

was accepted by the Office for a left rotator cuff tear. Appellant stopped work on February 25, 1997. The Office paid appropriate compensation for temporary total disability and placed her on the periodic rolls as of December 19, 1997. She underwent rotator cuff surgery on January 13, 1998 and returned to limited-duty work on April 29, 1998. Thereafter, she filed a claim for a schedule award.

On March 31, 1999 the Office granted appellant a schedule award for a 13 percent impairment of the left upper extremity. The period of the award was from March 28, 1999 to January 5, 2000, a total of 40.56 weeks of compensation. Appellant requested a lump-sum payment which was subsequently made by the Office.¹

On May 18, 1999 appellant filed a traumatic injury claim, noting that she injured her left shoulder when she attempted to catch a mail tray that fell from a case on May 17, 1999. She stopped work on May 18, 1999. The Office accepted her claim for a left shoulder strain and left supraspinatus partial tear. The Office paid wage-loss compensation for total disability commencing July 2, 1999, and she was placed on the periodic rolls. Appellant returned to part-time modified limited duty on July 15, 2000 as a window distribution clerk. The Office continued to pay partial disability compensation until her return to full duty on July 1, 2001.²

On October 18, 2001 the Office noted that appellant had accepted wage-loss compensation beginning July 2, 1999 during a period for which she received compensation under a schedule award. The period of dual benefits was commenced July 2, 1999 through January 5, 2000, the expiration of the schedule award.

On June 4, 2002 the Office issued a preliminary notice of overpayment in the amount of \$14,212.90 for the period July 2, 1999 through January 5, 2000, because she received concurrent compensation under the schedule award lump sum and for wage loss. The Office determined that appellant was without fault in the creation of the overpayment, finding that the lump-sum offer letter did not specify that she could not receive additional compensation for her accepted left shoulder condition. The Office advised appellant of her right to a preresoupment hearing if she contested fact or amount of overpayment or to support a request for waiver.

On June 28, 2002 appellant requested a preresoupment hearing which was held on September 3, 2003. Appellant requested waiver of recovery of the overpayment, claiming that it would constitute a severe financial hardship that would deprive her and her dependents of the ability to meet ordinary and necessary living expenses. Appellant did not complete the Office's financial information form, but did submit a written statement listing her monthly expenses. Appellant listed a \$25,000.00 bank note, for which she made payment of \$500.00; \$531.00 monthly car payment for a 1999 Cadillac; \$414.00 monthly payment for a 1996 Ford Explorer; a \$298.00 monthly payment for a houseboat; a \$142.00 monthly payment for a credit card; and \$100.00 monthly payment for a second credit card; and a \$425.00 monthly house payment. In

¹ Appellant received a commuted payment of \$19,433.09 for the period of the schedule award.

² On July 11, 2001 the Office granted appellant a schedule award for an additional 15 percent impairment of her left upper extremity.

addition, appellant testified that she had approximately \$375.00 in monthly food expenses; \$200.00 for clothing; \$270.00 for electricity; \$35.00 for water; \$70.00 for cable; \$35.00 for gas; \$75.00 for telephone usage; \$111.00 for gasoline for her car and \$11.00 for maintenance; and \$45.00 for medical expenses. Appellant indicated that her family's assets consisted of two cars and a boat.

In a decision dated November 26, 2003, the Office hearing representative finalized the overpayment of \$14,212.90. The hearing representative found that appellant was overpaid because she received wage-loss compensation for a period covered by her schedule award payment for the same part of the body, her left shoulder. The hearing representative found that appellant was improperly paid a schedule award and wage-loss compensation for the period July 2, 1999 to January 5, 2000 for her injury to the left shoulder. She noted that Office records reflected that appellant was paid \$14,212.90 in wage loss for the period July 2, 1999 to January 5, 2000.

The hearing representative also found that recovery of the overpayment, and any applicable interest, by deductions from appellant's continuing compensation benefit payments in the amount of \$470.00 per month, would not deprive appellant of income required to meet ordinary and necessary living expenses. The hearing representative stated that appellant provided information, at both her hearing and in her statement, which indicated that she had \$3,176.34 in monthly income.³ The hearing representative further stated that appellant had listed expenses of \$3,151.00 in her written statement;⁴ however, she deducted the amount claimed by appellant for monthly clothing expenses, \$200.00 in light of the amount of her credit card bills, and for the monthly payment for her boat, \$298.00, which she deemed to be not reasonable. The hearing representative concluded that appellant's total monthly household expenses were approximately \$2,653.00.

The hearing representative found that, although appellant did not state the value of her boat, it "certainly would be considered a part of the asset base not exempted from recoupment. If the monthly cost is nearly \$300.00 per month, I find it reasonable to conclude that the value is over \$5,000.00. I therefore cannot consider the cost of a boat to be an ordinary and necessary living expense. Considering [appellant's] necessary expenses, and her assets, I find that [appellant] can pay \$470.00 per month. She will still have over \$50.00 left." The Office determined that therefore appellant was not entitled to waiver and found that she should repay the overpayment at a rate of \$470.00 per month. This appeal follows.

³ This amount was calculated by adding her bi-weekly compensation of \$1,138.00, to which appellant testified times 26 pay periods, which when divided by 12 months equaled \$2,465.67 per month. The hearing representative then added the \$328.00 her husband earned every 2 weeks, which when multiplied by 26 and divided by 12 months equaled \$710.67.

⁴ The hearing representative calculated this amount by adding the amount of monthly food expenses she claimed at the hearing -- between \$350.00 and \$400.00, which he rounded off to \$375.00; \$200.00 for clothing; \$270.00 for electricity; \$35.00 for water; \$70.00 for cable; \$35.00 for gas; \$75.00 for telephone usage; \$100.00 for gasoline for her car and \$11.00 for maintenance; \$45.00 for medical expenses.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Act provides that an employee who receives continuing compensation, or has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, may not receive salary, pay or remuneration of any type from the United States.⁵

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation for the period July 2, 1999 through January 5, 2000. Under Federal (FECA) Procedure Manual, Part 2 -- Claims, *Waiver of Recovery*, Chapter 2.808.5.a(4) (September 1994), a schedule award for one injury may be paid concurrently with wage loss for another injury only if the injuries are not to the same part of the body. The record reflects that appellant received a lump-sum payment under the March 31, 1999 schedule award for impairment to her left shoulder arising from the 1997 employment injury. The period of the award ran from March 28, 1999 to January 5, 2000. Subsequently, wage-loss compensation was paid for the period July 2, 1999 through January 5, 2000 based on her May 17, 1999 injury to the left shoulder.⁶ This created an overpayment of compensation for the concurrent or overlapping period, of July 2, 1999 to January 5, 2000. The Board finds, therefore, that the fact of overpayment is established in this case.

The Board finds, however, that the Office's calculation of the amount of the overpayment cannot be fully ascertained from the case record.

The record reflects that appellant was issued wage-loss compensation of \$13,927.91 in gross compensation by five checks paid from July 2, 1999 to January 1, 2000. To calculate the 4 days of compensation which appellant received January 2 through 5, 2000, her gross monthly compensation of \$2,144.71 was first divided by 28 days, which the Board notes equals \$76.95. However, the handwritten calculation lists 41.24 which, when multiplied by 4 days, was listed as totaling 164.98. This appears erroneous. Moreover, adding \$164.98, as listed, to the five payments of \$13,927.91 would not result in a total of \$14,212.90, the amount found as the overpayment in this case. It is well established in overpayment cases, the Office should provide a clear statement as to how the amount is calculated.⁷ The case will be remanded to the Office for a further determination on this matter.

⁵ 20 C.F.R. § 10.400(b). See also *Dale Mackelprang*, 55 ECAB ____ (Docket No. 03-1614, issued December 2003).

⁶ Once the period of the schedule award expired after January 5, 2000, appellant was entitled to the receipt of compensation paid through September 16, 2000.

⁷ See *Norman F. Bligh*, 41 ECAB 230 (1989).

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁸ provides that an overpayment must be recovered 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.” Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must determine whether recovery of the overpayment would “defeat the purpose of the Act or would be against equity and good conscience,” pursuant to the guidelines provided in sections 10.436 and 10.437 of the implementing federal regulations.⁹

With regard to the “defeat the purpose of the Act” standard, section 10.436 of the regulation provides:

“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 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. A higher amount is specified for a beneficiary with one or more dependents.”

With regard to the “against equity and good conscience” standard, section 10.437 of the regulation provides:

“(a) 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.

“(b) 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. In making such a decision, [the Office] does not consider the individual’s current ability to repay the overpayment.

- (1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous

⁸ 5 U.S.C. § 8129(a)-(b).

⁹ See 20 C.F.R. §§ 10.436 and 10.437.

transfers of funds to other individuals are not considered relinquishments of valuable rights.

(2) To establish that an individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits, and that this decision resulted in a loss.”

Office regulations provide that 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 or her current income (including compensation benefits) to meet current or 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.¹⁰ The Board has found that an individual is deemed to need substantially all of his or her income to meet current ordinary and necessary expenses by more than \$50.00.¹¹ Additionally, the guidelines for recovery of an overpayment from an individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his or her income to meet current ordinary and necessary living expenses and also that his or her assets, those which are not exempted, do not exceed a resource base.¹²

Office procedures provide that recovery will defeat the purpose of the Act if the individual's assets do not exceed the resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent, plus \$600.00 for each additional dependent. This base includes all of the claimant's assets that are not exempted from recoupment.¹³ The first \$3,000.00 or more, depending on the number of the individual's dependents, is also exempted from recoupment as a necessary emergency resource.¹⁴

¹⁰ *Frederick Arters*, 53 ECAB 397 (2002).

¹¹ *Id.*

¹² *John Skarbek*, 53 ECAB 630 (2002).

¹³ The Office procedure manual provides that an individual's assets include liquid assets such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds, certificates of deposit and the like and nonliquid assets such as the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings/supplies therein, any vehicles above the two allowed per family, jewelry, artwork, etc. Assets do not include the value of household furnishing of the primary residence, wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which is maintained as the principal family domicile or income from income-producing property if the income from such property has been included in comparing income and expenses. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.a(4) (September 1994).

¹⁴ Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 6.200.6.a(1)(b).

ANALYSIS -- ISSUE 2

The Board finds that the Office hearing representative erred in her determination of whether appellant was entitled to waiver of the overpayment. The hearing representative made an incorrect calculation in determining appellant's monthly expenses. Although she stated that appellant had listed \$3,151.00 in monthly expenses, he neglected to include the bank note listed on appellant's financial statement. When the monthly payment of \$500.00 on the note is added to monthly expenses, this totals \$3,651.00, an amount well in excess of \$3,176.34, the amount found as appellant's monthly assets. The hearing representative deleted the \$298.00 boat payment from appellant's monthly expenses while simultaneously including the estimated amount of the boat, \$5,000.00, as part of her assets. Under Chapter 6.200.6a(4) of the Federal (FECA) Procedure Manual,¹⁵ the hearing representative may properly include the value of a boat as an asset. However, the Office should rely on the actual fair market value of the boat, not the hearing representative's estimate. As appellant's family assets consist of autos and the boat, the fair market value of the boat must be determined.

The Board will therefore set aside the Office's findings with regard to the amount of overpayment and the calculation of appellant's monthly assets and expenses. The case will be remanded for further determinations in conformance with this decision. After such development as it deems necessary, the Office shall issue a *de novo* decision on the amount of overpayment and waiver.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation for the period July 2, 1999 through January 5, 2000 because she received concurrent compensation under a schedule award and for wage loss arising from injuries to her left shoulder. The Board will set aside the Office's determination of the amount of overpayment and that appellant is not entitled to waiver. The case is remanded for further development consistent with this decision.

¹⁵ *Id.* at Chapter 6.200.6.a(4).

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2003 decision of the Office of Workers' Compensation Programs is affirmed, in part, in finding an overpayment of compensation. The decision is set aside as to the issue of amount and waiver, and the case is remanded for further action consistent with this decision of the Board.

Issued: October 11, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board