

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

B.W., Appellant)	
)	
and)	
)	Docket No. 06-1141
)	Issued: November 22, 2006
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Murfreesboro, TN, Employer)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 18, 2006 appellant filed a timely appeal from a January 17, 2006 decision of a hearing representative of the Office of Workers' Compensation Programs, affirming the rescission of appellant's compensation from May 10, 1999 to February 14, 2002 and finalizing an overpayment of compensation in the amount of \$23,495.53. The hearing representative found that appellant was without fault in the creation of the overpayment, but was not entitled to waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the rescission and overpayment issues in this case.

ISSUES

The issues are: (1) whether the Office properly rescinded compensation for total disability for the period May 10, 1999 to February 14, 2002 on the grounds that appellant was not disabled due to his accepted September 17, 1993 employment injury; (2) whether the Office properly determined that he received an overpayment in the amount of \$23,495.53; and (3) whether the Office properly denied waiver. On appeal, appellant contends that the overpayment should be waived.

FACTUAL HISTORY

On the prior appeal of this case,¹ the Board found that the Office abused its discretion in denying surgical authorization and set aside the denial of appellant's recurrence claim.² The Board found the medical evidence of record supported that expenditures for mechanical repair of the central disc herniation surgery were incurred for treatment of appellant's accepted employment injury. The Board remanded the case to the Office to issue a corrected statement of accepted facts and referral of appellant to a Board-certified neurosurgeon for determination of whether he sustained a recurrence of disability on January 27, 1995 due to his accepted herniated disc injury. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.³

In a letter dated May 8, 1996, appellant informed the employing establishment that he was accepted into a vocational rehabilitation program and requested reduction of his work hours to 28. On May 9, 1996 the employing establishment approved appellant's request to convert from full-time to part-time status working 14 hours per week.

In a letter dated June 29, 1998, appellant requested to convert from part time back to full-time status, which was denied by the employing establishment on July 7, 1998 due to a hiring freeze. In a June 1, 1998 report, appellant's physician had released him to full-time work with restrictions.

On April 21, 1999 appellant informed the employing establishment that he filed for disability retirement and requested 182 hours of leave without pay for the period May 10 to August 7, 1999.⁴

In a June 6, 2002 memorandum, the Office noted appellant requested to return to full duty on June 29, 1998, but the request was denied by the employing establishment due to a hiring freeze.

In a June 20, 2002 memorandum to file, an Office claims examiner noted that the medical evidence established that appellant was capable of working with restrictions.

¹ Docket No. 97-1668 (issued September 8, 1999).

² The Office accepted that appellant, then a 21-year-old nursing assistant, sustained a herniated nucleus pulposus at L5-S1 as a result of an injury sustained on September 17, 1993.

³ Subsequent to the Board's remand the Office accepted appellant's claim for a recurrence of disability beginning January 25, 1995 and approved the surgical decompression surgery which had been performed in September 1995. The Office also authorized payment of compensation for the period December 27, 1993 to January 25, 1995. Appellant retired on disability from the employing establishment effective September 20, 1999. The disability annuity was subsequent due to his earnings exceeding 80 percent of what he would have earned in his federal position.

⁴ The record contains evidence of payment of a disability annuity beginning May 10, 1999 and terminating July 1, 2002.

On October 18, 2002 the Office determined that appellant was entitled to weekly compensation of \$167.25 for the period May 10, 1999 to February 14, 2002.⁵ The Office also informed appellant that he could not receive benefits from the Office of Personnel Management (OPM) and wage-loss compensation from the Federal Employees' Compensation Act and that he must elect which benefit to receive. The Office provided appellant with an election form to determine which benefits he would receive. On October 30, 2002 the Office received appellant's August 26 and October 26, 2002 forms electing to receive benefits under the Act.

In an April 23, 2004 letter, the employing establishment noted that appellant's normal working hours as of September 17, 2003 was 33 hours working a compressed schedule and he did not work a rotating shift. The Office noted that appellant worked 40 hours per week on a nonrotating schedule as of January 27, 1995. As of February 28, 1998, appellant was working a rotating schedule of 14 hours per week.

On June 17, 2004 the Office received an agency certification of reassignment an accommodation report June 16, 1999. The employing establishment noted that there were "no available vacant positions at the same grade and pay level to allow assignment of employee to a classified position."

In a July 8, 2004 letter, the employing establishment noted that appellant requested and was granted part-time work 14 hours per week. It noted that appellant had requested to convert back to full-time status. In addition, appellant's employment ceased effective September 20, 1999 due to approval of his disability retirement application.

In an August 19, 2004 report, by Dr. David G. Florence, a treating physician, reviewed appellant's history, his participation in a vocational rehabilitation program and the accommodation made by the employing establishment to allow him to participate in the program. Dr. Florence directed appellant to reduce his hours to 14 per week effective May 7, 1996 and released appellant to work 40 hours per week in June 1998. He noted that appellant subsequently sustained intermittent periods of disability and, in May 1999, accepted a disability retirement.

The record contains a computer printout sheet and compensation payment history sheet revealing that a direct deposit was made to appellant on July 11, 2004 in the amount \$23,493.53 for the period May 10, 1999 to February 14, 2002.

On October 27, 2004 the Office issued a notice of proposed rescission of compensation for the period May 10, 1999 to February 14, 2002 on the grounds that the evidence established that he was not disabled from his employment duties during this period.⁶

By decision dated December 21, 2004, the Office finalized its proposed rescission of appellant's entitlement to wage-loss compensation for the period May 10, 1999 through

⁵ On October 18, 2002 the Office issued a loss of wage-earning capacity decision which found his employment as a case manager beginning February 15, 2002 fairly and reasonably represented his wage-earning capacity.

⁶ The Office issued a decision on April 22, 2004 denying appellant's request for a schedule award.

February 14, 2002. On December 30, 2004 the Office notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$23,493.53, for the period May 10, 1999 through February 14, 2002, as he received compensation to which he was not entitled. The Office found that he was at fault in creating the overpayment and requested that he complete an overpayment recovery questionnaire and submit financial documents in order to support waiver of the overpayment if it was subsequently determined that he was without fault in creating the overpayment.

On January 28, 2005 appellant requested a prerecoupment hearing and submitted a completed overpayment recovery questionnaire. He listed his monthly income as \$2,332.00 and his monthly expenses as \$559.00 for housing, \$300.00 for food, \$100.00 for clothing, \$250.00 for utilities, \$301.21 for automobile, \$35.00 for credit card, \$200.00 for child care, \$80.00 for security finance, \$35.00 for Household Bank, \$25.00 for Chevron Credit, \$35.00 for Powers Storage and \$300.00 for automobile insurance and cell phone expenses. He also noted \$100,000.00 in student loans, which were deferred. He specified assets of \$205.00 in his checking and savings accounts and cash on hand.

At the hearing, held on October 26, 2005, appellant related that Dr. Florence had referred him to a vocational rehabilitation program and reduced his hours to 14 hours per week. He subsequently requested a return to full-duty work but was told by the employing establishment that no full-duty work was available. Appellant testified that the employing establishment informed him that they would not accommodate his schedule so he could attend school. He testified his annual income was \$30,420.00 and that he earned \$150.00 from a church position.

In a decision dated January 17, 2006, an Office hearing representative affirmed the December 21, 2004 rescission and finalized the overpayment. He found that appellant was without fault “as he could not be expected to know” the overpaid amount was incorrect.” The hearing representative addressed the requirements for waiver of an overpayment, noting that the applicable resource base was \$5,000.00 for an individual with a spouse or one dependent. He found that appellant had monthly expenses of \$2,220.00 and monthly income of \$3,135.00. The hearing representative instructed the Office to recover the overpayment at the rate of \$400.00 per month.

LEGAL PRECEDENT -- ISSUE 1

The Board has upheld the Office’s authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁷ It is well established that, once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁸ This holds true where the Office later decides that it has erroneously accepted a claim

⁷ *Andrew Wolfgang-Masters*, 56 ECAB ____ (Docket No. 05-1, issued March 22, 2005); *see also* 20 C.F.R. § 10.610.

⁸ *Jorge E. Stotmayor*, 52 ECAB 105 (2000).

for compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.⁹

The Board has held that, if the record establishes that limited-duty work within a claimant's work restrictions would be available for him if his behavior was acceptable and there is no evidence that the claimant stopped work due to his physical condition, then the claimant has no disability within the meaning of the Act.¹⁰

ANALYSIS -- ISSUE 1

In order to rescind acceptance of appellant's claim for total disability compensation for the period May 10, 1999 through February 14, 2002, the Office must establish that his inability to earn wages was not due to his accepted employment injury. In the instant case, appellant worked 33 hours per week at the time of his employment injury on September 17, 1993. His tour of duty was increased to 40 hours per week on a nonrotating schedule as of January 27, 1995. In a letter dated May 8, 1996, appellant informed the employing establishment that he was accepted into a vocational rehabilitation program and requested a reduction of his work hours to 28. On May 9, 1996 the employing establishment approved appellant's request to convert from full-time to part-time status working 14 hours per week. The employing establishment noted that, as of February 28, 1998, appellant was working a rotating schedule of 14 hours per week. The record contains medical evidence including a June 1, 1998 report from Dr. Florence returning appellant to work 40 hours per week with restrictions. On April 21, 1999 appellant informed the employing establishment that he filed for disability retirement, which was effective May 10, 1999.

By decision dated October 18, 2002, the Office paid appellant wage-loss compensation from May 19, 1999 through February 14, 2002. However, the Board finds that the medical and factual evidence of record does not establish that appellant was disabled for work due to his accepted employment condition of herniated nucleus pulposus at L5-S1. Rather, appellant reduced his hours and converted from full-time to part-time status to accommodate his college work schedule. His stoppage of work on May 10, 1999 was not due to residuals of his accepted condition, but rather due to his filing for disability retirement due to the employing establishment's denial of his request to convert back to full-time status or increase his work hours. The Board finds that, in rescinding acceptance of appellant's claim for compensation for total disability from May 10, 1999 through February 14, 2002, the Office provided reasons for its decision as it properly explained that his work stoppage was not due to his employment injury entitling him to compensation benefits. It did not act arbitrarily in this case.

⁹ *Andrew Wolfgang-Masters, supra* note 7.

¹⁰ *Janice Green*, 49 ECAB 307, 308 (1998); *Lester Covington*, 47 ECAB 539, 542 (1996).

LEGAL PRECEDENT -- ISSUE 2

The Federal Employees' Compensation Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.¹¹

ANALYSIS -- ISSUE 2

On October 18, 2002 the Office paid appellant \$23,495.53 in wage-loss compensation for total disability for the period May 10, 1999 through February 14, 2002. As noted, the Office erred in issuing compensation for this period as appellant was not disabled from employment due to his accepted conditions. The Office properly rescinded its finding that appellant was entitled to compensation during this period. Consequently, he received an overpayment of compensation in the amount of \$23,495.53.

LEGAL PRECEDENT -- ISSUE 3

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under section 8129(b), as specified in section 10.436, provides:

“(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.”¹²

Section 10.437 of the regulations covers the equity and good conscience standard and provides:

“(a) Recovery of an overpayment is considered 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

¹¹ 5 U.S.C. § 8102(a); *see also* *Rose E. Tausel*, Docket No. 04-369 (issued April 21, 2004).

¹² 20 C.F.R. § 10.436.

position for the worse. In making such a decision, [the Office] does not consider the individual's current ability to repay the overpayment.

(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

(2) To establish that an individual's position has changed for the worst, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss."¹³

The fact that a claimant was without fault in creating the overpayment does not necessarily preclude the Office from recovering all or part of the overpayment; the Office must exercise its discretion in determining whether waiver is warranted under either of these two standards.¹⁴ The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.¹⁵

ANALYSIS -- ISSUE 3

The Office found that appellant was not at fault in the creation of the overpayment. In support of his request for waiver, appellant submitted an overpayment recovery questionnaire in which he listed monthly income of \$2,332.00 per month. However, at the hearing he testified his annual income was \$30,420.00 or \$2,535.00 monthly and he earned \$150.00 weekly from a church position, for a total monthly income of \$3,135.00. He listed monthly expenses as \$559.00 for housing, \$300.00 for food, \$100.00 for clothing, \$7,250.00 for utilities, \$301.21 for automobile, \$35.00 for credit card, \$2,000.00 for child care, \$80.00 for security finance, \$35.00 for Household Bank, \$25.00 for Chevron Credit, \$35.00 for Powers Storage and \$300.00 for automobile insurance and cell phone expenses, for a total of \$2,220.00. The Board finds that, as appellant's monthly income of \$3,135.00 exceeds his monthly expenses of \$2,220.21¹⁶ by \$914.79, he is not entitled to waiver as he does not need substantially all his income to meet current ordinary and necessary expenses.¹⁷ The hearing representative noted that appellant

¹³ 20 C.F.R. § 10.437.

¹⁴ *Linda Hilton*, 52 ECAB 476 (2001).

¹⁵ *Rudolph A. Geci*, 51 ECAB 423 (2000).

¹⁶ The Board notes that, while appellant noted that he had approximately \$100,000.00 in student loans, he indicated that there was no monthly payment as repayment was deferred.

¹⁷ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (May & October 2004).

related at the hearing that he had increased income and debts. He determined, however, that appellant had not adequately specified the change in income and expenses and relied upon the information provided in the overpayment recovery questionnaire. The Board finds that the hearing representative's analysis is reasonable and his determination that appellant is not entitled to waiver of the overpayment under the defeat the purpose of the Act standard is affirmed.

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.¹⁸

In this case, appellant has neither alleged, nor submitted evidence demonstrating that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation payments he received. Accordingly, the Board finds that the Office did not abuse its discretion in denying waiver of the overpayment in this case.

CONCLUSION

The Board finds that the Office properly rescinded payment of compensation for the period May 10, 1999 through February 10, 2002 on the grounds that appellant was not disabled from employment during this period due to his work injury. The Board further finds that he received an overpayment of compensation in the amount of \$23,495.53 and that the Office properly denied waiver of the overpayment.¹⁹

¹⁸ 20 C.F.R. § 10.437

¹⁹ The Board notes that it does not have jurisdiction to review the Office's recovery of the overpayment. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *Judith A. Cariddo*, 55 ECAB 348 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 17, 2006 is affirmed.

Issued: November 22, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board