

FACTUAL HISTORY

On January 18, 1995 appellant, then a 42-year-old letter carrier, sustained an emotional condition in the performance of duty. The Office accepted his claim for mild, recurrent major depression. Appellant received appropriate compensation benefits and retired in 1997 on Office of Personnel Management retirement benefits. On February 2, 2001 he elected to receive compensation under the Federal Employees' Compensation Act.

The Office computed appellant's benefits entitlement from February 20, 1997 through January 9, 2001 and sent appellant a check in the amount of \$54,579.89. It issued additional supplemental checks as reimbursement for other benefits due and began paying compensation on a regular basis.

Appellant questioned the amount he was being paid and on September 28, 2001 the Office issued a decision explaining the manner in which his benefits had been calculated.

Appellant, however, continued to disagree and requested an oral hearing before an Office hearing representative. The hearing was held on July 24, 2002, at which appellant testified, indicating that he believed that the Office calculated his benefits incorrectly as he was making more than his date-of-injury pay rate that was used and that it did not include cost-of-living adjustments in the amount of \$1,997.00, using only his \$35,604.00 base pay rate. Appellant claimed that the Office did not give him proper cost-of-living increases in his benefits rate for subsequent years.

By decision dated October 16, 2002, the hearing representative found that, with cost-of-living increases in 1992, 1995 and 1997, it was possible that appellant was making more than \$684.69 a week, and he remanded the case for the purpose of having the Office contact the employing establishment for the purpose of determining whether appellant was receiving a cost-of-living adjustment on January 18, 1995 which would have increased his weekly pay to more than \$684.69.

The Office provided its record of payment of appellant's weekly amount of pay and the Office computer system supplied the amount of all applicable cost-of-living allowances in calculating his past due benefits and his current and future entitlements.

On November 27, 2002 the Office advised appellant that his compensation rate and the total back benefits were based on the wages he had been earning as of January 18, 1995.¹ By letter dated December 3, 2002, appellant advised the Office that he had returned to his date-of-injury job from November 1, 1995 through December 10, 1996, the date of his recurrence of disability, causally related to his employment injury. Thereafter the Office determined that appellant was entitled to compensation based on the recurrence pay rate.

¹ The date of injury.

On January 23, 2003 the Office recomputed appellant's pay rate at \$702.90.² This new pay rate produced different results than that previously obtained using the incorrect pay rate. Using the new pay rate resulted in the determination that appellant had been underpaid compensation for the period March 25, 2001 through January 25, 2003, and a compensation check was issued to appellant. However, the Office also found that appellant had been overpaid compensation from February 20, 1997 through March 24, 2001 in the amount of \$3,039.54.

On February 6, 2003 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$3,039.54. The Office found that appellant was not at fault in the creation of the overpayment, and it requested that he submit additional evidence if he sought waiver of recovery of the overpayment. He was also advised that he had the burden of proof to establish entitlement to waiver and that refusal to provide this information would result in a denial of waiver of recovery pursuant to 20 C.F.R. § 10.438.

In response, appellant claimed that he was owed money for the period in question; however, his calculations used his full new pay rate, \$702.90, instead of using the three-fourths rate as required by the Act. No other financial documentation was submitted as requested.

On March 6, 2003 the Office finalized its overpayment decision finding that appellant's compensation had been properly computed under the recurrence pay rate and that, therefore, appellant had been overpaid for the period February 20, 1997 through March 24, 2001 in the amount of \$3,039.54. The Office also finalized its determination that appellant was not at fault in the creation of the overpayment, but that he was not entitled to waiver because he submitted no financial information as requested.

On March 25, 2003 the Office received appellant's February 11, 2003 request for waiver of recovery of the overpayment and request for a hearing on the overpayment determination.³ On May 8, 2003 appellant again requested waiver of recovery of the overpayment, but no financial information accompanied either request. Subsequently, appellant requested a review of the written record by the Office hearing representative.

By decision dated September 25, 2003, the Office hearing representative completed a review of the record and affirmed the Office's overpayment decision. The hearing representative found that the Office had properly used appellant's recurrence pay rate as it was higher than his date-of-injury pay rate. She further noted that using the higher pay rate resulted in a lower amount of compensation as it delayed the date that consumer price increases would be applied to appellant's compensation rate. This had the unexpected result of causing the lower pay rate to compute to higher compensation in some years. The hearing representative found that it was this difference that had caused an overpayment to be created for the period February 20, 1997 through March 24, 2001. The hearing representative also found that appellant was not at fault in the creation of the overpayment, but that he was not entitled to waiver as he had not submitted

² Appellant's new pay rate was based on an annual salary of \$36,551.00 which he was earning as of December 10, 1996, the date of recurrence of his disability.

³ The request had been sent to appellant's Senator and forwarded to the Office.

the requested financial information. The hearing representative limited appellant's rate of repayment of the overpayment to \$230.00 per month.

Appellant appealed the March 6 and September 25, 2003 decisions and requested an oral argument, arguing that, since he was making more money with the application of his recurrence rate of pay, his compensation should have been more, and he claimed that the Office owed him over \$60,000.00 in compensation. However, he based this computation on payment to him of a 100 percent rate of compensation rather than a three quarters percent rate of compensation, to which he was actually entitled under the Act.

LEGAL PRECEDENT -- ISSUE 1

The Office is directed by the statute to compute compensation based on an employee's monthly pay, which is defined under section 8101(4)⁴ as the greater of the rate of pay at the time of injury, the rate of pay at the time disability begins, or the rate of pay at the time compensable disability recurs if the recurrence begins more than six months after an injured employee resumes regular full-time federal employment.⁵

ANALYSIS -- ISSUE 1

At the time of his injury on January 18, 1995, appellant was earning \$35,604.00 a year, or \$684.69 weekly. He was out of work from the date of injury to November 1, 1995 when he resumed full-time regular work and worked for more than six months until December 10, 1996 when he stopped work claiming a recurrence of disability. On December 10, 1996 appellant was making \$36,551.00 per year or \$702.90 per week. Therefore, as \$702.90 is greater than \$684.69, appellant's greater rate of pay was \$702.90 per week which was the rate of pay on the date of his recurrence of disability as directed by the statute.

Under the definition provided by section 5 U.S.C. § 8101(4), the Office properly selected appellant's greatest rate of pay which was his recurrence rate of pay and used it for calculating his compensation for the period February 20, 1997 through March 24, 2001, which was a period following the occurrence of his claimed recurrence of disability. Therefore the selection and recalculation of his overpayment using the \$702.90 weekly rate of pay for the period identified was proper.

LEGAL PRECEDENT -- ISSUE 2

When an overpayment has occurred to an individual by reason of an error of law or fact, such individual, as soon as the mistake is discovered of his attention is called to the same, shall refund to the Office any amount so paid or, upon failure to make such a refund, the Office may proceed to recover the overpayment.⁶

⁴ 5 U.S.C. § 8101(4).

⁵ See *Jeffrey T. Hunter*, 52 ECAB 503 (2001) (appellant did not return to "regular" full-time employment).

⁶ See *Albert Pineiro*, 51 ECAB 310, 312 (2000) (the Office made payment of compensation after it had been terminated).

ANALYSIS -- ISSUE 2

The error in this case was a mistake in the rate of pay determination for the period February 20, 1997 through March 24, 2001. The Office determined that it had originally used the incorrect pay rate in paying appellant compensation and when it recalculated the amount of compensation due appellant using the correct recurrence pay rate, it discovered that appellant had received an overpayment of compensation in the amount of \$3,039.54.

Although it might be expected that the \$20.00 higher December 1996 recurrence pay rate of \$702.90 would have resulted in an underpayment of compensation, this higher pay rate actually resulted in a lower amount of compensation due because the recurrence pay rate was from a subsequent date which resulted in a delay until March 1, 1998, for the application of the consumer price increases which would be applied to appellant's compensation rate. This calculation was then properly compared to the amount of compensation which had actually been paid based on the \$682.69 date-of-injury pay rate of January 1995. However, the lower pay rate from the date of injury had resulted in higher compensation in some years due to the earlier and cumulative application of consumer price increases. It was this difference that caused the \$3,039.54 overpayment to be created for the period February 20, 1997 through March 24, 2001. Total compensation paid at the date-of-injury pay rate for the period was \$118,607.62 whereas the amount due under the recurrence pay rate came to \$115,568.08, a difference of \$3,039.54.

Accordingly, the Board finds that appellant received an overpayment of compensation in the amount of \$3,039.54 for the period February 20, 1997 through March 24, 2001.

LEGAL PRECEDENT -- ISSUE 3

For waiver under the defeat the purpose of the Act standard, a claimant must establish that he needs substantially all current income to meet current ordinary and necessary living expenses and that his assets do not exceed the applicable resource base.⁷

The Act⁸ and its implementing regulations⁹ are clear that recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such overpayment or on notice it would be paid, relinquished a valuable right or change his position for the worse.¹⁰ To establish that a valuable right was relinquished, the individual must show that the right was valuable, that it cannot be regained and the action taken was based chiefly or solely on the payments or notice of such payments.¹¹ Entitlement to consideration of waiver

⁷ *Id.*

⁸ 5 U.S.C. §§ 8101-8193.

⁹ 20 C.F.R. § 10.0-10.826 (2003).

¹⁰ *See Jorge O. Diaz*, 51 ECAB 124 (1999).

¹¹ *Id.*

only allows a claimant the opportunity to establish a basis for granting waiver of recovery of the overpayment pursuant to section 8129.¹²

Office regulations state that 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 of the 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. "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."¹³

ANALYSIS -- ISSUE 3

The Office properly found that appellant was without fault in the creation of the overpayment as he did not meet any of the above-mentioned criteria for determining fault.

In this case, although the Office requested financial information, appellant did not provide it within 30 days of the request or at any time thereafter. As no financial information was provided, the Office was directed by 20 C.F.R. § 10.438(b) to deny waiver. Therefore, the Office properly denied his request for waiver of recovery of the overpayment. As well, directing recovery at the rate of \$230.00 from each continuing compensation payment cannot be demonstrated to be inappropriate or unreasonable as neither the Office nor the Board can make a knowledgeable determination on that issue.

CONCLUSION

The Office properly selected appellant's recurrence rate of pay as his greater rate of compensation entitlement in calculating the overpayment in the amount of \$3,039.54 for the period February 20, 1997 through March 24, 2001, and the Office properly denied appellant's request for waiver of recovery of the overpayment and required repayment at the rate of \$230.00 from each payment of continuing compensation.

¹² *Id.*

¹³ 20 C.F.R. § 10.438(b). See *Linda Hilton*, 52 ECAB 476 (2001); *Robert B. Hutchins*, 52 ECAB 344 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 25 and March 6, 2003 are hereby affirmed.

Issued: May 5, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member