

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

CALVIN L. WILLIAMS, Appellant)

and)

DEPARTMENT OF THE ARMY, FORT A.P.
HILL -- DEH, Bowling Green, VA, Employer)

**Docket No. 05-1548
Issued: May 15, 2006**

Appearances:
Calvin L. Williams, 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 July 19, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 31, 2005, which found an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment in the amount of \$85,446.44 for the period July 14, 2002 through November 29, 2003; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment; and (3) whether the Office abused its discretion in setting the rate of recovery.

FACTUAL HISTORY

On November 14, 1989 appellant, a 35-year-old motor vehicle operator, filed a traumatic injury claim that was accepted for a fractured right ankle. Appellant indicated that he had not worked his position for at least 11 months prior to his injury. Appellant was placed on the

periodic rolls effective August 11, 1989, at a pay rate of \$370.80 per week (\$1,112.40 for each four-week period).

On July 21, 1993 appellant received a schedule award for the period July 25, 1993 through June 12, 1994, payable at 75 percent of his pay rate of \$370.80 per week, plus cost-of-living adjustments (\$1,248.00 for each four-week period).

By letter dated June 24, 1994, the Office informed appellant that his entitlement to a schedule award had expired and that he would begin receiving wage-loss compensation benefits effective June 12, 1994, at 75 percent of his pay rate of \$370.80 per week, plus cost-of-living adjustments (\$1,279.00 for each four-week period).

An automated computer payment system form, dated July 8, 2002, reflects that after July 28, 1994, appellant received yearly cost-of-living increases such that his compensation was: \$1,474.00 every four weeks by March 1, 2000; \$1,524.00 every four weeks by March 1, 2001; and \$1,543.00 every four weeks by May 19, 2002. On May 19, 2002 the Office began deducting health benefits, resulting in a net compensation of \$1,380.44 every four weeks. Appellant's compensation continued at that rate through July 13, 2002. Computer printouts reflect that appellant received net compensation in the amount of \$6,031.12 for the period from September 8 through October 5, 2002 and \$6,175.08 for the period January 26 through February 22, 2003.¹ The Office issued a check payable to appellant dated January 24, 2004, in the amount of \$981.56 for the period December 28, 2003 through January 24, 2004. The Office prepared a worksheet showing that appellant was entitled to compensation from July 14, 2002 through November 29, 2003, at 75 percent of the pay rate of \$370.80 per week effective August 11, 1989, plus cost-of-living increases, for total gross income of \$28,154.07. Another worksheet reflected that he was entitled to compensation from July 14, 2002 through November 29, 2003, in the amount of \$28,154.07 but was paid the gross amount of \$113,600.48, resulting in an overpayment of \$85,446.44.²

In a preliminary overpayment decision dated March 2, 2004, the Office found that appellant had incorrectly received compensation of \$5,193.68 for each four-week period from July 14, 2002 through November 29, 2003, when he should have been paid \$1,390.44 for each four-week period. The Office found that he was paid a gross amount of \$113,600.48, when he should have received \$28,154.07, resulting in an overpayment of \$85,446.44. Appellant was found to be at fault in that he knew or should have known that the payments were incorrect and did not contact the Office to question the reason for the increase. The Office advised appellant of actions available to him if he believed that he should receive a waiver instead of repaying the overpayment, including requesting that the Office issue a final decision based on the written evidence currently of record. The Office further advised appellant to submit a detailed

¹ In a May 31, 2005 decision, the Office hearing representative stated that on October 5, 2002, appellant was issued a check in the amount of \$6,193.68 for the period July 14 through August 10, 2002, at 75 percent of a pay rate of \$4,440.00 per month effective January 1, 2000, plus cost-of-living increases, less deductions for health benefits. However, the record does not contain a copy of the August 10, 2002 check.

² The Board notes that the Office's calculations are incorrect. If appellant was paid a gross amount of \$113,600.48 but should have been paid a gross amount of \$28,154.07, the resulting overpayment would be \$85,446.41.

explanation of his reasons for seeking a waiver; a completed (Form OWCP-20); and supporting documents, to include copies of tax returns, bank account statements, bills and cancelled checks and pay slips.

By letter dated March 21, 2004, appellant requested a hearing on the issue of waiver. Appellant contended that he had unsuccessfully attempted to contact the Office in order to clarify the reason for the increase in his compensation payment.

In an overpayment recovery questionnaire Form OWCP-20 dated March 22, 2004, appellant indicated that his monthly income consisted solely of his workers' compensation benefit in the amount of \$966.24 and that he had no assets. Appellant listed no expenses. He stated that he had accepted the increased benefits because he believed that they were schedule award benefits. Appellant also submitted a copy of a February 11, 2004 U.S. Bankruptcy Court form.

At the March 14, 2005 hearing, appellant testified that he had contacted the Office to ascertain the reason for the increase in his compensation benefits. He alleged that in a telephone conversation, he was told by Charmayne Browne that the increases were a result of a schedule award. Appellant's wife and daughter testified that they were present when appellant made the call to the Office and that he later told them that Ms. Browne had advised that the increased payments represented a schedule award. Appellant further testified that he would suffer financial hardship if he was required to make repayment and that he had not listed the overpayment debt in his bankruptcy filing. The hearing representative left the record open for 30 days, so that appellant could present a statement of his current financial status.

Following the hearing, appellant submitted an order from the U.S. Bankruptcy Court bearing an illegible date directing him to pay the sum of \$180.00 per month to the U.S. Bankruptcy trustee. Appellant also submitted a U.S. Bankruptcy Court order dated February 10, 2005, confirming appellant's Chapter 13 plan filed on December 17, 2004. In a statement dated March 16, 2005, James Banks, Jr. indicated that he had been providing appellant with monetary assistance since December 2003. Appellant provided copies of various bills, including a February 2005 electric bill with current charges due of \$218.67 and overdue charges of \$226.46; a March 2005 Direct TV bill with current charges due \$89.79 and overdue charges of \$90.61; a March 2005 propane gas bill reflecting a monthly budget payment due of \$113.00; and a March 2005 Nationwide Insurance bill in the amount of \$137.14. Appellant also submitted a receipt reflecting a \$400.00 payment for rent for the month of March 2005.

By decision dated May 31, 2005, the Office hearing representative found that an overpayment existed in the amount of \$85,446.44 and that appellant was at fault in the creation of the overpayment, and that he knew or should have known the payments to be incorrect. The hearing representative determined that appellant was not discharged by the bankruptcy filing because the debt was not listed in his Chapter 13 petition. He further determined that recovery should be set at the minimal rate of 15 percent of his current gross income, namely \$187.80 every four weeks, since appellant had failed to submit a complete statement of finances as requested at the hearing.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees Compensation Act³ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁴ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁵

A claimant's obligation to repay an overpayment is forgiven if the bankruptcy court has discharged the debt in a bankruptcy proceeding, unless the debt is found to be nondischargeable. A debt is not discharged if the claimant knowingly failed to list it in petitioning the court.⁶

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation. However, the amount and duration of overpayment are in question.

Appellant sustained an injury in the performance of duty and was placed on the periodic rolls effective August 11, 1989, at a pay rate of \$370.80 per week. The Office contends that appellant erroneously received significant increases in wage-loss payments commencing July 14, 2002 through November 29, 2003. However, the record is unclear as to when the increased payments began. The record is also unclear as to the evolving amounts of the payments.

The record contains a computer printout showing that appellant received net compensation in the amount of \$1,380.44 through July 13, 2002. The record also contains evidence that appellant received net compensation in the amount of \$6,031.12 for a four-week period from September 8 through October 5, 2002 and \$6,175.08 for a four-week period from January 26 through February 22, 2003. However, the record does not contain documentation of appellant's compensation from July 14 through September 7, 2002. In fact there is no documentation of payments for any period from July 14, 2002 through November 29, 2003, with the exception of those listed above. The Board notes that the Office stated in its May 31, 2005 decision that on August 10, 2002, appellant was issued a check in the amount of \$6,193.68 for the period July 14 through August 10, 2002 at 75 percent of a pay rate of \$4,440.00 per month effective January 1, 2000, plus cost-of-living increases minus deductions for health benefits. However, there is no evidence of record to substantiate that statement.

The record contains an overpayment worksheet dated March 2, 2004, reflecting that appellant should have been paid gross compensation in the amount of \$28,154.07 for the period

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, Initial Overpayment Actions, Chapter 6.200.4e(3) (May 2004).

July 14, 2002 through November 29, 2003 at 75 percent of a pay rate of \$370.80 per week effective August 11, 1989, but instead was paid a gross amount of \$113,600.48, resulting in an overpayment of \$85,446.44. However, the Office did not provide a breakdown of its payments to appellant, including cost-of-living increases and deductions for benefits. Upon recognizing its error, the Office reduced its compensation payment to appellant and issued him a check dated January 24, 2004 in the amount of \$981.56 for the period December 28, 2003 through January 24, 2004, ostensibly at 75 percent of a pay rate of \$370.80 per week effective January 1, 2000, plus cost-of-living increases minus deductions for health benefits. However, the record reflects that appellant received net compensation in the amount of \$1,380.44 for each four-week period through July 13, 2002. The Office's failure to explain the discrepancy in payments casts doubt on the accuracy of the amount of the overpayment as calculated by the Office. The Board also notes that the Office's calculation of overpayment was based on gross income figures. The Office failed to provide evidence of the net amount that was overpaid during the period at issue. For all of these reasons, it is impossible for the Board to ascertain the correct amount of overpayment from the evidence of record.

The Board will set aside the May 31, 2005 decision, on the amount of the overpayment and remand the case to the Office for a proper analysis and explanation of its calculation of overpayment.⁷

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁸ provides that 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 this subchapter or would be against equity and good conscience. Section 10.433 of the Office's implementing regulations⁹ provides that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(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 to be incorrect.”

⁷ The Board also notes that the record indicates that appellant filed for bankruptcy in 2004. Office procedures provide that a claimant's obligation to repay an overpayment is forgiven if a bankruptcy court has discharged the debt in a bankruptcy proceeding. *Id.* There is nothing of record in this case to indicate that the Office was named as a creditor in appellant's filing for bankruptcy. Appellant's bankruptcy filing is, therefore, irrelevant to the case at hand.

⁸ 5 U.S.C. § 8129(b).

⁹ 20 C.F.R. § 10.433.

ANALYSIS -- ISSUE 2

The Office found that appellant accepted payments which he knew or should have known to be incorrect in reaching its determination that he was at fault in the creation of an overpayment. The evidence of record is sufficient to establish that appellant received a substantial increase in monthly compensation payments for more than one year. Appellant alleged that he had accepted the increased payments because he believed they were based on a schedule award. The Board finds that appellant's claim lacks credibility. On June 24, 1994 the Office informed appellant that his entitlement to a schedule award had expired. Therefore, it was not reasonable for appellant to assume that increased payments received in calendar 2002 and 2003 were a result of any prior schedule award. Appellant also testified at the March 14, 2005 hearing that when he telephoned the Office to ascertain the reason for the increase in his compensation benefits and was told that the increases were a result of a schedule award. Appellant's wife and daughter stated that appellant told them sometime after the alleged telephone conversation with the Office, that he had been advised that the increased payments resulted from a schedule award. The Board finds that the statements of appellant's wife and daughter are insufficient to corroborate this claim. Appellant's testimony at the March 14, 2005 hearing contradicts the claim made in his March 21, 2004 hearing request that he had unsuccessfully attempted to contact the Office in order to clarify the reason for the increase in his compensation payment.

Appellant's receipt of notice on June 24, 1994 that his entitlement to a schedule award had expired, coupled with the actual reduction of his benefits at that time, constitutes evidence that he, knew or should have known that the payments were incorrect and he was not entitled to the substantially increased payments he subsequently received. The Board has held that the Office's erroneous payment of benefits does not excuse an employee from accepting a payment that he or she knew or should have known to be incorrect.¹⁰ Under these circumstances, the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, it was not subject to waiver.

CONCLUSION

The Board finds that an overpayment occurred in this case. However, the case is not in posture for a decision on the amount and duration of overpayment or rate of recovery. The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment and thus not entitled to waiver.

¹⁰ *Ricky Greenwood*, 57 ECAB ____ (Docket No. 05-1739, issued March 10, 2006).

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2005 decision of the Office of Workers Compensation Programs is affirmed as to the fact of overpayment and determination of fault. It is further ordered that the case be remanded to the Office for further development consistent with this decision with regard to the issues of amount and duration of overpayment and recovery.

Issued: May 15, 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