

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

S.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Joseph, MI, Employer**

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**Docket No. 05-1953
Issued: December 6, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On September 20, 2005 appellant filed a timely appeal from the November 1, 2004 and February 25, 2005 merit decisions of the Office of Workers' Compensation Programs, terminating his compensation effective that date on the grounds that he no longer had any residuals or disability causally related to his accepted employment injury. He also appeals a November 1, 2004 merit decision, finding that he forfeited his right to compensation for the period May 11, 1999 through August 11, 2000 because he knowingly failed to report earnings, an August 16, 2005 merit decision, finding that he received an overpayment in the amount of \$48,406.36 and an August 16, 2005 decision which found an overpayment in the amount of \$21,982.77. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective November 1, 2004 on the grounds that he no longer had any residuals or disability causally related to his accepted July 9, 1997 employment injury; (2) whether appellant forfeited his right to compensation for the period May 11, 1999 through August 11, 2000 because he

knowingly failed to report earnings; (3) whether the Office properly determined that appellant received an overpayment in the amount of \$48,406.36 due to the forfeiture and his receipt of compensation for total disability during the period September 24, 1998 through May 10, 1999; (4) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thereby, precluding waiver of the overpayment; (5) whether appellant received an overpayment in the amount of \$21,982.77 for the period November 15, 1997 through September 23, 1998 because he received compensation at an incorrect pay rate; and (6) whether the Office properly denied waiver of recovery of the \$21,982.77 overpayment.

FACTUAL HISTORY

On November 20, 1997 appellant, then a 53-year-old part-time flexible city carrier, filed an occupational disease claim alleging that on July 9, 1997 he first realized that the multiple bone chips and spurs in his spine were caused by factors of his federal employment. He attributed his condition to carrying a mail sack on his upper left shoulder which put pressure on his shoulder, neck and spine. Appellant indicated that his spine had been sore since May 1997. He did not engage in anything outside of work that could cause this problem. Appellant stopped work on July 7, 1997.¹ By letter dated March 3, 1998, the Office accepted his claim for aggravation of degenerative disc disease of the neck.² The Office paid appropriate compensation for total disability.

On July 20, 1999 a Form CA-1049 was issued to appellant notifying him of his placement on the periodic rolls and advising him of his entitlement to ongoing disability payments. The CA-1049 form further advised:

“To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the [Office] that you are working.” (Emphasis in the original.)

Appellant signed the CA-1049 form on July 23, 1999.

On August 11, 2000 appellant completed a CA-1032 form indicating that, for all periods during the 15 months covered by the form, he was unemployed and he did not engage in employment, self-employment, volunteer work or any business enterprise. These forms advised appellant that with regard to employment:

“Report ALL employment for which you received a salary, wages, income, sales commissions, piecework or payment of any kind. Such employment includes service with the military forces of the United States, including the National Guard, Reserve component or other affiliates.” (Emphasis in the original.)

¹ Appellant retired on disability from the employing establishment effective November 21, 1997 because his medical problems prevented him from returning to his regular work duties within a reasonable time period.

² Appellant underwent surgery in May 1995 and August 1997 to remove a benign cyst from his neck.

The form completed by appellant on August 11, 2000 covered the period May 11 through August 11, 2000.

In an investigative memorandum dated November 21, 2003, the employing establishment indicated that from September 24, 1998 through July 19, 1999 appellant had earnings as a security guard at a Las Vegas, Nevada hotel and casino. He worked 40 hours a week in this position, earning \$7.50 per hour initially and then \$8.00 per hour beginning on March 22, 1999. Appellant was also observed performing physical activities that were consistent with a medical opinion that he could perform sedentary work, six hours a day.

On March 25, 2004 the Office requested that the employing establishment provide appellant's pay rate for the date of injury effective September 28, 1998 to determine the amount of the overpayment that was created when appellant received compensation for total disability while working. On April 6, 2004 the employing establishment indicated that appellant was paid \$18.43 per hour. On April 28, 2004 the Office sought clarification from the employing establishment because the information submitted did not address appellant's pay rate for 1998. The employing establishment responded that, on September 24, 1998, appellant was a Level 5, Step 0 grade and earned \$37,831.00 per year.

The Office received records from the Social Security Administration (SSA) which revealed that appellant earned \$15,420.91 as a security guard. They also showed that he worked for E-T-T, Inc. in 1998 and earned \$521.50. By letter dated May 24, 2004, the Office requested that the company provide information regarding appellant's employment including, among other things, his job title and weekly pay rate. It did not respond.

In a June 21, 2004 medical report, Dr. William D. Smith, an attending Board-certified neurosurgeon, found that appellant experienced deterioration of the C5-6 and C6-7 region with foraminal stenosis and cord impingement. He stated that appellant's symptoms were caused by his accepted employment-related injury and that he was a candidate for an anterior cervical discectomy based on the results of a June 1, 2004 magnetic resonance imaging (MRI) scan. In a June 4, 2004 work capacity evaluation (Form OWCP-5c), Dr. Smith indicated that appellant was unable to perform his regular work duties.

On August 9, 2004 the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon, for a second opinion medical examination. In an August 27, 2004 report, Dr. Sherman provided a history of appellant's employment injury and medical treatment and noted appellant's complaints of neck pain. He reported essentially normal findings on physical examination of the neck and upper extremities and reviewed an x-ray of the cervical spine. Dr. Sherman diagnosed moderate osteoarthritis at the C5-6 and C6-7 interspaces without neurologic or mechanical deficit. He opined that the diagnosed condition was due to appellant's advancing age and not any work-related injury. Dr. Sherman stated that the osteoarthritic changes in the cervical spine were stable. There was no evidence of any neurologic abnormalities or radicular pain that indicated an aggravation of appellant's underlying accepted cervical spine condition and appellant had no nonindustrial or preexisting disability. Dr. Sherman stated that the proposed surgery was not necessary because it would not provide any benefit for appellant's complaints. Further, appellant had no radicular symptoms or signs of

abnormality in the face of normal electrical studies. Dr. Sherman noted that the proposed surgery was for relatively minor transient neck pain which did not impede appellant's activities. He concluded that appellant could work eight hours a day within certain physical limitations. In an accompanying Form OWCP-5c, Dr. Sherman set forth appellant's physical restrictions.

By letter dated September 15, 2004, the Office issued a notice of proposed termination of compensation based on Dr. Sherman's August 27, 2004 medical report. The Office provided 30 days in which appellant could respond. He did not respond within the allotted time period.

In a November 1, 2004 decision, the Office found that appellant had forfeited his compensation benefits from May 11, 1999 to August 11, 2000 as he was employed and failed to report his earnings as required.

By letter dated November 1, 2004, the Office issued a preliminary determination finding that an overpayment in the amount of \$48,406.36 was created. It found that \$37,326.29, the amount of compensation paid during the period May 11, 1999 to August 11, 2000, was created because appellant forfeited his compensation benefits for this period. The Office further found that appellant was at fault in the creation of this overpayment because he knowingly failed to report earnings from employment while in receipt of compensation. The Office also found that an overpayment in the amount of \$11,080.08 was created since he received compensation for total disability rather than partial disability during the period September 24, 1998 to May 10, 1999 based on his actual earnings. It noted that appellant was paid \$18,222.08 when he should have received compensation in the amount of \$7,142.00 after adjusting his actual earnings and correct pay rate. The Office determined that appellant was at fault in the creation of the overpayment because he accepted payments which he knew or should have been expected to know were incorrect as he had returned to private employment with earnings. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only, or a prerecoupment hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment and if he believed that recovery of the overpayment should be waived. The Office requested that he complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents within 30 days.

In a separate letter also dated November 1, 2004, the Office issued a preliminary determination that an overpayment in the amount of \$21,982.77 was created as appellant received compensation at an incorrect pay rate of \$740.40 during the periods November 15, 1997 through September 23, 1998 and August 12, 2000 through August 7, 2004. It noted that he should have been paid at the rate of \$643.60 as his annual salary was \$33,467.15 as a part-time flexible employee. The Office stated that from November 15, 1997 through September 23, 1998 appellant was paid total disability compensation in the amount of \$24,906.17 when he should have received \$21,583.59 at the correct pay rate, resulting in an overpayment of \$3,322.58. During the period August 12, 2000 through August 7, 2004, appellant was paid total disability compensation in the amount of \$128,638.92 when he should have received compensation in the amount of \$109,978.73 at the correct pay rate, resulting in an \$18,660.19 overpayment. The Office added \$3,322.58 and \$18,660.19 to total the overpayment in the amount of \$21,982.77. The Office found that appellant was without fault in the creation of the overpayment and was advised about his procedural rights.

By decision dated November 1, 2004, the Office terminated appellant's compensation effective that date on the grounds that he no longer had any residuals or disability causally related to the accepted employment injury.

The Office received appellant's undated letter which indicated that he had filed a complaint against Dr. Sherman for failing to conduct a thorough medical examination and telling him to shut up. In an October 29, 2004 letter to the Nevada State Board of Medical Examiners, Dr. Sherman denied appellant's allegations. The Office also received appellant's undated letter which blamed the employing establishment for his problems since it would not offer him a job.³

In an undated letter received by the Office on December 3, 2004, appellant requested reconsideration of the Office's November 1, 2004 termination decision. He also requested a review of the written record with regard to the November 1, 2004 preliminary overpayment determinations. Appellant submitted an OWCP-20 form he completed on November 23, 2004 which indicated monthly income of \$468.00 from his wife's social security benefits. He listed monthly expenses in the amount of \$1,635.00 which included \$575.00 for rent or mortgage, \$400.00 for food, \$30.00 for clothing, \$230.00 for utilities and \$300.00 for car insurance and gas. Appellant stated that he had incurred numerous automobile repair bills in the prior six months and that his van was broken. His assets included \$150.00 cash on hand which included \$100.00 for emergencies. Appellant stated that he and his wife lived on a day-by-day basis.

By letter dated February 7, 2005, the Office requested that appellant complete an enclosed Form OWCP-20 with regard to his financial assets and monthly expenses and submit supporting documents such as, credit card and bank statements and bills for the prior three months.

On February 21, 2005 appellant submitted a completed Form OWCP-20 which provided monthly income of \$468.00 from his wife's social security benefits. It provided monthly expenses which included \$575.00 for rent or mortgage, \$300.00 for food, \$200.00 plus for utilities, \$370.00 for car expenses and insurance and \$100.00 for an illegible debt, totaling \$1,545.00. Appellant reported \$100.00 cash on hand.

On February 25, 2005 the Office denied modification of the November 1, 2004 termination decision. It found that appellant failed to submit medical evidence establishing that he had any continuing employment-related residuals or disability. The Office found that Dr. Sherman's June 21, 2004 report constituted the weight of the medical opinion evidence.

In a March 14, 2005 letter, the Office advised appellant that he failed to submit sufficient financial documents supportive of his assets and expenses as requested. He was advised that his failure could result in a final decision with a demand for repayment. On April 5, 2005 appellant submitted a handwritten list of his expenses.

³ On May 25, 1999 the employing establishment offered appellant a modified position. On June 2, 1999 he stated that he would accept a position if one was located near his new residence in Las Vegas, Nevada. Appellant indicated that he relocated due to an attending physician's recommendation. On May 3, 2004 the employing establishment advised the Office that its records documented appellant's ability to work and that its previous attempts to find work for him in Nevada were unsuccessful as he failed to report to interviews with a Las Vegas personnel office.

By decision dated August 16, 2005, the Office finalized the \$48,406.37 overpayment determination and the finding of fault based on appellant's failure to submit supportive documentation of his expenses and assets. In a separate decision of August 16, 2005, the Office finalized the \$21,982.77 overpayment determination based on the incorrect pay rate. It found that appellant was without fault but denied waiver and directed repayment of the overpayment because he failed to submit adequate financial documents to determine his financial status.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. The Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁴ The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

ANALYSIS -- ISSUE 1

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits. In a June 21, 2004 medical report, Dr. Smith, an attending physician, opined that appellant experienced deterioration of the C5-6 and C6-7 region with foraminal stenosis and cord impingement which was causally related to his accepted employment-related injury. He found that appellant was totally disabled for work.

Dr. Sherman, an Office second opinion physician, submitted an August 27, 2004 report in which he provided an accurate factual and medical background. He conducted a thorough medical examination which noted essentially normal results. Dr. Sherman diagnosed moderate osteoarthritis at the C5-6 and C6-7 interspaces without neurologic or mechanical deficit. He opined that this condition was due to appellant's advancing age and not the accepted employment injury as the cervical spine was stable and there was no objective evidence of neurologic abnormalities or radicular pain indicating an aggravation of his underlying work-related injury. Dr. Sherman further opined that the proposed cervical surgery was not necessary as it would not benefit appellant's complaints of memory changes and he had no radicular symptoms or signs of abnormality in the face of normal electrical studies. He concluded that appellant could work eight hours a day in any type of climate with certain physical limitations.

The Board finds that Dr. Sherman's opinion is entitled to the weight of the medical evidence and establishes that appellant no longer has any residuals or disability due to his July 9, 1997 employment injury as it is sufficiently rationalized and based on a proper factual and medical background.

⁴ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁵ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

LEGAL PRECEDENT -- ISSUE 2

Section 8106(b) of the Federal Employees' Compensation Act⁶ states in pertinent part:

“The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.... An employee who--

- (1) fails to make an affidavit or report when required; or
- (2) knowingly⁷ omits or understates any part of his earnings;

forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”⁸

ANALYSIS -- ISSUE 2

On August 11, 2000 appellant completed a Form CA-1032 indicating that he had no employment, employment activity or earnings for the 15 months preceding the date of signature of this form. However, an investigation revealed that, from May 11 through August 11, 2000, he had unreported earnings as a security guard and in an unknown position at E-T-T, Inc.

Appellant did not report his earnings on the August 11, 2000 CA-1032 form which advised him that he must report all employment and all earnings from employment. The CA-1032 form instructs compensation recipients to report all earnings from employment. The record clearly establishes that appellant was employed during the period in question which he knowingly failed to report to the Office. The investigation report and SSA records document that appellant worked as a security guard during the period in question. Appellant has not disputed that he worked in this position. Further, appellant's signing of certification clauses on the CA-1032 form provides persuasive evidence that he “knowingly” understated his earnings and employment information.⁹ His failure to list his earnings and employment was made with knowledge of the reporting requirements. The Board finds that appellant forfeited his right to compensation during the period May 11, 1999 through August 11, 2000.

⁶ 5 U.S.C. § 8106(b).

⁷ Knowingly is defined as with knowledge, consciously, willfully or intentionally. *See* 20 C.F.R. § 10.5(n).

⁸ While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and, therefore, a statutory provision about such earnings would be meaningless. 24 ECAB at 260.

⁹ *See generally Robert C. Gilliam*, 50 ECAB 334 (1998).

LEGAL PRECEDENT -- ISSUE 3

Section 10.529 of the Office's implementing regulation provides as follows:

“(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

“(b) Where the right to compensation is forfeited, [the Office] shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. [§] 8129 [recovery of overpayments] and other relevant statutes.”¹⁰

If a claimant has any earnings during a period covered by a Form CA-1032 which he or she knowingly fails to report, he or she is not entitled to any compensation for any portion of the period covered by the report, even though he or she may not have had earnings during a portion of that period.¹¹

Section 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.¹²

ANALYSIS -- ISSUE 3

The Office paid appellant compensation from May 11, 1999 through August 11, 2000 in the amount of \$37,326.29. The employing establishment's investigative memoranda and SSA records documented appellant as having earnings in the amount of \$15,940.41 as a security guard. He failed to report his earnings and employment on the August 11, 2000 CA-1032 form covering the period May 11, 1999 through August 11, 2000. As previously found, appellant forfeited his right to compensation during this period. The Board finds that an overpayment of compensation exists in the amount of \$37,326.29 for the period May 11, 1999 to August 11, 2000.

With regard to the period September 24, 1998 to May 10, 1999, appellant was paid \$18,222.08 for total disability when he should have received partial disability compensation in the amount of \$7,142.00 after an adjustment of his actual earnings and correct pay rate. Therefore, the Board finds that an overpayment of compensation was created in the amount of \$11,080.08. In light of the above findings, the Board finds that an overpayment was created totaling \$48,406.36.

¹⁰ 20 C.F.R. § 10.529.

¹¹ *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

¹² 5 U.S.C. § 8116(a).

LEGAL PRECEDENT -- ISSUE 4

Section 8129(b) of the Act¹³ provides that an overpayment of compensation shall be recovered by the Office 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.”¹⁴ The Office may not waive the overpayment of compensation unless appellant was without fault.¹⁵ Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.¹⁶

On the issue of fault, section 10.433 of the Office’s regulations, provides that an individual will be found at fault if he or she has done any of the following:

“(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”¹⁷

With respect to whether an individual is without fault, section 10.433(b) of the Office’s regulations provides in relevant part:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”¹⁸

ANALYSIS -- ISSUE 4

The Office applied the second standard in determining that appellant was at fault in the creation of the \$37,326.29 overpayment. Appellant failed to furnish information which he knew or should have known to be material. He reported that he was not employed between May 11, 1999 through August 11, 2000 when, in fact, the record establishes that he was employed as a security guard with earnings that were not reported. Appellant was advised by a CA-1049 form, which he signed, of his obligation to report his return to work. He was also advised by a CA-1032 form he signed on August 11, 2000, of his obligation to report earnings from employment for the period of May 11, 1999 to August 11, 2000.

¹³ 5 U.S.C. § 8129(b).

¹⁴ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹⁵ *Norman F. Bligh*, 41 ECAB 230 (1989).

¹⁶ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

¹⁷ 20 C.F.R. § 10.433(a).

¹⁸ 20 C.F.R. § 10.433(b).

The Board finds that appellant knew or should have known that he was required to report all earnings from employment for the period covered by the CA-1032 form. The Office fully advised him of his obligation to report earnings from employment and the record establishes that he failed to report his earnings for the period May 11, 1999 to August 11, 2000 in violation of section 8129(b) of the Act. The Board finds that appellant is at fault in the creation of the \$37,326.29 overpayment and is not entitled to waiver of the overpayment.

With regard to the \$11,080.08 overpayment, the Office applied the third standard in determining that appellant was at fault in the creation of this overpayment. Appellant accepted payments which he knew or should have known were incorrect. He returned to work as a security guard on September 24, 1998. The Board notes that appellant was clearly advised on July 20, 1999 that to avoid an overpayment of compensation he must notify the Office of any return to work. He was further advised that, if he worked during any period covered by the payment, he must return the payment to the Office. Under these circumstances appellant should have known that he could not continue to receive the compensation payments after he returned to work.¹⁹

Based on the evidence of record, the Board finds that appellant accepted payments he knew or should have known to be incorrect. Under section 10.433(a) of the Office's regulations, he is properly found not to be without fault pursuant to section 8129 of the Act and is not entitled to waiver of the overpayment. With respect to recovery of the overpayment, the Board's jurisdiction is limited to recovery from continuing compensation payments. Since the Office is not attempting to recover the overpayment from continuing compensation, the issue is not before the Board.²⁰

LEGAL PRECEDENT -- ISSUE 5

For all claims under the Act,²¹ compensation is to be based on the pay rate as determined under section 8101(4), which defines monthly pay as the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.²²

ANALYSIS -- ISSUE 5

In this case, appellant's pay rate for compensation purposes is the rate of pay he was receiving as of the date of injury, July 9, 1997. The record indicates that for the period November 15, 1997 to August 7, 2004 he received compensation based on a weekly pay rate of \$740.40. Pay rate information provided by the employing establishment indicated that, as of

¹⁹ *Neill D. Dewald*, 57 ECAB ____ (Docket No. 06-117, issued February 21, 2006)

²⁰ *See Sherry A. Hunt*, 49 ECAB 467 (1998).

²¹ 5 U.S.C. §§ 8101-8193.

²² 5 U.S.C. § 8101(4); *see John M. Richmond*, 53 ECAB 702 (2002).

July 9, 1997, appellant's annual rate of pay was \$33,467.15 or \$643.60 per week. The Board therefore finds that an overpayment in compensation was created. The record demonstrates that, for the period November 15, 1997 to August 7, 2004, appellant received compensation for total disability in the amount of \$153,545.09 based on the incorrect pay rate of \$740.40 per week, when he should have received compensation totaling \$131,562.32 based on the correct pay rate of \$643.60 per week, yielding an overpayment in compensation in the amount of \$21,982.77, as properly determined by the Office. He was found without fault in the creation of this overpayment.

LEGAL PRECEDENT -- ISSUE 6

Section 8129 of the Act²³ provides that an overpayment of compensation 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 this subchapter of the [Act] or would be against equity and good conscience.

Section 10.436 of the Office's regulations²⁴ provides:

“Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because:

“(a) The 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) The beneficiary's assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.”

With respect to whether recovery of the overpayment would be against equity and good conscience, section 10.437 of the Office's regulations²⁵ provides:

“(a) Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.

“(b) Recovery of an overpayment is also considered to be against equity and good conscience when any 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 making such a decision, [the Office] does not consider the individual's current ability to repay the overpayment.”

²³ See note 13 *supra*.

²⁴ 20 C.F.R. § 10.436.

²⁵ 20 C.F.R. § 10.323(b).

Section 10.438 of the Office's regulations²⁶ provides:

“(a) 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 an 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.

“(b) 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.”

ANALYSIS -- ISSUE 6

The Office determined that an overpayment was created for which appellant was not at fault based on the use of an incorrect pay rate in calculating his compensation. However, the fact that the Office found that appellant was not at fault in the creation of the overpayment does not, of itself, establish a basis for waiver of recovery of the overpayment.²⁷ Appellant bears responsibility for providing the financial information necessary to support waiver. In this case, appellant submitted OWCP-20 forms that listed monthly income and expenses or assets. However, he supplied no documents supporting the amount of his expenses and assets as requested by the Office. The Office's February 7, 2005 letter explained that this information would be used to make a final decision on the overpayment.

Because appellant failed to submit supporting documentation, the Office was unable to determine whether recovery of the overpayment would defeat the purpose of the Act. Therefore, the Board finds that the Office properly denied waiver of recovery of the overpayment on this ground.²⁸

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective November 1, 2004 on the grounds that he no longer had any residuals or disability causally related to his accepted employment injury. The Board further finds that appellant forfeited his right to compensation for the period May 11, 1999 through August 11, 2000 because he knowingly failed to report earnings. The Board also finds that the Office properly determined that appellant received an overpayment in the amount of \$48,406.36 as a result of forfeiture under 5 U.S.C. § 8106(b)(2) and his receipt of compensation for total disability during the period September 24, 1998 through May 10, 1999. In addition, the Board finds that the Office properly

²⁶ 20 C.F.R. § 10.438.

²⁷ *Jorge O. Diaz*, 51 ECAB 124 (1999).

²⁸ See *John Skarbek*, 53 ECAB 630 (2002) (finding that appellant's failure to submit the necessary financial information in support of waiver justified the Office's refusal to waive recovery of the overpayment).

determined that appellant was at fault in the creation of the \$48,406.36 overpayment, thereby, precluding waiver of the overpayment. Moreover, the Board finds that appellant received an overpayment in the amount of \$21,982.77 for the period November 15, 1997 through September 23, 1998 because he received compensation at an incorrect pay rate. Lastly, the Board finds that the Office properly denied waiver of recovery of the \$21,982.77 overpayment.

ORDER

IT IS HEREBY ORDERED THAT the August 16 and February 25, 2005 and November 1, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 6, 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