

In a letter dated May 31, 2005, the Office advised appellant of a preliminary determination that an overpayment of \$2,322.22 was created. The Office explained that, although appellant returned to a light-duty full-time position on March 22, 2005, he had received compensation through April 16, 2005. According to the Office, appellant had received \$2,322.22 in compensation for wage loss from March 22 to April 16, 2005. The Office determined that appellant was without fault in creating the overpayment.

On June 5, 2005 appellant requested a hearing on the issue of waiver of the overpayment. He submitted an overpayment recovery questionnaire (Form OWCP-20), reporting assets of \$1,809.00 (\$1,009.00 in a checking account and cash, \$800.00 in a savings account). Appellant reported monthly expenses of \$3,326.09, and monthly income of a Department of Veterans Affairs disability payment of \$728.00.

At a hearing held on December 5, 2005, appellant further discussed his financial circumstances. He noted that he sold a motorcycle for \$3,000.00 in the summer of 2005 and that he expected to receive a payment of \$1,000.00 from a relative for Christmas. In response to an inquiry as to his bank account balances, appellant's spouse stated that they currently had approximately \$9,000.00 because "relatives loaned us money to pay our bills." The spouse noted that a friend had sent them \$5,000.00 and these were loans from friends and relatives that would have to be paid back.

In a decision dated January 27, 2006, the hearing representative affirmed the determination that an overpayment of \$2,322.22 was created. He noted the requirements for waiver of the overpayment, stating that the applicable resource base was \$5,000.00 for an individual with a spouse. The hearing representative found that appellant received \$1,260.00 in monthly wages and that cable television and internet expenses would not be ordinary and necessary. According to the hearing representative, appellant "has monthly expenses of \$3,412.00 and monthly income of \$1,988.00 as well as \$6,009.00 in cash or bank accounts. The claimant also received \$1,000.00 from a relative and also the proceeds of a motorcycle sale (\$3,000.00)." The hearing representative concluded that appellant could repay the overpayment at the rate of \$50.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.¹ 20 C.F.R. § 10.500 provides that "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."

¹ 5 U.S.C. § 8116(a).

ANALYSIS -- ISSUE 1

Appellant does not contest that an overpayment of compensation was created in this case. He was receiving compensation every 28 days and the Office reported that appellant returned to work on March 22, 2005 in a full-time position. The Office indicated that he received compensation for wage loss through April 16, 2005. Since appellant was not entitled to compensation while working full time, the amount he received from March 22 to April 16, 2005 represented an overpayment of compensation. The Office determined that appellant had been paid \$2,322.22 during this period, and the Board finds that this represents the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act² 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.”³ 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.

According to section 10.436, 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.⁴ For waiver under the “defeat the purpose of the Act” standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the resource base.⁵

An individual’s liquid assets “include but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds and certificate of deposits.”⁶ Nonliquid assets “include but

² 5 U.S.C. §§ 8101 *et seq.*

³ 5 U.S.C. § 8129(b).

⁴ Office procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

⁵ See *Robert E. Wenholz*, 38 ECAB 311 (1986).

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (May 2004).

are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings/supplies...."⁷

ANALYSIS -- ISSUE 2

As noted above, the issue of whether recovery of an overpayment would defeat the purpose of the Act requires a finding as to (1) whether appellant needs substantially all of his current income to meet current ordinary and necessary living expenses, and (2) whether his assets exceed the resource base. With respect to the first question, the hearing representative appears to conclude that appellant did need substantially all current income to meet necessary expenses, as he finds appellant's monthly income was less than monthly expenses.

It is with the second question, however, that the hearing representative fails to properly resolve the issue. The hearing representative applied an incorrect standard with respect to the resource base. The current standard, as determined by the Office pursuant to its regulations, is that assets for an individual with a spouse must exceed \$8,000.00.⁸ The hearing representative indicated that the applicable amount was \$5,000.00. Moreover, the hearing representative did not adequately determine the amount of appellant's assets in this case. He refers to \$3,000.00 from the sale of a motorcycle, but the testimony indicated that the sale took place in the summer of 2005 and it is not clear how much, if any, of the proceeds remained. There is also a reference to \$1,000.00 from a relative, although this appeared to be a reference to money appellant had not yet received as of the time of the hearing and no confirmation was provided that appellant actually received this amount.

In addition, the hearing representative found that appellant had \$6,009.00 in bank accounts and cash, without further explanation. This finding may represent the \$1,009.00 that appellant had originally reported on the OWCP-20 in cash and checking accounts, plus the \$5,000.00 that appellant's spouse had testified was loaned by a friend. This amount would not be sufficient to meet the resource base, nor is it clear whether this reflects liquid assets that may be included by the Office in its waiver determination. The Office acknowledged that the testimony asserted that money was loaned to appellant, without discussing the implications of such an assertion or requesting additional evidence.

The Board therefore finds that the Office did not properly resolve the issue of whether appellant's assets exceeded the resource base of \$8,000.00. The hearing representative did not apply the appropriate standard or make sufficient findings as to the amount of appellant's assets. The case will be remanded to the Office for further development and a decision that properly resolves the waiver issue.

CONCLUSION

The record establishes that an overpayment of \$2,322.22 occurred. The case will be remanded for a proper decision on the issue of waiver of the overpayment.

⁷ *Id.*

⁸ *Supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 27, 2006 is affirmed with respect to the amount of the overpayment, and set aside and remanded for further action consistent with this decision of the Board on the waiver issue.

Issued: August 11, 2006
Washington, DC

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

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