

FACTUAL HISTORY

This is the fourth appeal to the Board in this case. On September 26, 2006 the Board remanded the case to the Office for reconstruction of the record and appropriate development.¹ In a September 25, 2007 decision, the Board reversed the Office's January 12, 2007 decision, which reduced appellant's compensation benefits based on its determination that the constructed position of dispatcher represented his wage-earning capacity.² On January 7, 2008 the Board affirmed the Office's February 20, 2007 schedule award decision.³ The facts and the conclusions of law in those cases are incorporated herein by reference.

Appellant was referred for vocational rehabilitation services; however, he was unable to obtain employment. By decision dated August 2, 2005, the Office reduced his wage-loss compensation benefits effective August 7, 2005 based upon its determination that the position of "dispatcher, maintenance service" was medically and vocationally suitable, and represented his wage-earning capacity of \$340.00 per week. On January 12, 2007 it reissued its August 2, 2005 decision finalizing the reduction of compensation effective August 7, 2005.⁴ By decision dated September 25, 2007, the Board reversed the Office's January 12, 2007 decision.

On September 27, 2007 appellant's representative asked the Office to determine whether appellant was entitled to an adjustment of compensation as a result of the Board's September 25, 2007 decision.

On January 3, 2008 the Office asked the Social Security Administration to provide an itemized statement of earnings for appellant from January 1, 2005 through December 31, 2007. A January 28, 2008 report from the Social Security Administration reflected that appellant reported earned income in 2005 of \$3,867.02 from King Limo. Earned income in 2006 was reported as \$2,156.37 from King Limo and \$35,612.02 from Thomas Jefferson Hospital.

The record contains a record of retroactive payment to appellant for the period August 7 through October 16, 2005 in the amount of \$2,591.50. Noting that the payment represented an adjustment in compensation based on the constructed dispatcher position, the Office advised that appellant was entitled to the amount of \$5,893.00 during the applicable period, but was paid only \$3,301.50.

¹ Docket No. 06-775 (issued September 26, 2006). On February 27, 2002 appellant, a 29-year-old mail carrier, sustained an injury to his lower back while lifting a mail tray. The Office accepted his claim for aggravation of a herniated lumbar disc. Appellant subsequently underwent a lumbar laminectomy and was placed on the periodic rolls.

² Docket No. 07-786 (issued September 25, 2007).

³ Docket No. 07-982 (issued January 7, 2008). The Office's February 20, 2007 decision granted appellant a schedule award for a 12 percent impairment of his left lower extremity. The period of the award was from November 16, 2006 through July 15, 2007.

⁴ On December 22, 2005 an Office hearing representative affirmed the reduction of benefits, but inadvertently referred to a November 7, 2005 decision. On appeal, the Board remanded the case to the Office for clarification. (Docket No. 06-775, issued September 26, 2006). In a January 12, 2007 decision, the Office reissued its August 2, 2005 decision finalizing reduction of compensation effective August 7, 2005, noting that the reference to a November 7, 2005 decision was a typographical error.

In a decision dated January 22, 2008, the Office reduced appellant's compensation benefits based on his actual earnings at Thomas Jefferson Hospital in the amount of \$589.60 per week. The decision reflected that appellant's compensation for each four-week period would be \$459.86.⁵

On March 20, 2008 the Office notified appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$14,412.14 due to the fact that he received compensation based on a constructed loss of wage-earning capacity (LWEC), when he should have been paid compensation based on his actual earnings for the period October 17, 2005 to January 19, 2008.⁶ In reinstating appellant's compensation the Office noted that he had received actual earnings from King Limo and Thomas Jefferson Hospital during the period that the LWEC was in effect. Office calculations and worksheets reflected that he had received the amount of \$28,060.35, but was entitled to only \$13,648.21, resulting in an overpayment of \$14,412.14.⁷ It found that appellant was without fault in the creation of the overpayment, as he was not aware that the Board's decision reversing the LWEC decision would effect a reduction of his compensation based on actual wages. The Office calculated the overpayment amount as follows:

1. August 7 to October 16, 2005: Overpayment -- None

Appellant was not working, but the Office reduced compensation based on LWEC: The Office provided a retroactive adjustment in the amount of \$2,591.50 on January 18, 2008. (Appellant received \$3,301.50 based on LWEC amount, but was entitled to full benefits in the amount of \$5,893.00.)

2. October 17, 2005 to January 2, 2006: Overpayment -- \$66.86

Appellant earned \$3,867.02 at King Limo during this period. Per social security, he was paid \$3,627.00 at constructed LWEC rate, but should have received \$3,560.14 based on actual earnings.

3. January 3 to June 6, 2006: Overpayment -- \$5,525.36

Appellant worked full time at Thomas Jefferson Hospital and part time at King Limo. He earned \$2,156.37 at King Limo during this period. For the 22-week period, his total weekly income from King Limo and Thomas Jefferson Hospital was \$668.02. Appellant was paid

⁵ The Board notes that appellant did not appeal from the Office's January 22, 2008 decision. Therefore, the Board will not address the merits of that decision.

⁶ The Office explained that the overpayment occurred during two separate periods, October 17, 2005 through November 15, 2006 and July 16, 2007 through January 19, 2008. Appellant was not paid wage-loss compensation from November 16, 2006 through July 15, 2007, while he was in receipt of schedule award payments.

⁷ The record contains worksheets dated February 2, 2008 reflecting that appellant's current weekly pay rate for his job when injured was \$780.40. Fiscal printouts indicate that the Office compared the compensation appellant received based on his constructed position to his actual average weekly earnings, in order to calculate the amount of overpayment for each period.

\$7,368.50 at the constructed LWEC rate, but should have received \$1,842.14 based on actual earnings.

4. June 7 to November 15, 2006: Overpayment -- \$4,032.54

Appellant worked at Jefferson during this period. He was paid \$7,799.14 at the constructed LWEC rate, but should have received \$3,766.50 based on actual earnings.

5. November 16, 2006 to July 15, 2007: Overpayment -- None

Schedule award payments, rather than compensation payments, were received during this period.

6. July 16, 2007 to January 19, 2008: Overpayment -- \$4,787.28

Appellant worked at Thomas Jefferson Hospital during this period. He was paid \$9,265.71 at the constructed LWEC rate, but should have received \$4,478.43 based on actual earnings.

Total overpayment amount: \$14,412.14

The Office advised appellant of his right to request a telephone conference, a final decision based on the written evidence or a precoupment hearing, if he objected to the decision or requested waiver of the recovery of the overpayment. Appellant was advised to complete an overpayment recovery questionnaire and to submit supporting financial documents.

On March 26, 2008 appellant, through his attorney, requested a precoupment hearing. He submitted a copy of a motor vehicle lease agreement dated July 12, 2006, whereby appellant leased a 2006 Jeep Commander valued at \$36,271.00. Appellant was given a \$2,500.00 trade-in allowance and other cash credits totaling \$4,000.00. The lease terms provided that appellant would make monthly payments of \$443.44, and at the end of the lease term, he would have the opportunity to purchase the vehicle for its residual value (\$24,187.05).

At the July 16, 2008 hearing, appellant's attorney contended that the Office incorrectly calculated the overpayment amount by improperly basing its determination on combined earnings received by appellant in his full-time and part-time jobs. He argued that, as the Office would not pay a claimant a higher level of compensation based on a second, part-time job, the second job should not be considered in any overpayment determination. Counsel also contended that the overpayment amounts should be divided into separate decisions, so that some might be administratively dismissed. Finally, he argued that, because appellant had relied to his detriment on anticipated compensation when he leased a vehicle on August 12, 2006, waiver of this amount was warranted according to the Office procedure manual. Counsel contended that appellant would not have leased the vehicle had he known he was not entitled to his full benefit; therefore, recovery in the lease amount was against equity and good conscience. He acknowledged that appellant was not eligible for waiver based on his income and assets.

Appellant submitted an overpayment recovery questionnaire dated August 18, 2008 and supporting documents reflecting monthly income in the amount of \$4,341.46 and monthly expenses in the amount of \$3,864.16. Assets included stock accounts totaling \$15,924.50, a one-

half interest in a rental property valued at \$90,000.00, a savings account in the amount of \$7,620.00, and a checking account in the amount of \$1,175.00.

By decision dated October 15, 2008, the Office finalized its determination that appellant received an overpayment of compensation in the amount of \$14,412.14 due to the fact that he received compensation based on a constructed LWEC, when he should have been paid compensation based on his actual earnings from October 17, 2005 to January 19, 2008. The hearing representative found that, although appellant was found not to be at fault in creating the overpayment, he was not entitled to a waiver of recovery of the overpayment. Referencing financial information reflecting that appellant's monthly income exceeded his expenses by more than \$50.00, the hearing representative found that recovery would not defeat the purpose of the Act or be against equity and good conscience. He also found that the evidence did not establish that appellant had relinquished a valuable right or based his decision to lease a new car solely on his anticipated receipt of unchanging future compensation payments. Therefore, appellant had not established detrimental reliance warranting waiver of recovery of the overpayment. The hearing representative further determined that appellant did not qualify for a compromise of the principal and directed recovery at the rate of \$350.00 every 28 days to allow collection of the overpayment without depriving appellant of funds to meet ordinary and necessary living expenses.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act⁸ 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.⁹ When an overpayment has been made to an individual 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 the individual is entitled.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$14,412.14. Therefore, the October 15, 2008 decision shall be affirmed as to fact and amount of overpayment.

The Office reduced appellant's compensation benefits effective August 7, 2005 based on its August 2, 2005 LWEC decision, which found that appellant was capable of earning the wages of the constructed position of dispatcher. Following the Board's September 25, 2007 reversal of this decision, the Office properly reevaluated appellant's entitlement to compensation. It compared his actual wages during the period affected by the LWEC decision with his eligibility for receipt of compensation for total disability.¹¹ The Office determined that appellant's actual

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Id.* at § 8102(a).

¹⁰ *Id.* at § 8129(a).

¹¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(b)(2) (December 1995).

wages during this period were higher than the benefits he received under the LWEC decision. Therefore, he had received an overpayment of benefits.

The evidence reflects that, from October 17, 2005 through January 19, 2008, appellant received compensation benefits based on the constructed LWEC rate in the amount of \$28,060.35. However, based on his actual earnings he was entitled to only \$13,648.21. This resulted in an overpayment of \$14,412.14. The Office correctly compared the compensation appellant received based on his constructed position to his actual average weekly earnings during each period, in order to calculate the amount of overpayment for each period.¹² The Office properly found that he received an overpayment of compensation in the amount of \$14,412.14.

Appellant's representative does not contest the Office's finding as to appellant's actual earnings during the alleged periods of overpayment. He contends, however, that, since a second part-time job would not be included in determining pay rate for compensation purposes, the Office should not have included appellant's earnings from both his full-time and part-time employment in calculating the overpayment amount. But the issue in this case is not a pay rate issue. Compensation for wage loss is paid for disability, which is defined as the inability to earn the wages earned at the time of injury. The actual earnings, however they may be classified, are relevant factors in determining the amount of compensation owed. The Office offsets compensation based on the actual earnings in accordance with its implementing regulations and Board precedent.¹³ The Board finds that the Office properly included appellant's actual earnings from both his full- and part-time employment in determining the amount of overpayment.

Appellant's representative also argued that the overpayment amounts should have been broken down into separate decisions, so that some of the smaller amounts could be administratively dismissed. However, he has presented no support for this position. The Board finds appellant's representative's contention to be without merit. The overpayment during each period identified was due to the same set of circumstances over an extended time frame. Moreover, it was not explained how separate decisions would provide a different result, given the fact that administrative termination of debt collection is discretionary.¹⁴

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act¹⁵ provides that an overpayment must be recovered unless "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."

¹² The Board notes that the Office addressed appellant's entitlement to compensation benefits from August 7 through October 16, 2005 separately by issuing a retroactive adjustment in the amount of \$2,591.50 for this period on January 18, 2008. Therefore, appellant's actual wages during this period are not relevant to the overpayment decision.

¹³ See *D.M.*, 60 ECAB ___ (Docket No. 08-1600, issued July 13, 2009); *Donna M. Rowan*, 54 ECAB 698 (2003); *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (December 1995).

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.3 and 8. (May 2004).

¹⁵ 5 U.S.C. § 8129.

Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.¹⁶

Section 10.436 of the implementing federal regulations¹⁷ provide that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to “defeat the purpose of the Act.”

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 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.¹⁸ To establish a position for the worse, the individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amounts and that this decision resulted in a loss. Conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose.¹⁹

ANALYSIS -- ISSUE 2

Although the Office found that appellant was without fault in the matter of the overpayment, repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.²⁰ The Board finds that the Office properly denied waiver of recovery of the overpayment.

Appellant’s representative acknowledged that his financial situation precluded waiver of recovery of the overpayment. The record reflects that appellant receives total monthly income in the amount of \$4,341.46. Appellant has stated his monthly expenses to be \$3,864.16. Accepting these amounts as accurate, his monthly income exceeds monthly expenses by \$477.30. In that his monthly income exceeds his expenses by more than \$50.00, appellant is not deemed to need substantially all of his current income (including compensation benefits) to meet current ordinary and necessary living expenses²¹ and has ample funds available for debt repayment. Further,

¹⁶ *Wade Baker*, 54 ECAB 198 (2002).

¹⁷ 20 C.F.R. § 10.436 (2009).

¹⁸ *Id.* at § 10.437.

¹⁹ *See Jorge O. Diaz*, 51 ECAB 124 (1999).

²⁰ *See supra* note 16.

²¹ *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6a(1) (June 2009). “An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.[00]”).

appellant's assets far exceed the asset base allowed under Office procedures.²² Therefore, the Office properly concluded that recovery of the overpayment would not cause hardship to appellant or defeat the purpose of the Act.

In *James Lloyd Otte*,²³ the employee had received an overpayment in the amount of \$746.95 due to the Office's failure to deduct life insurance premiums. The Board found that his monthly income exceeded monthly expenses by more than \$200.00 and concluded that he had not shown that he needed substantially all of his income to meet ordinary living expenses. The Board denied the request for waiver.²⁴ In the instant case, appellant's monthly income exceeded monthly expenses by \$477.30, in excess of the amount specified in the Federal (FECA) Procedure Manual.²⁵ Therefore, he has not shown that he needs substantially all of his income to meet ordinary living expenses.

Additionally, recovery of the overpayment is not considered to be against equity and good conscience. Appellant alleged that he would experience financial hardship in attempting to repay the debt and that he had changed his position for the worse in reliance on the overpaid compensation. The Board finds that his contention is without merit. Appellant has funds in checking and savings accounts totaling \$8,803.20 and is in possession of mutual fund accounts with balances totaling \$15,924.50. He also holds a 1/2 ownership interest in rental property valued at \$90,000.00 (1/2 x 180,000.00). Taking into consideration appellant's assets and positive monthly cash-flow of \$477.30, the Board finds that recovery of the overpayment would not be against equity and good conscience.

On appeal, counsel argues that appellant was entitled to waiver based on the principle of detrimental reliance as he increased his monthly expenses, by leasing a motor vehicle, in reliance upon the Office's prior representation as to his benefits. Counsel argued that appellant would not have taken on higher monthly costs and given up the car he owned, had he known he was not entitled to the compensation he received. The Board finds that appellant does not qualify for waiver under the principle of detrimental reliance.

Appellant cited an example in the Office's procedure manual, where an individual established that she entered into a rental agreement, which required her to pay an additional monthly rent in the amount of \$15.00, in reliance upon overpaid compensation. In that case, the Office granted waiver of the rental amount because it determined that the claimant would not have signed the agreement but for her belief that she was entitled to ongoing compensation. The example in the procedure manual is distinguishable from the facts of the instant case. The Office specifically found that the claimant's reliance upon the overpaid compensation was the sole reason that she signed the rental agreement. No such evidence has been presented in this case.

²² See *id.* at Chapter 6.0200.6(a) (Recovery of an overpayment will defeat the purpose of the Act if both the individual from whom recovery is sought needs substantially all of his income to meet ordinary and necessary living expenses and the individual's assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependant).

²³ 48 ECAB 334 (1997).

²⁴ *Id.* at 339.

²⁵ See *supra* note 21.

Appellant has not established that this action of leasing a vehicle was solely based on his receipt of compensation.

The evidence does not establish that appellant gave up a valuable right or changed his position for the worse in reliance on anticipated payments.²⁶ Appellant has failed to meet his burden of proof to show that he would not have leased his vehicle in 2006 but for his expectation that he would continue to receive his compensation payments as previously computed. The leasing of a new vehicle, in and of itself, does not require such a conclusion. Appellant did not establish that his decision to lease the car resulted in a loss. Conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose.²⁷ Although appellant entered into a lease agreement rather than a purchase agreement, he had the use of the vehicle during the period of the lease and retained an ownership interest. As he derived some benefit, he did not suffer a loss. Moreover, appellant has not shown that, if required to repay the overpayment, he would be in a worse position after repayment than if he had never received the overpayment at all.²⁸ The Office properly found that he was not entitled to waiver on the grounds that recovery would be against equity and good conscience.

As appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion in denying waiver of recovery.

LEGAL PRECEDENT -- ISSUE 3

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 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.²⁹

ANALYSIS -- ISSUE 3

The Board finds that the Office did not abuse its discretion in setting the rate of recovery from continuing compensation at \$350.00 every 28 days.

Appellant's monthly income exceeds his monthly expenses by \$477.30. Based on this information and other financial evidence submitted, the Office determined that he could repay the debt at the rate of \$350.00 per month plus interest without great hardship. The Board finds that the Office gave due regard to the relevant factors noted above and did not abuse its discretion in setting a rate of recovery that left appellant with approximately \$127.30 in discretionary income per month (\$477.30-\$350.00). The Board notes that the combined value of

²⁶ 20 C.F.R. § 10.437 (2009).

²⁷ See *Jorge O. Diaz*, *supra* note 19.

²⁸ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (May 2004).

²⁹ 20 C.F.R. § 10.441(a) (2009).

his liquid assets and investments exceeds the amount of the overpayment. The Board will affirm the Office's August 9, 2004 decision on the issue of the rate of recovery.³⁰

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$14,412.14 for the period October 17, 2005 through January 19, 2008. The Board further finds that the Office properly denied waiver of recovery of the overpayment, and did not abuse its discretion in requiring repayment at the rate of \$350.00 every 28 days from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 2, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

³⁰ The Office hearing representative completed a Compromise of Principle worksheet, which found that the overpayment balance of \$14,412.14 should not be compromised.