

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$2,891.40 for the period November 21 to December 23, 2006 because she worked while in receipt of compensation benefits for total disability; and (2) whether the Office properly denied waiver of the recovery of the overpayment.

## **FACTUAL HISTORY**

The Office accepted that appellant sustained carpal tunnel syndrome of her right wrist for which surgery was performed on August 19, 2005.<sup>1</sup> By letter dated September 15, 2005, it placed appellant on the periodic rolls in receipt of compensation for temporary total disability. She returned to work on November 21, 2006 in a full-time modified-duty capacity.<sup>2</sup>

A December 14, 2006 compensation worksheet noted an outstanding overpayment in the amount of \$2,891.40. Appellant returned to work on November 21, 2006 but continued to receive compensation for the following 33 days or \$87.62 a day.

On December 15, 2006 the Office advised appellant of its preliminary determination that she was overpaid \$2,891.40 in compensation as she returned to work on November 21, 2006 but received benefits to December 23, 2006. It noted that appellant received compensation every 28 days in the amount of \$2,453.31 or \$87.62 per day and thus she was overpaid 33 days for the period November 21 to December 23, 2006. The Office found that appellant was without fault in creating the overpayment and notified her of her right to a prerecoupment hearing.

On December 25, 2006 appellant requested a prerecoupment hearing and submitted an overpayment recovery questionnaire. She listed total monthly income as \$3,000.00 and \$100.00 in a savings account. Appellant itemized her household monthly expenses as: rent or mortgage, \$779.00; food, \$400.00; clothing, \$100.00; utilities, \$800.00; other expenses, \$150.00. In addition, she listed monthly installment payments to AFF Financial, \$475.00<sup>3</sup> and All State, \$175.00.

A prerecoupment hearing was held on June 4, 2007, at which time appellant noted that her monthly expenses and income were as reported. At the hearing she agreed to pay \$100.00 monthly towards repayment of the overpayment. Appellant did not submit any supporting financial evidence.

In an August 13, 2007 decision, the Office hearing representative found that an overpayment in the amount \$2,891.40 occurred and that appellant was without fault in the creation of the overpayment. The hearing representative determined that appellant did not qualify for waiver as her monthly income exceeded her ordinary and necessary living expenses

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<sup>1</sup> This was assigned file number xxxxxx550. On the second page of the claim form, the employing establishment noted that appellant had three other compensation claims. File number xxxxxx441 with a March 4, 2001 date of injury, file number xxxxxx600 with an August 1, 1999 date of injury and file number xxxxxx734 with an April 28, 1999 date of injury. The Office accepted appellant's April 28, 1999 claim left shoulder contusion and assigned it file number xxxxxx734. On August 17, 2001 it issued a schedule award for a nine percent permanent impairment of the left upper extremity. The Office accepted appellant's February 1, 2000 occupational disease claim for left carpal tunnel syndrome and left elbow neuritis on August 11, 2000 and authorized left carpal tunnel release surgery, which was performed on May 21, 2002. This was assigned file number xxxxxx600.

<sup>2</sup> On January 31, 2007 the Office issued a loss of wage-earning capacity decision based upon appellant's modified mail handler job. It determined that appellant had no wage loss as her actual earnings met or exceeded the current wage of her date-of-injury job.

<sup>3</sup> She noted that she owned a total of \$18,200.00 to this company.

and she was also in receipt of compensation under a schedule award.<sup>4</sup> The hearing representative directed repayment in the amount of \$100.00.<sup>5</sup>

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

The Federal Employees' Compensation Act places limitations on the right to receive compensation. An employee who is receiving compensation for an employment injury may not receive wages for the same time period.<sup>6</sup> It is therefore well established that an employee is not entitled to compensation for temporary total disability after returning to work.<sup>7</sup> Temporary total disability is defined as the inability to return to the position held at the time of injury or earn equivalent wages or perform other gainful employment.<sup>8</sup> Section 8129(a) of the Act provides that when an overpayment has been made to an employee because of an error of fact or law, adjustment shall be made by decreasing later payments to which she is entitled.<sup>9</sup> The Office's implementing federal regulations provide that compensation for wage loss due to disability is available only for those periods during which an employee's work-related condition prevents her from earning the wages earned before the injury.<sup>10</sup>

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

The Board finds that appellant received an overpayment of compensation as she returned to work on November 21, 2006 but continued to receive wage-loss compensation for total disability until December 23, 2006 in the amount of \$2,891.40. Appellant did not dispute that she received compensation payments following her return to work on November 21, 2006. The record establishes that she received compensation in the amount of \$87.62 a day for 33 days or \$2,891.40. The Board will affirm the fact and amount of the overpayment.

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<sup>4</sup> In a May 21, 2007 decision, the Office granted appellant a schedule award for eight percent impairment of her right arm. Appellant was found entitled to 24.96 weeks of compensation at a weekly pay rate of \$817.77. She received a payment of \$3,384.02 for the period April 5 to May 12, 2007 and continuing payments every four weeks of \$2,512.00.

<sup>5</sup> The hearing representative noted that appellant agreed to this monthly repayment amount. At the hearing appellant indicated that she did not want the money to be deducted from her schedule award payments and that she would pay the amount.

<sup>6</sup> 5 U.S.C. § 8116(a).

<sup>7</sup> *E.g.*, *L.S.*, 59 ECAB \_\_\_\_ (Docket No. 07-1961, issued February 14, 2008); *Tammi L. Wright*, 51 ECAB 463 (2000).

<sup>8</sup> 20 C.F.R. § 10.400(b); *see Neill D. Dewald*, 57 ECAB 451 (2006).

<sup>9</sup> 5 U.S.C. § 8129(a).

<sup>10</sup> *See* 20 C.F.R. § 10.500.

## **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act<sup>11</sup> provides: 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 the Act or would be against equity and good conscience.<sup>12</sup> Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.<sup>13</sup>

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under section 8129(b), as specified in the Office's regulations, provide:

“(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.”<sup>14</sup>

Section 10.437 of the regulations covers the equity and good conscience standard and 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 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.”<sup>15</sup>

The fact that a claimant was without fault in creating the overpayment does not necessarily preclude the Office from recovering all or part of the overpayment; the Office must exercise its discretion in determining whether waiver is warranted under either of these two

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<sup>11</sup> 5 U.S.C. § 8129.

<sup>12</sup> 5 U.S.C. § 8129(b). See *Terry A. Keister*, 56 ECAB 559 (2005).

<sup>13</sup> *Tammy Craven*, 57 ECAB 689 (2006).

<sup>14</sup> 20 C.F.R. § 10.436. 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. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (May 2004).

<sup>15</sup> 20 C.F.R. § 10.437.

standards.<sup>16</sup> The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to the statutory guidelines.<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

The Office found that appellant was without fault in the creation of the overpayment. However, this does not mean that it is precluded from recovering the overpayment. Waiver may be allowed provided appellant needs substantially all of her current income to meet ordinary and necessary living expenses and her assets do not exceed the specified amount or if recovery would be against equity and good conscience.

Appellant provided a listing of her monthly income, expenses and assets in the December 25, 2006 OWCP-20 financial information form. She noted that her monthly earnings from wages as \$3,000.00 and that she had two dependent children. Appellant listed monthly expenses of \$799.00 in mortgage or rent, \$400.00 for food, \$100.00 in clothing, \$800.00 for utilities and \$150.00 in other expenses. She also listed other debts being paid by monthly installments of \$475.00 to AFF Financial and \$175.00 to Allstate. The total listing of monthly expenses was 2,879.00 or a difference of \$121.00. The hearing representative noted, however, that the Form OWCP-20 did not include the May 21, 2007 schedule award, under which appellant received in excess of \$20,000.00 (\$817.77 per week x 24.96 weeks = \$20,411.54).<sup>18</sup> Therefore, appellant did not qualify for waiver under the defeat the purpose of the Act standard.<sup>19</sup>

Further, there is no evidence in this case and appellant did not allege that she relinquished a valuable right or changed her position for the worse in reliance on the compensation she received after returning to work on November 21, 2006. Pursuant to its regulations, the Office hearing representative properly found that recovery of the overpayment would not be against equity or good conscience. The evidence fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience and the Board finds that the Office did not abuse its discretion in denying waiver of recovery of the overpayment.<sup>20</sup>

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<sup>16</sup> See *George A. Rodriguez*, 57 ECAB 224 (2005); *Linda Hilton*, 52 ECAB 476 (2001).

<sup>17</sup> *Ralph A. Geci*, 51 ECAB 423 (2000).

<sup>18</sup> 20 C.F.R. § 10.436.

<sup>19</sup> See *George A. Rodriguez*, *supra* note 16 (Office procedures state that 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); *Nina D. Newborn*, 47 ECAB 132 (1995).

<sup>20</sup> The Board's jurisdiction over recovery is limited to reviewing those cases whether the Office seeks recovery from continuing compensation payments under the Act. *Terry A. Keister*, *supra* note 12. As appellant agreed to repayment from her funds and not from continuing compensation received from her schedule award, the Board does not have jurisdiction to review the payment plan. Moreover, she agreed to the monthly repayment plan set by the Office hearing representative.

**CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$2,891.40 and that she was not eligible for waiver.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 13, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 29, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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