

**United States Department of Labor
Employees' Compensation Appeals Board**

C.W., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Adelanto, CA, Employer**

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**Docket No. 09-958
Issued: November 5, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 27, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 14, 2009 merit decision concerning 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.

ISSUES

The issues are: (1) whether appellant received a \$43,976.74 overpayment of compensation; and (2) whether the Office abused its discretion by refusing to waive recovery of the overpayment.

FACTUAL HISTORY

The Office accepted that on June 13, 1997 appellant, then a 35-year-old unit manager, sustained a lateral collateral ligament sprain of his left knee and torn left medial meniscus. Appellant received a schedule award on June 14, 1999 for a 10 percent permanent impairment of his left leg. He was later found to have a 24 percent permanent impairment of his left leg and on January 21, 2000 appellant was granted an additional schedule award for a 14 percent permanent impairment of his left leg. Appellant reinjured his left knee on July 17, 2001 due to running to

an emergency call and the Office accepted that he sustained a torn left medial meniscus due to this injury. He again filed for a schedule award and was found to have a total permanent impairment of his left leg of 17 percent. The Office failed to check appellant's various claim files for payment of schedule award compensation¹ and did not realize that he already had been compensated for a 24 percent permanent impairment of his left leg. On September 9, 2002 it granted appellant a schedule award for a 17 percent permanent impairment of his left leg. The award ran for 48.96 weeks from June 25, 2002 to June 2, 2003 and paid appellant a total of \$43,976.74.²

In a July 29, 2008 letter, the Office advised appellant of its preliminary determination that he received a \$43,976.74 overpayment of compensation because he received a September 9, 2002 schedule award for a 17 percent permanent impairment of his left leg which compensated him for impairment for which he had previously been compensated. It also made a preliminary determination that he was not at fault in the creation of the overpayment. The Office advised appellant that he could submit evidence challenging the fact, amount or finding of fault and request waiver of the overpayment. It informed appellant that he could submit additional evidence in writing or at a precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. The Office requested that appellant complete and return an enclosed financial information questionnaire within 30 days even if he was not requesting waiver of the overpayment.

In a financial information questionnaire completed on August 10, 2008, appellant indicated that he had \$6,410.00 in monthly income from his employing establishment job and private consulting work, \$5,803.96 in monthly expenses and \$1,100 in assets. On February 18, 2009 appellant participated in a telephone conference with an Office claims examiner. He advised that his monthly income and monthly expenses had not changed since he completed the financial information questionnaire on August 10, 2008.

In a January 14, 2009 decision, the Office determined that appellant received an overpayment of compensation. It found that appellant was not at fault in the creation of the overpayment but that the overpayment was not subject to waiver. The Office noted that the evidence revealed that his monthly income exceeded his monthly expenses by \$606.04. It required repayment of the overpayment by deducting \$500.00 from appellant's compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act³ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁴ Section 8129(a) of the Act provides, in

¹ Appellant's several left leg claims eventually were combined under a single master file.

² Appellant reinjured himself on June 12, 2007 due to running to make an assistance call at work and the Office accepted that he sustained a lateral collateral ligament sprain of his left knee and torn left lateral meniscus.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8102(a).

pertinent part, “When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁵ Section 8116(a) of the Act provides that, while an employee is receiving compensation or if he 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, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁶

ANALYSIS -- ISSUE 1

Appellant first sustained a work-related left knee injury on June 13, 1997 and through schedule awards dated June 14, 1999 and January 21, 2000 he was granted schedule award compensation for a total permanent impairment of his left leg of 24 percent. He reinjured his left knee on July 17, 2001, filed another schedule award claim and was found to have a total permanent impairment of his left leg of 17 percent. The Office failed to check appellant’s various claim files for payment of schedule award compensation and did not realize that he already had been compensated for a 24 percent permanent impairment of his left leg. On September 9, 2002 it granted appellant a schedule award for a 17 percent permanent impairment of his left leg. The award ran for 48.96 weeks from June 25, 2002 to June 2, 2003 and paid appellant a total of \$43,976.74. Appellant was not entitled to receive the September 9, 2002 schedule award for a 17 percent left leg impairment because he had already been compensated for this extent of left leg impairment. Therefore, the Office properly determined that appellant received a \$43,976.74 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within its discretion pursuant to statutory guidelines.⁷ 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 this subchapter or would be against equity and good conscience.”⁸ If the Office finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), it 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.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary’s assets do not exceed a specified amount as determined by

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8116(a).

⁷ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁸ 5 U.S.C. § 8129(b).

the Office from data provided by the Bureau of Labor Statistics.⁹ According to 20 C.F.R. § 10.437, 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 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 position for the worse.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 2

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. His monthly income exceeds his monthly ordinary and necessary expenses by approximately \$606.00.¹² As appellant's current income exceeds his current ordinary and necessary living expenses by more than \$50.00, he has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses.¹³ Because he has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.¹⁴

⁹ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). Office procedure provides that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

¹⁰ 20 C.F.R. § 10.437(a), (b).

¹¹ *Id.* at § 10.437(b)(1).

¹² In a financial information questionnaire completed on August 10, 2008, appellant indicated that he had \$6,410.00 in income from his employing establishment job and private consulting work, \$5,803.96 in monthly expenses, and \$1,100 in assets. In a February 18, 2009 telephone conference with an Office claims examiner, appellant advised that his monthly income and monthly expenses had not changed since he completed the financial information questionnaire on August 10, 2008.

¹³ *See supra* note 9.

¹⁴ *See William J. Murphy*, 41 ECAB 569, 571-72 (1989).

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, he has failed to show that the Office abused its discretion by refusing to waive the overpayment.¹⁵

CONCLUSION

The Board finds that appellant received a \$43,976.74 overpayment of compensation. The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' January 14, 2009 decision is affirmed.

Issued: November 5, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁵ On appeal appellant argued that his financial situation prevented him from paying off the overpayment at a rate of \$500.00 every 28 days. He is not currently receiving Office compensation benefits. As recovery from continuing compensation benefits under the Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *Levon H. Knight*, 40 ECAB 658, 665 (1989).