

expenses as determined by the Office hearing representative. He contends that in its waiver calculation, the Office improperly included appellant's wife's salary in the household income although she was no longer working. Counsel asserted that, if appellant's wife's former salary were subtracted from the household income, appellant would meet the Office's financial formula for waiver.

FACTUAL HISTORY

This is the second appeal before the Board in this case. By order issued March 21, 2008, the Board remanded the case to the Office for reconstruction of the record.² The relevant facts of the case are set forth below.

The Office accepted that on or before December 30, 2005 appellant, then a 35-year-old fire management officer, sustained chronic obstructive asthma due to exposure to smoke and dust in the performance of duty. On July 10, 2007 it granted appellant a schedule award in the amount of \$34,582.97 for a 20 percent permanent impairment of the lungs. Appellant did not receive additional wage-loss compensation after the schedule award payments ended in August 2007. Following additional development, by decisions dated July 9, 2008, the Office rescinded the schedule award, finding that appellant had no (zero) permanent impairment of the lungs. It found that the schedule award was based on incorrectly administered pulmonary function studies. The correct tests showed appellant's lung function was within normal limits.

By notice dated July 16, 2008, the Office advised appellant of its preliminary determination that an overpayment of \$34,582.97 had been created in his case as the schedule award was rescinded. It found that appellant was without fault in creation of the overpayment.

In a July 22, 2008 letter, appellant, through his attorney, requested a telephonic hearing regarding the preliminary finding of overpayment. At the hearing, held on November 4, 2008, counsel asserted that appellant was entitled to waiver of the overpayment based on his detrimental reliance on the schedule award. Appellant used the funds to pay off a student loan and car loan. The schedule award payments ended in August 2007. In October 2007, appellant quit his job because he wished to stay home with his two-year-old child. He testified that his wife was pregnant and due to deliver in February 2009. Appellant's wife earned \$6,875.00 a month in gross income, \$5,496.00 net.

Appellant submitted information regarding his income, assets and expenses. He stated that he no longer had any of the compensation checks or funds in his possession. Appellant explained that he repaid \$7,162.92 in student loans at 5.5 percent interest and a \$10,465.67 in car loans at 4.76 percent interest. He listed \$8,968.00 in monthly household income, including \$6,875.00 gross salary from his wife's job, \$1,659.00 in federal retirement benefits, \$429.00 in veterans' benefits and \$5.00 in dividends. Appellant listed \$11,679.00 in monthly expenses, as follows: \$100.00 for gifts and charitable donations; \$800.00 for food; \$100.00 for automotive repairs; \$507.00 for automobile license fees, gasoline and insurance; \$110.00 for clothing, \$50.00 for satellite radio; \$100.00 for household sundries; \$592.00 in medical expenses; \$835.00

² Docket No. 07-1983 (issued March 21, 2008).

in utilities; \$343.00 for insurance premiums; \$2,000.00 for a residential mortgage; \$1,600.00 in property rental; \$300.00 for escrow payments; \$198.00 for home maintenance; \$563.00 for child care; \$1,150 for religious tithing; \$500.00 in credit card payments; \$50.00 for commuting tolls; \$70.00 for cosmetics and haircuts; \$158.00 for professional licenses; \$42.00 for education; \$20.00 for printer paper and toner; \$100.00 for vacation savings; \$1,391.00 in taxes. He also noted \$19,510.00 in bank accounts and stocks. Appellant asserted that as his monthly expenses exceeded his monthly income by \$2,716.00, he could repay only \$17,292.00 of the overpayment. He calculated that he could make monthly payments of \$202.83 without financial hardship.

In letters dated December 10, 2008 and January 1, 2009, appellant stated that his wife had been placed on bed rest due to pregnancy complications. She would be off work through February 9, 2009 and planned to return to work on April 6, 2009. Appellant stated that his wife would not receive any salary for December 2009 as she would not be working and had exhausted her leave balance. He noted that their savings would be spent by the end of February 2009.

By decision dated and finalized January 22, 2009, an Office hearing representative affirmed the preliminary findings of fact and amount of the overpayment and that appellant was not at fault in its creation. The hearing representative found that appellant had a net income of \$7,191.24 and allowable monthly expenses of \$6,852.00. The hearing representative disallowed expenses for vacation savings, satellite radio and an unexplained insurance charge. Also, as appellant did not work and stayed home to take care of his child, the hearing representative disallowed the \$563.00 monthly child care expense. The hearing representative therefore found that appellant's monthly income exceeded his expenses by more than \$50.00. Therefore, recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience. The hearing representative noted that appellant's wife had stopped work and did not plan to resume work until April 2009. The hearing representative found that this "temporary change in the family income" was "insufficient to justify waiver" of the overpayment. However, as appellant was "currently experiencing an unusual financial situation with his wife's pregnancy, the Office should not begin collecting the overpayment until April 2009." The hearing representative further found that appellant did not establish detrimental reliance, as the interest rates on the loans he repaid with schedule award funds were greater than the three percent interest charged by the Office on the overpayment debt. The hearing representative directed recovery of the overpayment by collecting \$202.00 a month from appellant.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employee's Compensation Act provides 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.³ Permanent impairment to specified

³ 5 U.S.C. § 8102(a).

members of the body may entitle a claimant to a schedule award.⁴ If the Office later rescinds a claim, the amount of any compensation paid is considered an overpayment of compensation.⁵

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for bilateral lung disease sustained in the performance of duty. It paid appellant a schedule award in the amount of \$34,582.97 for a 20 percent impairment of both lungs. As set forth above, the Office properly rescinded the schedule award as it was based on a misinterpretation of the medical evidence. Consequently, appellant received an overpayment of compensation in the amount of \$34,582.97. He did not appeal the rescission of the schedule award.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁶ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of the Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁷

Recovery of an overpayment will defeat the purpose of the Act if such 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. A higher amount is specified for a beneficiary with one or more dependents.⁸ 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.⁹ Recovery of an overpayment is also considered to be against equity and good conscience when any 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.¹⁰

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

⁴ *Id.* at § 8106(a).

⁵ *George A. Rodriguez*, 57 ECAB 224 (2005).

⁶ 20 C.F.R. § 10.433(a).

⁷ *Id.* at § 10.434.

⁸ *Id.* at § 10.436.

⁹ *Id.* at § 10.437(a).

¹⁰ *Id.* at § 10.437(b).

determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹¹

ANALYSIS -- ISSUE 2

The Office determined that appellant was without fault in the creation of the overpayment. Because he was not at fault, it may adjust later payments only if the adjustments would not defeat the purpose of the Act or be against equity and good conscience.¹² Appellant furnished the Office with information regarding his finances. The Office determined that appellant had allowable monthly expenses of \$6,852.00 and a monthly net household income of \$7,191.24. This income included \$5,496.00 in net income from appellant's wife's job. This income ended in November 2008 when appellant's wife stopped work due to pregnancy complications. Appellant stated that, if his wife returned to work, she would not do so before April 2009.

In its January 22, 2009 decision finalizing the overpayment and denying waiver, the Office stated that, because appellant was "currently experiencing an unusual financial situation with his wife's pregnancy, the Office should not begin collecting the overpayment until April 2009." The Office's procedures provide that 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, *i.e.*, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses plus \$50.00.¹³ While appellant's wife was not working, the household monthly income was reduced to \$1,695.24, an amount far exceeded by \$6,852.00 in monthly expenses. The Office thereby acknowledged that it could not begin collecting the overpayment while appellant's monthly income was so reduced.

The Board has held that the Office must rely on a claimant's current financial situation at the time of the waiver determination.¹⁴ Past circumstances or assumed future conditions are not a proper basis on which to decide a claimant's eligibility for waiver.¹⁵ Appellant's wife stopped work in November 2008. This reduced appellant's monthly household income to \$1,695.24. There is no indication of record that appellant's wife resumed work or that the household income otherwise increased. Yet, the Office denied waiver, based on appellant having a monthly household income of \$7,191.24. The January 22, 2009 waiver determination was thus improper. The case will be remanded for the Office to obtain current financial information from appellant

¹¹ *Id.* at § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹² 20 C.F.R. §§ 10.436, 10.437; *C.M. & J.M., children of J.M.*, 58 ECAB ___ (Docket No. 06-1597, issued May 8, 2007).

¹³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6200.6(a)(3) (October 2004).

¹⁴ *L.S.*, 59 ECAB ___ (Docket No. 07-196, issued February 14, 2008).

¹⁵ 20 C.F.R. § 10.433.

and to determine whether waiver of recovery of the overpayment is warranted. After such further development as the Office deems necessary, it should issue an appropriate decision.¹⁶

CONCLUSION

The Board finds that the Office properly found that appellant received an overpayment of compensation in the amount of \$34,582.97 and that he was not at fault in its creation. The Board further finds that the case is not in posture for decision regarding waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 22, 2009 is affirmed, in part, regarding the fact and amount of the overpayment. The January 22, 2009 decision is set aside, in part, regarding the denial of waiver. The case is remanded to the Office for further action consistent with this decision and order.

Issued: October 22, 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

¹⁶ Recovery of the overpayment is not an issue in this case as appellant is not in receipt of continuing compensation. With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. 20 C.F.R. § 10.441; *see Miguel A. Muniz*, 54 ECAB 217 (2002).