

Appellant received compensation for temporary total disability. A May 12, 2007 compensation report for the period April 15 to May 12, 2007 showed a net compensation of \$2,703.10 every 28 days. The Office issued payments of \$2,703.10 for the 28-day periods June 10 to July 7, 2007 and July 8 to August 4, 2007.

The treating orthopedic surgeon, Dr. Douglas Harper, submitted a duty status form (CA-17) dated July 2, 2007 indicating appellant could return to work with restrictions on July 9, 2007. In an e-mail dated July 20, 2007, an employing establishment compensation specialist stated that appellant had accepted a job offer on July 7, 2007 and requested the Office terminate compensation.

By letter dated August 14, 2007, the Office advised appellant of a preliminary determination that an overpayment of \$2,799.63 was created from July 7 to August 4, 2007, because appellant had returned to work and continued to receive compensation. It found appellant was not at fault in creating the overpayment.

Appellant requested a prerecoupment hearing before an Office hearing representative, which was held on February 8, 2008. According to her, she returned to work on July 9, 2007, not July 7, 2007. Appellant indicated that she took two weeks of annual leave and began working on July 23, 2007. In an overpayment recovery questionnaire, she reported her monthly income as \$2,400.00, with listed monthly expenses of approximately \$3,000.00. Assets of \$1,000.00 were reported in bank accounts. At the hearing appellant indicated her income represented her take home pay. She also provided additional testimony regarding her expenses.

By decision dated April 11, 2008, the hearing representative finalized the preliminary determination of overpayment and denied waiver. In a decision dated May 27, 2008, he vacated the April 11, 2008 decision and found the overpayment amount was \$2,699.94. With respect to waiver, the hearing representative disputed appellant's reported income of \$2,400.00, stating that a Form CA-7 dated March 3, 2007 showed appellant's pay to be \$49,219.00 per year, or \$4,101.58 per month. He also found that the evidence showed appellant's expenses were \$2,455.51 per month. Since appellant did not need substantially all her income to meet expenses, waiver was denied.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the 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.¹ 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 work-related medical condition prevents him or her from earning the wages earned before the work-related injury."

¹ 5 U.S.C. § 8116(a).

ANALYSIS -- ISSUE 1

The initial determination of an overpayment was based on a finding that appellant returned to work on July 7, 2007. Appellant argued that she returned to work on July 9, 2007, as this was the date her physician released her to work and the light-duty job was available. The record indicated that appellant used annual leave from July 9 to 23, 2007, when she began working at the full-time light-duty job. The hearing representative properly found that appellant was entitled to compensation through July 9, 2007. Appellant received a compensation payment on August 4, 2007 for the period July 8 to August 4, 2007. She is not entitled to receive compensation for temporary total disability for a period that worked, and therefore an overpayment of compensation was created.

As to the amount, the record does not support the hearing representative's findings. It appears that appellant found the net amount of compensation for the period July 8 to August 4, 2007 was \$2,799.63, and then she deducted one day of compensation (for July 8, 2007) of \$99.99 for a total of \$2,699.64. The figure of \$2,799.63 represented compensation for 29 days, not 28 days. The net compensation from July 8 to August 4, 2007 was \$2,703.10, which represents a daily amount of \$96.54. Since appellant was entitled to one day of compensation during this period, the overpayment is \$2,703.10 minus \$96.54, or \$2,606.56.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.² These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] 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 [the Act] or would be against equity and good conscience."³ Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulations⁴ provide that recovery of an overpayment will defeat the purpose of the Act if 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.⁵ An

² *Robert Atchison*, 41 ECAB 83 (1989).

³ *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361 (1994).

⁴ 20 C.F.R. § 10.436 (1999).

⁵ An individual's assets must exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (October 2004).

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 \$50.00.⁶

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt; and when an 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.⁷

ANALYSIS -- ISSUE 2

The hearing representative makes a finding that appellant did not need substantially all her current income to meet ordinary living expenses. In this regard the hearing representative relies on a Form CA-7 showing appellant had gross earnings of \$49,219.00 per year, or \$4,101.58 per month, rather than the \$2,400.00 reported by appellant. But it is not the gross income that is used to determine a claimant's current income. As the OWCP-20 form indicates, it is the net earnings (the form refers to take-home wages) that are considered. If the hearing representative needed additional information from appellant regarding monthly net income, then she could have requested the information in accord with Office regulations.⁸ The evidence regarding gross income is not sufficient to establish the current income and therefore not sufficient to make a finding that appellant's current income exceeded ordinary and necessary expenses by more than \$50.00. The case will accordingly be remanded to the Office for further development and a proper finding on the issue of waiver. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The amount of the overpayment is \$2,606.56. The case will be remanded for a proper determination on waiver of the overpayment.

⁶ *Sherry A. Hunt*, 49 ECAB 467 (1998).

⁷ 20 C.F.R. § 10.437 (1999).

⁸ *See id.* at § 10.438 (2007).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 27, 2008 is modified to reflect an overpayment of \$2,606.56. The decision is set aside on the issue of waiver and remanded for further action consistent with this decision of the Board.

Issued: April 13, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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