

percent for the right arm. On July 30, 2002 the Office issued a schedule award for an additional 17 percent impairment to the right arm and an additional 3 percent for the left arm. The Board found that the Office properly rescinded the July 30, 2002 schedule award as the medical evidence did not establish that the additional award was warranted. The history of the case with respect to the schedule awards is contained in the Board's prior decision and is incorporated herein by reference.

In a letter dated December 3, 2002, the Office advised that it had made a preliminary determination that an overpayment of \$1,694.64 had been created. The Office stated that appellant had been paid compensation pursuant to the schedule award from June 7 to August 10, 2002, but was not entitled to the payment because she previously received a schedule award for the same part of the body under a separate claim. With respect to fault, the Office made a preliminary determination that appellant was at fault in creating the overpayment.

Appellant completed an overpayment questionnaire (Form OWCP-20) reporting household monthly income of \$2,400.00 plus \$747.00 in Social Security benefits and a \$351.00 supplemental security income payment for her son. She reported \$3,278.00 in monthly expenses. Appellant indicated that she had \$225.00 in bank accounts and no other assets were reported.

In a memorandum of a June 2, 2003 telephone conference, an Office claims examiner indicated that appellant was found not at fault in creating the overpayment. The memorandum reported that appellant had monthly expenses of \$1,706.00.² Appellant was advised that she could submit additional evidence before a final decision was issued. In a letter dated June 16, 2003, appellant stated that her total household monthly income was \$2,388.00, with listed expenses of \$2,335.00 per month.

In a decision dated September 23, 2003, the Office finalized its determination that an overpayment of \$1,694.64 was created from June 7 to August 10, 2002. The Office denied waiver on the grounds that appellant's income exceeded expenses by more than \$50.00 and her assets exceeded \$5,000.00.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.³ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal

² The discrepancy in amount record by the memorandum appeared to be due in part to a lower credit card monthly payment and the lack of \$1,050.00 in "other expenses" recorded on the OWCP-20.

³ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

justice for all claimants the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.⁴

If a claimant receives a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.⁵

ANALYSIS -- ISSUE 1

The Office issued a schedule award decision on July 30, 2002 for an additional 17 percent permanent impairment to the right arm and 3 percent for the left arm. The period of the award was 62.4 weeks commencing June 7, 2002. The record indicates that the Office issued a payment on August 2, 2002 for \$964.64 covering the period June 7 to July 13, 2002, and a payment dated August 10, 2002 of \$730.00 for the period July 14 to August 10, 2002. The Board's prior decision found that the Office properly rescinded the July 2, 2002 schedule award based on the medical evidence. Therefore appellant was not entitled to compensation under the July 2, 2002 schedule award. As the Office made two payments totaling \$1,694.64, the amount represents an overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁶ provides: "Adjustment or recovery 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 the Act or would be against equity and good conscience."⁷ Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

Section 10.436 provides that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary "needs substantially all of his or her current 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 the Office from data provided by the Bureau of Labor Statistics.⁸ For waiver under the "defeat the purpose of the Act" standard, appellant must show that he needs

⁴ A. *George Lampo*, 45 ECAB 441 (1994).

⁵ See *Richard Saldibar*, 51 ECAB 585 (2000) (the Board found that the overpayment issue was not in posture because the Office had not properly resolved the schedule award issue).

⁶ 5 U.S.C. § 8101 *et seq.*

⁷ 5 U.S.C. § 8129(b).

⁸ Office procedures provide that the assets must not exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or dependent plus \$600.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200 (September 1994).

substantially all of his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the resource base.⁹

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) the 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.

ANALYSIS -- ISSUE 2

In denying waiver of the overpayment the Office stated that appellant had assets over the \$5,000.00 resource base. There is no evidence of record supporting this finding -- the OWCP-20 reported no assets other than \$225.00 in banking accounts. In order to establish that recovery of the overpayment would defeat the purpose of the Act, however, the record must also show that appellant needed substantially all of her current income to meet ordinary and necessary living expenses.

With respect to monthly income and expenses, the Board notes that appellant initially included as income Social Security and supplemental security income on her December 7, 2002 OWCP-20, but her June 13, 2003 statement did not reflect such income and provided no explanation for this omission. Accepting appellant's June 13, 2003 statement on its face, she had \$53.00 of excess monthly income over expenses. An individual is deemed to need substantially all of her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.¹⁰ In this case appellant did indicate that she had more than \$50.00 in excess income over expenses, and therefore recovery would not defeat the purpose of the Act.

With respect to equity and good conscience, appellant provided no evidence that she gave up a valuable right or changed her position for the worse in reliance on the overpayments. In addition, the evidence does not establish that a severe financial hardship would result from recovery of the overpayment. As noted above, appellant did have excess income over expenses and the circumstances of this case do not establish that recovery of the overpayment would result in severe financial hardship.

The Board accordingly finds that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience under sections 10.436 and 10.437. The Office therefore properly denied waiver of the overpayment in this case.

⁹ See *Robert E. Wenholz*, 38 ECAB 311 (1986).

¹⁰ *Jorge O. Diaz*, 51 ECAB 124, 128 (1999); *Marlon G. Massey*, 49 ECAB 650 (1998); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

CONCLUSION

An overpayment of compensation of \$1,694.64 was created when the Office issued payments pursuant to a schedule award that was not supported by the record and was properly rescinded. Appellant is not entitled to waiver of recovery of the overpayment because recovery would not defeat the purpose of the Act or be against equity and good conscience.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 23, 2003 is affirmed.

Issued: December 16, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member