

On May 1, 2002 appellant, then a 54-year-old distribution clerk, filed a traumatic injury claim alleging that on April 30, 2002 she was struck on both knees by turnstile bars while in the

performance of duty. The Office accepted bilateral knee contusions, left knee strain, left knee medial meniscus tear and consequential right knee medial meniscus tear as work related. Appellant underwent left knee arthroscopy, partial medial and lateral meniscectomy, synovectomy and chondroplasty on February 10, 2003 and January 30, 2006. She also underwent arthroscopic medial and lateral meniscectomy, synovectomy and debridement of the right articular cartilage on June 4, 2007. The Office placed appellant on its periodic rolls effective March 19, 2006, where she received compensation every 28 days through direct deposit.

Appellant returned to work for 20 hours per week on March 25, 2008. Office records show that, from March 25 to May 10, 2008, the Office electronically paid appellant \$3,352.47 net compensation after deducting \$685.66 for health insurance, \$23.67 for basic life insurance and \$210.16 for optional life insurance from the gross compensation of \$4,271.96.

On May 16, 2008 the Office notified appellant of its preliminary determination that she received an overpayment in the amount of \$1,217.33 for the period March 25 through May 10, 2008 because she received compensation for total disability after she returned to work on March 25, 2008, for which she was not at fault. It found that appellant was entitled to compensation for her loss of wage-earning capacity for working part time for the period March 25 through May 10, 2008. The Office applied its formula for reducing compensation by actual earnings received for working 20 hours per week. It noted that the cost of health and life insurance premiums were over-deducted during the same period. In calculating the overpayment, the Office noted gross compensation paid for temporary total disability for March 25 to May 10, 2008 was \$4,271.96 and appellant's actual entitlement to compensation for that period was \$2,135.14 based on its formula for computing compensation when a claimant has returned to part-time work. Therefore, appellant was overpaid \$2,136.82 (\$4,271.96 minus \$2,135.14) for the period March 25 to May 10, 2008. The Office gave appellant credit for \$919.49 in health benefits insurance (\$685.66), basic life insurance (\$23.67) and optional life insurance (\$210.16), which should not have been withheld as the employing establishment resumed such deductions for health and life insurance upon appellant's return to work. Accordingly, it found that appellant's total overpayment was \$1,217.33 or \$2,136.82 amount overpaid minus \$919.49 in health and life insurance benefits costs. The Office requested that she submit an enclosed overpayment recovery questionnaire and supporting financial information within 30 days. It noted that waiver would be denied if appellant failed to furnish the information requested on the enclosed overpayment recovery questionnaire or any other information needed to address a request for waiver within the 30 days. Appellant did not respond to the preliminary overpayment determination.

By decision dated June 24, 2008, the Office finalized its finding that appellant received \$1,217.33 in overpayment of compensation for the period March 25 through May 10, 2008 based on her receipt of compensation for total disability after her return to part-time work on March 25, 2008. It found that she was without fault in the matter of the overpayment. The Office noted that waiver could not be granted as appellant had not provided any of the information necessary to make such a determination. It directed recovery of \$200.00 every four weeks from future compensation payments.

On appeal, appellant argues the recovery of \$200.00 from her continuing compensation payments would cause a significant hardship for her and her family.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act¹ provide that the United States shall pay compensation as specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period.² Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.³

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,217.33. The record supports that appellant received total disability compensation from the date that she returned to part-time work, March 25 through May 10, 2008. The record reflects that she received compensation payment for the period March 25 through May 10, 2008 in the gross amount of \$4,271.96, but was only entitled to compensation in the amount of \$2,135.14 based on her loss of wage-earning capacity for working 20 hours per week.⁴ The difference between the compensation paid of \$4,271.96 and the compensation due of \$2,135.14 is \$2,136.82. Since the employing establishment resumed deductions for health and life insurance upon appellant's return to work, the Office also determined that she was entitled to a \$919.49 credit for the costs of health insurance (\$685.66), basic life insurance (\$23.67) and optional life insurance (\$210.16). Thus, the amount of overpayment is \$2,136.82, minus \$919.49 in health and life insurance benefits costs or \$1,217.33.

As appellant was not entitled to compensation for total disability after her return to part-time work March 25 to May 10, 2008, the Office properly found an overpayment of compensation occurred in the amount \$1,217.33. She has not disputed that she received an overpayment of compensation in this amount.

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.⁵ The statutory

¹ 5 U.S.C §§ 8101-8193, 8102(a).

² *Id.* at § 8116(a).

³ *Danny E. Haley*, 56 ECAB 393, 400 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

⁴ The method for computing the compensation payable where an employee has actual earnings or an earning capacity is called the *Shadrick* formula, as it reflects the principles set forth in *Albert C. Shadrick*, 5 ECAB 376 (1953). See 20 C.F.R. § 10.403; *Donna M. Rowan*, 54 ECAB 698 (2003).

⁵ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

guidelines are found in section 8129(b) of the Act which states, “Adjustment recovery of an overpayment by the United States may not be made when an 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.”⁶

Section 10.438 of the regulations provide that 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. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver.⁷

ANALYSIS -- ISSUE 2

The Office found appellant to be without fault and eligible for consideration of waiver with regard to its finding that she received an overpayment in the amount of \$1,217.33. The applicable regulations provide that the individual who receives an overpayment is responsible for providing financial information. Failure to submit the requested financial information within 30 days of the request shall result in the denial of the waiver.⁸ In its May 16, 2008 preliminary overpayment determination, the Office advised appellant that, if she desired waiver of the overpayment, she must submit the requested financial information within 30 days. Appellant did not respond to the Office’s notification. As she failed to submit the requested financial evidence, the Office, pursuant to its regulations, properly denied waiver of recovery of the overpayment amount of \$1,217.33.

LEGAL PRECEDENT -- ISSUE 3

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information will be used to determine the repayment schedule, if necessary.⁹

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.¹⁰

⁶ See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

⁷ 20 C.F.R. § 10.438.

⁸ See *id.*

⁹ *Id.*

¹⁰ *Id.* at § 10.441(a).

ANALYSIS -- ISSUE 3

In the instant case, appellant did not provide any financial information which would assist the Office in determining the amount to deduct from future compensation payments in order to recoup the overpayment. The Office set the rate of recovery as \$200.00 from each continuing compensation payment until the benefit was paid in full. The Board finds that this was reasonable in the absence of any financial documentation proving otherwise.¹¹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,217.33 for the period March 25 through May 10, 2008. The Board further finds that the Office properly denied waiver of the overpayment and set the rate of recovery at \$200.00 from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the June 24, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 4, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹¹ On appeal, appellant submitted a listing of her current bills. As the Board's review is limited to evidence in the case record at the time the Office made its decision over which the Board has jurisdiction, the Board cannot review this evidence submitted for the first time on appeal. *D.E.*, 58 ECAB ____ (Docket No. 07-27, issued April 6, 2007); 20 C.F.R. § 501.2(c).