

**United States Department of Labor
Employees' Compensation Appeals Board**

STEPHEN M. EVERLY, Appellant)	
)	
and)	Docket No. 05-1410
)	Issued: April 10, 2006
TENNESSEE VALLEY AUTHORITY,)	
PARADISE FOSSIL PLANT, Paradise, KY,)	
Employer)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Donald W. Cottrell, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 22, 2005 appellant filed a timely appeal of the May 24, 2005 merit decision of the Office of Workers' Compensation Programs, which found that he received an overpayment of benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant received an overpayment in the amount of \$133,841.58 for the period October 25, 1987 to October 4, 2003; (2) whether the Office properly determined that appellant was at fault in creating the overpayment; and (3) whether the Office properly ordered a lump-sum payment of \$38,000.00 and deductions of \$500.00 every four weeks from appellant's continuing compensation.

FACTUAL HISTORY

On March 24, 1983 appellant, then a 32-year-old ironworker, sustained a traumatic injury in the performance of duty when he fell backwards off a truck and landed on his left knee. Appellant underwent arthroscopic surgery on March 25, 1983 to reattach his anterior cruciate ligament to his left femur. The Office accepted appellant's claim for left avulsion fracture, anterior cruciate ligament of the left knee and left knee internal derangement. He returned to limited duty on February 16, 1984, but sustained another traumatic injury on February 27, 1984, which the Office accepted for left knee strain (06-0343070).¹ Appellant received appropriate wage-loss compensation for temporary total disability. On August 6, 1986 the Office granted a schedule award for 20 percent impairment of the left lower extremity. The award covered 57.6 weeks from May 12, 1986 to June 19, 1987.²

After his schedule award expired appellant filed a September 7, 1987 claim for continuing compensation (Form CA-8) beginning June 20, 1987. He also informed the Office that beginning April 8, 1987 he had worked as a labor helper earning \$4.00 an hour.³

The Office resumed payment of wage-loss compensation, however, appellant's compensation was reduced based on his earnings as a labor helper. The Office paid appellant \$3,917.83 for the period June 20 to September 26, 1987. This payment was calculated on a four-week gross compensation rate of \$1,121.00, which took into account appellant's actual earnings as a labor helper. For the period September 27 to October 24, 1987, the Office mistakenly paid appellant wage-loss compensation for total disability in the amount of \$1,601.00. On October 27, 1987 the Office advised appellant of the error and requested that he return \$480.00, as that was the amount he had been overpaid. Appellant reimbursed the Office in full on November 2, 1987.

On November 16, 1987 the Office issued a formal loss of wage-earning capacity determination based on appellant's actual earnings as a labor helper. The Office advised appellant that effective June 20, 1987 his four-week gross compensation rate was \$1,121.00.

Almost 16 years later the Office discovered that it had paid appellant wage-loss compensation based on total disability instead of relying on the November 16, 1987 loss of wage-earning capacity determination. The Office apparently neglected to input the correct wage-earning capacity data in its system. This error was corrected for the compensation period beginning October 5, 2003. The Office reviewed appellant's payment history from October 25, 1987 to October 4, 2003 and found that appellant's gross compensation for the period was \$446,251.69.⁴ Had appellant been paid in accordance with the November 16, 1987 formal

¹ The Office combined the two claims under the March 24, 1983 injury claim number 06-0321310.

² For the term of the schedule award the Office reclassified appellant's periodic compensation roll payments from "temporary total disability" to "schedule award."

³ From June 20 to September 4, 1987, appellant reportedly worked 403 hours and earned \$1,612.00.

⁴ From this amount the Office withheld \$619.44 for life insurance premiums. Appellant received total net compensation of \$445,632.25 for the period October 25, 1987 to October 4, 2003.

wage-earning capacity determination he would have been entitled to gross compensation of \$312,410.11 for the same time period.⁵ The Office calculated a \$133,841.58 overpayment of compensation.

On November 28, 2003 the Office issued a preliminary finding that an overpayment existed in the amount of \$133,841.58, for the period October 25, 1987 to October 4, 2003. The Office acknowledged that the overpayment was due to their failure to reduce appellant's compensation in accordance with the November 16, 1987 loss of wage-earning capacity determination. However, the Office found appellant at fault because he accepted payments he knew or should have known were incorrect. The Office explained that it had made a similar error with respect to payment for the period September 27 to October 24, 1987. This mistake was brought to appellant's attention on October 27, 1987 and he subsequently reimbursed the Office \$480.00 in overpaid compensation. The Office reasoned that, when appellant continued to receive similar checks in the amount of \$1,601.00, he should have known they too had been issued in error.

Appellant requested a hearing before the Branch of Hearings and Review, which was held on August 17, 2004. He also submitted a December 15, 2003 overpayment questionnaire along with pertinent financial records including county, state and federal income tax returns. Appellant reported a monthly income of \$3,722.00 and monthly expenses of \$3,307.74. As of December 9, 2003 appellant reported savings of \$48,092.28 and a checking account balance of \$1,996.26.

By decision dated May 24, 2005, the Office hearing representative found that appellant received an overpayment of \$133,841.58 for the period October 25, 1987 to October 4, 2003. Appellant was found at fault in creating the overpayment and the hearing representative ordered him to make a lump-sum payment of \$38,000.00. The remaining balance was to be recouped by deducting \$500.00 every four weeks from appellant's continuing compensation benefits.

LEGAL PRECEDENT -- ISSUE 1

If an employee returns to work and has earnings, he is not entitled to receipt of temporary total disability benefits and actual earnings for the same time period. The Office, therefore, offsets actual earnings.⁶

ANALYSIS -- ISSUE 1

On September 7, 1987 appellant advised the Office that he was earning wages as a labor helper. Effective June 20, 1987, the Office adjusted appellant's wage-loss compensation to reflect his ability to earn weekly wages of \$153.66 as a labor helper. On November 16, 1987 the Office issued a formal loss of wage-earning capacity determination. The Office advised appellant that his new four-week gross compensation rate was \$1,121.00.

⁵ Deducting the same \$619.44 for life insurance premiums, appellant would have been entitled to net compensation of \$311,790.67 for the period October 25, 1987 to October 4, 2003.

⁶ 20 C.F.R. § 10.403(c) (1999); *Daniel Renard*, 51 ECAB 466, 469 (2000).

The record reflects that, during the period October 25, 1987 to October 4, 2003, the Office paid appellant wage-loss compensation for total disability, which he was not entitled to receive in light of the November 16, 1987 loss of wage-earning capacity determination. Appellant's gross compensation during this period totaled \$446,251.69. However, he was only entitled to receive gross compensation in the amount of \$312,410.11. The record, therefore, supports the Office's finding that appellant received an overpayment of compensation in the amount of \$133,841.58, for the period October 25, 1987 to October 4, 2003.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Federal Employees' Compensation Act and the implementing regulations, an overpayment must be recovered unless 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 Section 10.433 of the implementing regulations specifically provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁸ The regulation further provides that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.⁹ Under the regulations a recipient will be found to be at fault with respect to creating an overpayment if the recipient "[a]ccepted a payment which he or she knew or should have known to be incorrect."¹⁰

ANALYSIS -- ISSUE 2

The computation error the Office made and corrected for the four-week period ending October 24, 1987 was the same type of error that went unnoticed over a 16-year period from October 25, 1987 to October 4, 2003. On October 27, 1987 the Office advised appellant that it had mistakenly paid wage-loss compensation based on a four-week rate of \$1,601.00. In response, he reimbursed the Office \$480.00 on November 2, 1987. On November 16, 1987 the Office issued a formal loss of wage-earning capacity determination and advised appellant that, effective June 20, 1987, his new four-week gross compensation rate was \$1,121.00. He, however, continued to receive wage-loss compensation based on total disability.

The information provided by the Office on October 27 and November 16, 1987 was more than adequate to put appellant on notice that the payments he received for the period October 25, 1987 to October 4, 2003 were in error. The Office clearly told him how much compensation he was entitled to receive. When appellant received payment that exceeded the amount the Office

⁷ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437 (1999).

⁸ 20 C.F.R. § 10.433(a) (1999).

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.433(a)(3) (1999).

previously indicated as appropriate, he knew or at least should have known the payment was incorrect.¹¹ Accordingly, the Board finds that he was at fault in creating the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of the regulations authorizes the Office to recover an overpayment by decreasing later payments of compensation.¹² In exercising its authority under section 10.441(a), the Office must take 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

Appellant provided financial information prior to the hearing and he supplemented this information during the August 17, 2004 hearing. He and his spouse’s combined monthly income was \$3,973.10. Their combined monthly expenses totaled \$3,376.00. Thus, their combined monthly income exceeded their monthly expenses by approximately \$600.00. The record also revealed that appellant had available cash and savings in excess of \$48,000.00. Based on the available financial information the hearing representative found that it was appropriate to deduct \$500.00 every four weeks from appellant’s continuing compensation. The hearing representative also ordered that appellant remit a lump-sum payment of \$38,000.00.

The Board finds that the method of recovery determined by the Office hearing representative is improper under the Act. Appellant is receiving continuing compensation and the record does not indicate that there is any accrued compensation owed him against which an offset might otherwise be appropriate. Under these circumstances, the Act and the regulations provide for only one method of recovery of an overpayment. Because appellant is receiving continuing compensation benefits, the Office must recover the overpayment by decreasing future compensation payments.¹⁴ Neither the Act nor the regulations authorize the Office to demand a lump-sum repayment from a benefits recipient in conjunction with a prospective reduction of compensation.¹⁵ Accordingly, the Board finds that the Office hearing representative improperly required that appellant remit a lump sum payment of \$38,000.00. The case is remanded to the Office for further determination regarding an appropriate repayment schedule in accordance with 20 C.F.R. § 10.441(a).

¹¹ *Id.*

¹² 20 C.F.R. § 10.441(a) (1999).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 5 U.S.C. § 8129(b); 20 C.F.R. § 10.441(a), (b) (1999); *Jesse T. Adams*, 44 ECAB 256 (1992).

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$133,841.58 and he was at fault in creating the overpayment. The Board further finds that the Office improperly ordered a lump-sum payment of \$38,000.00 in addition to requiring regular deductions from appellant's continuing compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2005 decision of the Office of Workers' Compensation Programs is affirmed with respect to the existence and amount of overpayment. We also affirm the Office's finding that appellant was at fault in creating the overpayment. However, the finding regarding the method of repayment is set aside and the case is remanded for further consideration consistent with this decision.

Issued: April 10, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board