

impact to the right knee and lower trunk of the body when she fell off a stool in the performance of duty on July 27, 2001.¹ The Office accepted appellant's claim for osteochondritis dissecans lesion of the right knee and left quadriceps muscle tear as employment-related conditions and paid appropriate wage-loss compensation. Appellant returned to modified duty on August 13, 2001 missed intermittent periods thereafter and received appropriate compensation.² On May 14, 2002 appellant returned to her previous modified duty position for eight hours a day.

By decision dated July 15, 2002, the Office advised that appellant, had been reemployed effective on May 14, 2002 as a modified human resources associate with wages of \$799.13 per week and that this position fairly and reasonably represented her wage-earning capacity.

On June 10, 2003 appellant stopped work and underwent right knee arthroscopy and received appropriate compensation. She was placed on the periodic rolls effective July 5, 2003.

The Office continued to develop the claim and on July 14, 2003 issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$389.30 that arose because appellant returned to full-time work on May 14, 2002 but continued to receive compensation for wage loss through May 18, 2002. The Office made a preliminary finding that appellant was without fault in the matter of the overpayment. The Office allotted appellant 30 days to request a telephone conference, review of the written evidence or hearing and to submit financial information by completing an overpayment recovery questionnaire (Form OWCP-20) to allow the Office to determine if it should waive recovery of the overpayment.

By decision dated August 21, 2003, the Office finalized its preliminary determination as to the amount of the overpayment and appellant's lack of fault in the creation of the overpayment. Although the Office found appellant to be without fault, the Office refused to waive recovery of the overpayment on the basis that appellant did not provide financial information. The Office stated that the overpayment of compensation would be recovered by withholding \$150.00 per month from each of appellant's continuing compensation payments beginning September 6, 2003.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments, to which an individual is entitled.³

¹ The record indicates that appellant was working in a modified position as a letter sorting machine clerk from a previous injury sustained on August 26, 1987.

² Appellant underwent a right knee arthroscopy on December 11, 2001. On January 14, 2002 a registered nurse was assigned to provide medical management services. As a result of the injury, appellant is partially disabled for the job held at the date of the injury.

³ 5 U.S.C. § 8129(a).

The Office procedures provide that overpayments in compensation are created when a claimant returns to work and continues to receive compensation.⁴

ANALYSIS -- ISSUE 1

In the instant case, the Office made a preliminary finding that appellant was overpaid benefits in the amount of \$389.30. Appellant was informed by letter dated July 14, 2003, that the overpayment occurred because she returned to work full time on May 14, 2002 but continued to receive compensation for wage loss through May 18, 2002. The Office also advised appellant that she was not at fault and provided her with the information necessary to act on the preliminary notice.

The Office did not receive any additional information from appellant, contesting the fact or amount of the overpayment, prior to finalizing its decision on August 21, 2003. The record supports that the overpayment occurred because appellant returned to work on May 14, 2002 but received compensation for wage loss through May 18, 2002. Appellant, therefore, received an overpayment of \$389.30.

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

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 [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 Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office 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.

Section 10.436 of the implementing regulations⁷ provides that 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 or 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

⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

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

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

⁷ 20 C.F.R. § 10.436.

Bureau of Labor Statistics.⁸ 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 \$50.00.⁹

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.¹⁰

Section 10.438 of the federal regulation provides:

“(a) 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 on an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”¹¹

ANALYSIS -- ISSUE 2

In the instant case, the Board finds that, as appellant did not complete an overpayment recovery questionnaire, she is not entitled to waiver. On July 14, 2003 the Office mailed appellant an overpayment questionnaire and requested that she furnish the requested information within 30 days. Appellant did not respond within the allotted time and on August 21, 2003 the Office finalized the overpayment decision. Without an accurate and complete breakdown of appellant’s monthly income, monthly expenses and assets, supported by financial documentation, the Office is not able to calculate whether appellant’s assets exceed the specified resource base.¹² The Office, therefore, properly found that appellant was not entitled to waiver on the grounds that recovery would defeat the purpose of the Act.

⁸ An individual’s assets must exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the individual’s assets not exempt from recoupment. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 2.0200.6(a)(1) (September 1994).

⁹ See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹⁰ 20 C.F.R. § 10.437.

¹¹ 20 C.F.R. § 10.438.

¹² *Gail M. Roe*, 47 ECAB 268 (1995).

LEGAL PRECEDENT -- ISSUE 3

The method, by which the Office may recover overpayments is defined by regulation. The applicable regulation, 20 C.F.R. § 10.441(a), provides as follows:

“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.”¹³

ANALYSIS -- ISSUE 3

As discussed above, appellant did not provide any financial information for the Office to consider in determining the amount to be withheld from her continuing compensation. The Board, therefore, finds that the Office did not abuse its discretion in determining that the overpayment sum of \$389.30 would be recovered by deducting \$150.00 from appellant’s continuing compensation benefits.

On appeal, appellant indicated that the Office made its determination before her financial information was received. The Board notes that, subsequent to the Office’s August 21, 2003 decision, the Office received a Form OWCP-20 completed by appellant. While this was dated July 15, 2003, it was not received by the Office until August 24, 2003. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision.¹⁴

¹³ 20 C.F.R. § 10.441.

¹⁴ See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501.2(c).

CONCLUSION

The Board finds that the Office properly determined that an overpayment of compensation was created in the amount of \$389.30. The Board also finds that the Office properly refused to waive an overpayment of compensation in the amount of \$389.30; and the Office properly required repayment of the overpayment by withholding \$150.00 each month from appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the August 21, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member