

FACTUAL HISTORY

On September 12, 2001 appellant, a 36-year-old mail handler, filed an occupational disease claim alleging that on April 4, 2001 he first realized that walking caused stress on his feet. The Office accepted the claim for left foot plantar fasciitis and subsequently expanded the claim to include right foot plantar fasciitis. On September 3, 2002 the Office authorized surgery for a right Osteon release of plantar fasciitis, which was performed in September 2002. Appellant stopped work on June 24, 2002 and was placed on the period roll for temporary total disability by letter dated November 7, 2002. He returned to work on April 10, 2004.

In a letter to appellant dated April 14, 2004, the Office noted that he returned to work on April 10, 2004 and that the periodic roll payment for the period March 21 through April 17, 2004 would be sent out at the end of the month. As appellant returned to work in the middle of this pay cycle, the Office informed him not to cash the check since he was “not entitled to this compensation.” The Office advised that a separate check would be issued for the period March 21 through April 9, 2004, once he returned the check for the period March 21 through April 17, 2004.

An April 12, 2004 case history report indicates a total payment of \$2,286.14 for the period March 21 to April 17, 2004 with a cancel notation. A daily computation log for general compensation data transmitted with a run date of April 15, 2004, indicated a check was issued to appellant in the amount of \$1,625.07, for the period March 21 to April 9, 2004.

In a preliminary determination dated April 19, 2004, the Office found that an overpayment in the amount of \$623.70 had occurred from April 10 through 17, 2004, because appellant returned to work effective April 10, 2004, but received compensation for total disability through April 17, 2004. The Office found that appellant was without fault in the creation of the overpayment, as the time between when the check was issued and the preliminary finding was short and he may not have had the opportunity to repay the difference. It informed appellant that, if he disagreed with the fact or the amount of the overpayment, he could submit new evidence to support his contention or he could request a waiver of the recovery of the overpayment within 30 days of receipt of the Office’s letter and submit appropriate evidence to justify his request.

In a response dated May 12, 2004, appellant requested a decision based on the written record. He contended that as he was not at fault in the creation of the overpayment, it should be waived. Appellant stated that he told the claims examiner that he was returning to work on April 10, 2004 “weeks ahead of time” and that “she had plenty of time to make the change in my last check.” Appellant stated that he deposited the check on the day he received it since he had bills to pay and he did not receive the letter from the claims examiner telling him not to cash the check until the following Monday.

Appellant submitted an overpayment recovery questionnaire (Form OWCP-20), reporting \$4,606.00 in monthly income. With respect to monthly expenses, he reported a total of \$3,917.87,¹ which included a \$1,320.00 mortgage payment, \$400.00 in food expenses, \$1,192.87

¹ This appears to be a mathematical error by appellant. The total amount for his expenses equals \$3,937.87.

in other expenses and \$800.00 in credit card payments. He noted that he had funds of \$1,550.00. Appellant submitted copies of credit card statements and other monthly bills.

By decision dated May 27, 2004, the Office finalized its determination that an overpayment of \$623.07 was created. The Office denied waiver of the overpayment on the grounds that appellant had monthly living expenses of \$4,037.25, leaving him \$568.75 in excess monthly income.

LEGAL PRECEDENT -- ISSUE 1

20 C.F.R. § 10.500(a) provides as follows:

“Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury....”

ANALYSIS -- ISSUE 1

The record establishes, and appellant does not dispute, the existence of the overpayment. Appellant returned to work on April 10, 2004. In a letter dated April 14, 2004, the Office informed him that a check would be issued for the period March 21 through April 17, 2004, at the end of the month. He was advised not to cash the check, but return it to the Office as a separate check for the correct period, March 21 through April 9, 2004 would be issued. The Board finds that an overpayment occurred because appellant received compensation to which he was not entitled for the period April 10 to 17, 2004.

The Office explained how the amount of the overpayment was calculated. Appellant received a check for the period March 21 to April 17, 2004, in the amount of \$2,338.00. As he was entitled to compensation through April 9, 2004, the amount paid from April 10 to 17, 2004, or \$668.00 is an overpayment. The Office credited \$44.93 for payment of health benefits, basic life insurance and optional life insurance, which resulted in a total overpayment of \$623.07. The Board will affirm the Office’s May 27, 2004 decision on the issues of fact and amount of overpayment.

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.² These statutory guidelines are found in section 8129(b) of the Federal Employees’ Compensation Act which states: “Adjustments or recovery by the United States may not be made when incorrect payments 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.”³ Since

² See *Robert Atchison*, 41 ECAB 83, 87 (1989).

³ 5 U.S.C. § 8129(b).

the Office found that appellant was without fault in the matter 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 10.436⁴ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship to a currently or formerly entitled beneficiary because “(a) [t]he 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) [t]he beneficiary’s assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.” 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 \$50.00.⁵ Further, 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.⁶ Section 10.437⁷ states that recovery of an overpayment is also considered to be against good conscience if 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.

In determining the amount of the employee’s income, the Board has held that total income includes “any funds which may be reasonably considered available for his or her use, regardless of source.”⁸

ANALYSIS -- ISSUE 2

The Office determined that appellant was without fault in the creation of the overpayment due to the short time between the issuance of the check and the time he received the preliminary finding of an overpayment. Accordingly, the Office proceeded to determine whether appellant was entitled to waiver of the overpayment. The Board finds that the Office acted within its discretion when it determined that appellant was not entitled to waiver due to financial hardship. Appellant submitted information that his income was \$4,606.00. He noted that his monthly income consisted of \$4,500.00 from income and \$106.00 from other benefits. Appellant indicated that his monthly expenses totaled \$3,917.87, but the claims examiner determined his monthly expenses to be \$4,037.25. Accordingly, as appellant’s expenses of \$4,037.25 were less than his income of \$4,606.00 by \$568.75, he has not established that he was entitled to a waiver

⁴ 20 C.F.R. § 10.436.

⁵ *Frederick Arters*, 53 ECAB 397 (2002); see *Howard R. Nahikian*, 53 ECAB 406 (2002).

⁶ *Id.*

⁷ 20 C.F.R. § 10.437.

⁸ *Adolphus Bennett*, 49 ECAB 595, 598 (1998); *Thomas Lee Jones*, 48 ECAB 666, 667 (1997); Federal (FECA) Procedure Manual, Part 6 -- Initial Overpayment Action, *Waiver of Recovery*, 6.200.6(a)(2) (September 1994).

based on financial hardship as his monthly income exceeds his monthly expenses by more than \$50.00. There is no evidence in this case, nor did appellant allege, that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received from April 10 to 17, 2004. As recovery is not sought against continuing compensation, the Board does not have jurisdiction of this aspect of the case.⁹

CONCLUSION

The Board finds that the Office properly determined that an overpayment of \$623.07 was created and that appellant was not at fault in the creation of the overpayment. The Board also finds that the Office properly denied his request for wavier of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 27, 2004 is affirmed.

Issued: March 4, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁹ See *Albert Pineiro*, 51 ECAB 310 (2000).