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<b>T.R., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 07-2228</b>
	)	<b>Issued: May 19, 2008</b>
<b>DEPARTMENT OF THE INTERIOR, FISH &amp;</b>	)	
<b>WILDLIFE SERVICE, Albuquerque, NM,</b>	)	
<b>Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

On September 4, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 22, 2007 finalizing 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.

The issues are: (1) whether the Office properly found an overpayment of \$1,203.16 was created; and (2) whether the Office properly denied waiver of the overpayment.

The Office accepted that appellant sustained a herniated lumbar disc in the performance of duty on March 15, 2000.<sup>1</sup> Appellant returned to work part time and as of September 7, 2001

<sup>1</sup> A June 19, 2000 Office letter stated that the accepted condition was disc displacement; a November 9, 2006 statement of accepted facts reported that the accepted condition was a herniated lumbar disc.

she was working full time. On May 14, 2004 she began to work six hours per day. Appellant received compensation for the remaining two hours per day.<sup>2</sup> On April 20, 2006 the Office issued a schedule award for 10 percent right leg impairment and 6 percent left leg impairment. The period of the award was 46.08 weeks from May 16, 2005 to April 3, 2006.

On October 5, 2006 appellant stopped working and began receiving compensation for temporary total disability. By letter dated November 16, 2006, the Office advised appellant that she would be receiving net compensation of \$1,706.10 every four weeks. Appellant was advised that each payment contained the period covered, and if she worked during any portion of this period, she should return the payment.

The employing establishment offered appellant a light-duty position at two hours per day effective February 26, 2007. Appellant accepted the position and began working two hours per day as of February 26, 2007. The Office issued a payment dated March 17, 2007 for the period February 18 to March 17, 2007 in the amount of \$1,644.48.<sup>3</sup>

By letter dated March 12, 2007, the Office advised appellant of a preliminary determination that an overpayment of \$1,208.83 was created and she was at fault in creating the overpayment. The Office stated that appellant was only entitled to compensation through February 25, 2007. Appellant responded on March 19, 2007, arguing that the amount of the overpayment was incorrect.

In a letter dated June 7, 2007, the Office issued a “corrected” preliminary determination that found an overpayment of \$1,203.16 was created. The Office stated that the overpayment amount was calculated by dividing \$1,644.48 by 28 for a daily amount of \$58.73, then multiplying by 20, the number of days from February 26 to March 17, 2007, for a total of \$1,174.60. In addition, the Office stated that appellant was entitled to a cost-of-living increase as of March 1, 2007 of \$28.56, for a total overpayment of \$1,203.16. With respect to fault, the Office found that appellant accepted a payment she knew or should have known was incorrect.

By decision dated August 22, 2007, the Office finalized the preliminary determination as to amount and fault. Appellant was directed to submit a payment for \$1,203.16.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8116 of the Federal Employees’ Compensation Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.<sup>4</sup> 20 C.F.R. § 10.500 provides that “compensation for wage loss due to disability is available only for any periods during which an employee’s

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<sup>2</sup> The Office did not issue a formal wage-earning capacity decision, but offset appellant’s compensation based on actual earnings.

<sup>3</sup> The gross compensation was equal to the amount reported in the November 16, 2006 letter to appellant, with miscellaneous deductions reducing the net compensation.

<sup>4</sup> 5 U.S.C. § 8116(a).

work-related medical condition prevents him or her from earning the wages earned before the work-related injury.”

### **ANALYSIS -- ISSUE 1**

The Office found that an overpayment of compensation was created when appellant received a payment of \$1,644.48 for the period February 18 to March 17, 2007, and she had returned to work as of February 26, 2007. The preliminary determination and the final Office decision, however, failed to make adequate findings to confirm the fact and amount of the overpayment.

The record indicated that appellant received a payment of \$1,644.48 dated March 17, 2007. This purported to be an amount representing temporary total disability from February 18 to March 17, 2007, but the Office stated in its preliminary determination that appellant was entitled to a cost-of-living increase as of March 1, 2007, which apparently was not reflected in the \$1,644.48 payment. The Office calculated an overpayment based on the conclusion appellant was not entitled to any compensation after her return to work at two hours per day. The overpayment was held to be the daily amount of compensation received, multiplied by the number of days from February 26 to March 17, 2007, plus a cost-of-living increase.<sup>5</sup>

No evidence was cited in support of the determination that appellant was not entitled to any compensation for wage loss as of her return to work at two hours per day. There is no decision terminating compensation based on medical evidence, formal wage-earning capacity determination, or other evidence establishing that appellant was not entitled to any compensation as of February 26, 2007. Her return to work was at two hours per day, not full time. Appellant had been receiving compensation prior to her return to work and the Office provides no support for a finding that she should receive no compensation for wage loss commencing February 26, 2007.

The case will be remanded to the Office to properly explain its findings with respect to an overpayment. The Office must clearly explain what compensation appellant was owed from February 18 to March 17, 2007, in order to determine whether there was an overpayment, and if so, the correct amount. After such further development as is necessary, the Office should issue an appropriate decision. In view of the Board’s holding, the issue of waiver will not be addressed at this time.

### **CONCLUSION**

The Office did not provide sufficient supporting evidence to establish that an overpayment of \$1,203.16 was created and the case is remanded for further development.

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<sup>5</sup> It is not clear why the Office increased the overpayment by including a cost-of-living increase after appellant returned to work. If the Office believed appellant was not entitled to compensation as of February 26, 2007, then the overpayment would be the difference between \$1644.48 and the amount she should have received from February 18 to 25, 2007.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 22, 2007 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: May 19, 2008  
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