modified due to a change in her duties or a material change in her medical condition.

In a February 9, 2006 note, Dr. Joseph E. Freschi, a neurologist, found that appellant had bilateral distal median entrapment neuropathies at the wrist, worse on the right than the left.

On May 24, 2006 appellant filed an appeal with the Board and requested oral argument. The Board assigned Docket No. 06-1321 to this case. At appellant's request, the Board dismissed this appeal and cancelled oral argument by an October 13, 2006 order.

In a June 20, 2006 note, Dr. Osborn stated:

> "This letter will confirm that [appellant] attempted to return to work between April 7 and June 6, 2005. Although she made an attempt to return to work at this time, her pain became progressively severe and required her to stop working again. This period of time in which [appellant] returned to work should not be viewed as a recovery from her previous problems which have been ongoing. Her back and leg pain, on the basis of initial herniated disc and subsequent nerve scarring and arachnoiditis, remains an ongoing problem and she is permanently disabled as a consequence of this."

By decision dated October 2, 2006, the hearing representative set aside the Office's decision of September 28, 2005 and the preliminary overpayment determination of October 4, 2005. The hearing representative instructed the Office to further develop the evidence concerning appellant's pay rate.

By letter dated December 8, 2006, the employing establishment provided detailed pay rate information. It noted that: (1) on November 29, 1999 appellant was paid at a rate of $40,527.00 per year and that she had no Sunday premium or night differential; (2) on March 5, 2001 appellant was paid $41,484.00 per annum, also with no Sunday premium or night differential; (3) on December 16, 2002 she was paid $43,613.00 with no Sunday premium but a

night differential for 1.52 hour of $2.48; (4) on January 27, 2003 appellant was paid $42,558.00 per annum, no Sunday premium or night differential; and (5) on April 7, 2005 appellant was paid $46,351.00 for the job she held the date disability began. The employing establishment further noted that appellant stopped working on March 11, 2002.

By package submitted on December 11, 2006, appellant contended that the wage capacity decision, issued by the Office on February 23, 2006, was in error and submitted evidence to support her request that the decision should be modified, including medical reports from Drs. Osborn and Sween. She argued, among other things, that the impartial medical examiner's report was stale (seven months old), that a Social Security Administration decision finding her disabled should be controlling and cited to the section of the Office procedure manual that deals with vocational rehabilitation and suggested that those procedures were not followed prior to placing her in the monitor position.

In a letter dated January 31, 2007, the employing establishment further clarified that appellant was paid at a rate of $41,484.00 per year on March 11, 2002, $43,613.00 per year on December 16, 2002 and $42,558.00 on January 27, 2003.

In a decision dated March 12, 2007, the Office noted that, in an occupational disease case, the monthly pay rate is based on the date that appellant began to lose time from work, which would be November 29, 1999, the date she stopped work for lumbar surgery. It noted that as of that date appellant's salary was $40,527.00 or $779.37 per week, with no Sundays or night differential. The Office noted that appellant claimed compensation for when she stopped work on March 5, 2001, which was the first recurrence of disability as she had returned to work for over six months prior to this work stoppage and that at that time, she was paid $41,484.00 annual or $797.77 per week. Appellant's next work stoppage occurred on December 16, 2002 and at that time she was earning $43,613.00 annually or $838.71 per week. She also earned a night differential that was $2.48 per week for 1.52 hours. The Office determined that appellant's new pay rate was $841.19 for this recurrence. Appellant returned to work on December 30, 2002. On January 27, 2003 she stopped working again. At that time appellant's annual salary was $42,558.00 or $818.42 a week. As this was lower than her previous salary, the Office determined that she was to be paid at the prior rate of $841.19 per week from January 27, 2003 to April 6, 2005. Appellant returned to work on April 7, 2005, working 20 hours per week. She earned $452.69 base pay plus $43.85 Sunday pay and a $32.76 night differential for a total pay rate of $511.89. The Office noted that a separate decision would be issued regarding the change in the loss of wage-earning capacity and regarding the issue of overpayment of compensation caused by the incorrect pay rates.

In a decision dated March 21, 2007, the Office affirmed its earlier wage-earning capacity decision, finding that appellant had not submitted evidence establishing that she was incapable of performing the duties of a modified monitor beginning April 2005 and that none of the new medical evidence was sufficient to warrant modification of this decision. However, it modified the prior wage-earning capacity decision to correct the pay rate. Specifically, the Office noted that appellant's weekly pay rate when the disability recurred on December 16, 2002 was $841.19. It then noted that the current pay rate for the job and step when injured was $891.37, effective April 7, 2005. As appellant had earned $510.89 per week, the percentage of her new wage-earning capacity was 57 percent. The Office noted that 57 percent of appellant's weekly

pay rate when disability recurred yielded an adjusted wage-earning capacity amount per week in her new position of $479.48. This yielded a loss of wage-earning capacity per week of $361.71. As appellant was paid at a 75 percent compensation rate, this would amount to a compensation rate of $271.28 per week, which when increased by cost-of-living adjustments, yielded $295.50 per week. Accordingly, the Office found that appellant's new compensation rate for every four weeks would be $1,182.00.

On May 7, 2007 the Office issued a preliminary determination that appellant was overpaid in the amount of $12,328.01 because she was paid an incorrect pay rate for intermittent periods from March 5 through October 29, 2005 and that she was without fault in the creation of the overpayment. It noted that appellant was paid at an incorrect pay rate of $998.48 effective February 1, 1999 but should have been paid based on a recurrent pay rate of $797.77 effective March 5, 2001. The Office also noted that, effective December 16, 2002, appellant was entitled to a recurrent pay rate of $841.19. On April 7, 2005 appellant returned to limited-duty work as a modified monitor. The Office noted that the amount appellant was paid from March 5, 2001 through October 29, 2005 equaled $97,553.74 whereas the amount due for this period was $85,225.73 and that this difference, $12,328.01, was the amount of the overpayment.

The Office further informed appellant that in order for the Office to consider the question of waiver, she must complete the overpayment recovery questionnaire. It stated that appellant was required to: "Attach supporting documents … including copies of income tax returns, bank account statements, bills and canceled checks, pay slips and any other records which support the income and expenses listed." The Office also noted that, "under 20 C.F.R. [§] 10.438 failure to submit the requested information within 30 days would result in denial of waiver."

Appellant provided no response to the preliminary overpayment letter. She did not contest the amount of overpayment nor provide any financial information to the Office prior to its final overpayment decision of June 20, 2007.

By decision dated June 20, 2007, the Office found that appellant was overpaid compensation in the amount of $12,328.01, which occurred because she was paid an incorrect pay rate for intermittent periods from March 5, 2001 through October 29, 2005. It found that appellant was without fault in the creation of the overpayment, however, the Office did not waive the recovery of the overpayment because she did not respond to the preliminary findings and show evidence of financial hardship.

LEGAL PRECEDENT -- ISSUE 1

The Board has held that where an injury is sustained over a period of time, the date of injury is the date of last exposure to those work factors causing injury.[2]

Section 8114(d) of the Federal Employees' Compensation Act[3] provides:

"Average annual earnings are determined as follows:

> (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 --
>
> > (A) was fixed, the average annual earnings are the annual rate of pay."

Under 5 U.S.C. § 8101(4) monthly pay means the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs if the recurrence begins more than six months after the injured employee resumes full-time employment with the United States, which ever is greater.[4]

ANALYSIS -- ISSUE 1

In its March 12, 2007 decision, the Office determined that appellant's wage-earning capacity, originally issued on August 10, 2005, had been calculated with improper pay rates. In the instant case, appellant first became aware that her lumbar condition was related to her employment in February 1999. However, she first was disabled on November 29, 1999 when she underwent surgery. Appellant did not claim compensation for this time period. She first claimed compensation for disability commencing March 5, 2001. Accordingly, the Office had initially used March 5, 2001 as her effective pay rate date and paid compensation based on her pay rate at that time, *i.e.,* $41,484.00 per year or $797.78 per week.

The Office determined, however, that this initial pay rate was erroneous. It noted that appellant's pay rate was originally based on the date of injury whereas it should have been based on appellant's wages on November 29, 1999 the date her disability began. The Board notes that although appellant did not file a claim for time lost commencing November 29, 1999, this was

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[2] 20 C.F.R. § 10.5 defines the terms traumatic injury and occupational disease or illness. Traumatic injury is defined by section 10.5(ee) as a condition of the body caused by a specific event or incident or a series of events or incidents, within a single workday or shift. Such a condition must be caused by external force including stress or strain which is identifiable as to time and place of occurrence and member or function of the body affected. Occupational disease or illness is defined by 20 C.F.R. § 10.5(q) as a condition produced by the work environment over a period longer than a single workday or shift.

[3] 5 U.S.C. § 8114.

[4] *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates,* Chapter 2.900.5(a)(1) (March 1996).

the date her disability began and should have been used as the rate of pay in this occupational disease claim. At the time appellant's disability began, November 29, 1999, her annual salary was $40,527.00 or $779.37 per week. At that time, she was not working Sundays or earning a night differential. Accordingly, the Board finds the revised calculations regarding appellant's compensation rate for that period are correct.

In its decision, the Office notes that appellant returned to work sometime in February 2001.[5] Appellant stopped work on March 5, 2001, which the Office found to be the first recurrence of disability. As she had returned to full regular-duty work over six months prior to this work stoppage, the proper rate of pay was the rate on March 5, 2001, or $797.77.

Appellant returned to work on March 9, 2001. Her next work stoppage was on March 11, 2002. Accordingly, appellant's rate of pay would be represented by her recurrence as of this date as she held this job for over six months. On that date, her rate of pay was $41,484.00 per annum or $797.77 per week. Appellant used a combination of sick leave and leave without pay during this period of leave.

Appellant next stopped work on December 16, 2002. At that time she was earning $43,613.00 annually or $838.71 per week. Appellant also earned a night differential for $2.48 per week for 1.52 hours. The Office properly determined that this gave her a weekly pay rate of $841.19 for this recurrence. Appellant returned to work on December 30, 2002.

On January 27, 2003 appellant stopped working again. At that time, she was earning a salary of $42,558.00 or $818.42 per week. However, since appellant's pay rate was higher on the previous recurrence, the Office properly found that she was entitled to the former recurrent pay rate of $841.19 per week.

Accordingly, this Board finds the Office properly determined appellant's pay rate for compensation purposes.

LEGAL PRECEDENT -- ISSUE 2

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.[6] Section 8115(a) of the Act[7] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.[8] Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing

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[5] The year 2001 appears to be a typographical error in the decision. In the October 2, 2006 decision of the Office, the date of return to work was noted as February 2000. There is no contrary evidence to suggest that the return to work date was later than February 2000.

[6] *Gregory A. Compton*, 45 ECAB 154 (1993).

[7] 5 U.S.C. §§ 8101-8193.

[8] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

that they do not fairly and reasonably represent the injury employee's wage-earning capacity, must be accepted as such a measure.[9] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[10] has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[11]

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[12]

ANALYSIS -- ISSUE 2

The Office issued the wage-earning capacity decision on August 10, 2005 finding that appellant's part-time position as a monitor for the employing establishment fairly and reasonably represented her wage-earning capacity and that decision was affirmed by the Office hearing representative on February 23, 2006. It had relied on Dr. Hogan as the impartial medical examiner to find that appellant was capable of working four hours a day. Dr. Hogan recommended a work hardening program to bring appellant's work hours up to eight hours a day, but authorized her to work for four hours a day. The Office decision noted that appellant returned to work on April 7, 2005 in the position of monitor for four hours a day and worked at that position until June 19, 2005. Under the Office procedure manual, "[a]fter the claimant has been working for 60 days, the Office will determine whether the claimant's actual earnings fairly and reasonably represent his or her wage-earning capacity. If so, a formal decision should be issued no later than 90 days after the date of return to work."[13] The Office found that the weight of the evidence of record established that the part-time position of monitor fairly and reasonably represented appellant's capacity to earn wages.

Appellant argued that this decision was erroneous for numerous reasons and should be modified, including that the pay rate was incorrect.

With respect to appellant's argument that the pay rate was incorrect, the Board affirms the Office's modification of the wage-earning capacity decision compensation rate. At the time of the original decision, her compensation rate had been established at $1,056.00 for four weeks. Pursuant to the March 12, 2007 decision of the Office correcting appellant's pay rate for compensation purposes (as further discussed under Issue 1 herein), the Office modified the pay

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[9] *Lottie M. Williams*, 56 ECAB 320 (2005).

[10] 5 ECAB 376 (1953).

[11] 20 C.F.R. § 10.403(c).

[12] *Charles D. Thompson,* 35 ECAB 220, 225 (1983).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c)(1) (July 1997).

rate of the wage-earning capacity decision to $1,182.00 for four weeks, retroactive to April 7, 2005. It based its pay rate decision on specific employing establishment information and clearly noted the basis for the revised calculation. As the Office had used an erroneous date to establish the previous compensation rate, the Board finds that the Office properly modified the wage-earning capacity decision to reflect the correct rate of pay.

With respect to the arguments that the wage-earning capacity decision was erroneous and should be modified, the Office considered her arguments and determined that they were insufficient to warrant a modification of the wage-earning capacity decision. The Board agrees. The Board finds that the evidence submitted by appellant does not establish that there had been a material change in the nature and extent of her injury-related conditions. The medical reports by Dr. Osborn and Dr. Sween did not address appellant's ability to do the monitor position nor do they support that her condition has changed to warrant a modification of the wage-earning capacity decision. Further, no evidence was submitted to establish that appellant had been retrained or otherwise rehabilitated. The remaining arguments relate to appellant's contention that the decision was erroneous. She has submitted insufficient evidence to support that the impartial medical examiner's report was stale or that she did not work for 60 days in the positions. Further, a Social Security Administration determination on disability is not controlling under the Act. Accordingly, the Office properly denied modification of the wage-earning capacity decision.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of the Act provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): 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 this subchapter or would be against equity and good conscience. No waiver of payment is possible if the claimant is not without fault in helping to create the overpayment.

ANALYSIS -- ISSUE 3

The Office issued a preliminary overpayment letter on the basis that appellant had been paid at an incorrect rate of pay from March 5, 2001 through October 29, 2005 and found her without fault in this overpayment. The rate of pay appellant had received during that period of time was incorrect but should have been, as clarified by the Office's March 12, 2007 rate of pay decision, no more than $797.77 a month effective March 5, 2001 and effective December 19, 2002 it increased to $841.19 a month. The total amount of overpayment, the amount paid ($97,553.74) minus the amount actually owed ($85,225.73), was $12,328.01.

The Board finds the Office properly found that an overpayment existed, properly calculated the amount of overpayment and properly found appellant without fault in this overpayment. As appellant was without fault, she was eligible for consideration of waiver.

LEGAL PRECEDENT -- ISSUE 4

According to section 10.436,[14] 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.[15] For waiver under this standard, an appellant must meet the two-pronged test and show that she both needs substantially all of her current income to meet current ordinary and necessary living expenses,[16] and that her assets do not exceed the resource base.[17]

The burden is on the claimant to show that the expenses are reasonable and needed for a legitimate purpose.[18] The Office's regulations provide:

> "(a) 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....
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> "(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."[19]

ANALYSIS -- ISSUE 4

The Board notes that appellant did not dispute the fact of overpayment or the amount of overpayment and failed to provide any financial information for the Office to determine whether waiver of the overpayment was appropriate. The burden is on the claimant to show that waiver would defeat the purpose of the Act. Appellant likewise has not alleged and the evidence does not demonstrate that she relinquished a valuable right or changed her position for the worse due to the payment of the erroneous amount of compensation. Because she has not shown that

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[14] 5 C.F.R. § 10.436.

[15] Office procedures provide that 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).

[16] 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).

[17] *See supra* note 15. *W.F.*, 57 ECAB 705, 708 (2006).

[18] *Id.*

[19] 20 C.F.R. § 438.

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 the overpayment.[20]

CONCLUSION

The Board finds that the Office properly determined appellant's pay rate, that the Office properly modified the wage-earning capacity decision to reflect the corrected pay rate and that the Office properly denied appellant's request for modification of the wage-earning capacity decision. Further, the Board finds the Office properly found an overpayment of compensation in the amount of $12,328.01 and found appellant without fault, but properly denied waiver.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 20, March 21 and 12, 2007 are affirmed.[21]

Issued: January 5, 2009
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

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[20] The Board notes that it does not have jurisdiction over the issue of recovery of the overpayment, as appellant is no longer receiving continuing compensation payments. *George A. Rodriguez*, 57 ECAB 224 (2005).

[21] Subsequent to this appeal, by decision dated November 28, 2007, the Office denied modification of the March 12, 2007 decision. As this decision was issued after appellant's June 20, 2007 appeal with this Board, this decision is null and void and the Board and the Office may not have jurisdiction over the same issue at the same time. *See Douglas E. Billings*, 41 ECAB 880 (1990) (the Board and the Office may not exercise simultaneous jurisdiction over the same issue).