



## **FACTUAL HISTORY**

This is the fourth appeal before the Board. To briefly summarize the facts appellant, a 51-year-old general equipment examiner leader, filed a Form CA-2 claim for a bilateral hand condition. The Office accepted his claim for bilateral carpal tunnel syndrome. Appellant stopped working and accepted disability retirement, effective July 31, 1999. By decisions dated June 8, 2000, May 31 and September 28, 2001, January 20 and April 5, 2002, the Office issued appellant schedule awards totaling a 45 percent impairment for the left upper extremity and a 15 percent impairment for the right upper extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (the A.M.A., *Guides*) fifth edition. In a decision dated February 2, 2004, the Board set aside the April 5, 2002 Office decision, finding that the case was not in posture of decision due to a conflict of medical opinion between Dr. M.F. Longnecker, a Board-certified orthopedic surgeon and the attending physician and two Office medical advisers. The Board remanded to the Office for referral to an impartial medical examiner.<sup>1</sup>

On remand, the Office referred appellant to Dr. Thomas Purser, III, a Board-certified orthopedic surgeon, to resolve the conflict in medical evidence. By decision dated July 15, 2004, the Office denied modification of the April 5, 2002 decision, finding that, the weight of the medical evidence, represented by Dr. Purser's July 7, 2004 report, did not demonstrate a greater percentage of impairment than 45 percent for the left arm and 15 percent for the right arm. The Office noted that the final percentages of impairment derived by Dr. Purser were less than those previously awarded.

In a January 24, 2005 decision,<sup>2</sup> the Board affirmed the Office's July 15, 2004 decision. The Board found that Dr. Purser's opinion was entitled to the special weight of an impartial medical examiner. The Board further found that the Office's instruction to Dr. Purser to submit a supplemental report and its forwarding of the Office medical adviser's calculations to Dr. Purser to confirm the modified impairment rating were proper and in conformance with the A.M.A., *Guides*.

By letter dated August 10, 2005, appellant requested reconsideration. He submitted an April 11, 2005 report from Dr. Longnecker in which he found that appellant had a 56 percent pain-related impairment and 46 percent impairment in both extremities.

By decision dated December 2, 2005, the Office denied modification of the July 15, 2004 decision.

On December 6, 2005 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$26,106.85 from March 9, 2000 to October 12, 2003 because appellant incorrectly received an additional 15 percent impairment of the upper extremities to which he was not entitled. The Office found that appellant was without fault in the matter because he could not have been aware that the payments he had been receiving were incorrect. The Office advised appellant that if he disagreed with the fact or amount of the overpayment he

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<sup>1</sup> Docket No. 99-998 (issued June 8, 2000).

<sup>2</sup> Docket No. 04-1964 (issued January 24, 2005).

could submit new evidence in support of his contention. The Office further advised appellant that when he was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience. The Office informed appellant that he had the right to request a prerecoupment hearing on the matter of the overpayment and that any response he wished to make with regard to the overpayment should be submitted within 30 days of the December 6, 2005 letter.

On December 19, 2006 appellant requested a waiver of recovery of overpayment, claiming that recovery of the overpayment would constitute a severe financial hardship that would deprive him and his dependents of the ability to meet ordinary and necessary living expenses. He indicated on the Form OWCP-20 that he had \$2,500.00 in monthly income, consisting of \$1,900.00 in Social Security benefits and \$600.00 in additional compensation checks. Appellant stated on the form that he filed for bankruptcy in March 2005 and had the following monthly expenses: \$1,276.00 in rent or mortgage; \$500.00 for food; \$200.00 for clothing; \$400.00 for utilities; and \$125.00 in miscellaneous household expenses, for a total of \$2,500.00 in monthly expenses. However, he did not submit any documentation to verify his assertion that he filed for bankruptcy or his listing of his monthly income and expenses.

In a decision dated January 13, 2006, the Office hearing representative finalized the preliminary determination that appellant received the \$26,016.85 overpayment because he received an improper amount of compensation for a schedule award. The Office stated that “even though you have been found to be without fault, it has been determined that the circumstances of your case do not warrant waiver of recovery of the overpayment.” The Office determined that, therefore, appellant was not entitled to waiver and found that he should repay the overpayment of \$26,106.85 within 30 days.

In a May 18, 2006 decision,<sup>3</sup> the Board affirmed the Office’s December 2, 2005 decision. The Board found that Dr. Purser’s opinion that appellant sustained a 41 percent impairment rating of the left upper extremity and a 4 percent impairment rating of the right upper extremity continued to represent the weight of the medical evidence. The complete facts of this case are set forth in the Board’s February 1, 2004, January 24, 2005 and May 18, 2006 decisions and are herein incorporated by reference.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8107(a)<sup>4</sup> states:

“If there is permanent disability involving the loss, or loss of use, of a member or function of the body or involving disfigurement, the employee is entitled to basic compensation for the disability, as provided by the schedule in subsection (c) of this section, at the rate of  $6 \frac{2}{3}$  of his monthly pay.”

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<sup>3</sup> Docket No. 06-513 (issued May 18, 2006).

<sup>4</sup> 5 U.S.C. § 8107(a).

Federal (FECA) Procedure Manual, Part 6 -- Initial Overpayment Actions, *Identification of Overpayments and Debts*, Chapter 6.200.2d (September 1994) states:

“Overpayments of compensation occur under various circumstances, such as:

(d.) *A claimant is determined to be not entitled to compensation already paid.*”

20 C.F.R. § 10.431 states:

“Before seeking to recover an overpayment or adjust benefits, [the Office] will advise the beneficiary in writing that:

- (a) The overpayment exists and the amount of overpayment;
- (b) A preliminary finding shows either that the individual was or was not at fault in the creation of the overpayment;
- (c) He or she has the right to inspect and copy Government records relating to the overpayment; and
- (d) He or she has the right to present evidence which challenges the fact or amount of the overpayment and/or challenges the preliminary finding that he or she was at fault in the creation of the overpayment. He or she may also request that recovery of the overpayment be waived.”

### **ANALYSIS -- ISSUE 1**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$26,106.85.<sup>5</sup> The Office found that appellant was receiving a schedule award exceeding that to which he was entitled by taking the amount appellant was paid from March 9, 2000 to October 12, 2003, \$93,955.66 and subtracting \$67,848.81, the amount to which appellant was actually entitled, for an overpayment of \$26,106.85. Thus, the Office as incorrectly paid appellant an augmented schedule award from March 9, 2000 to October 12, 2003, the Office properly found that he received an overpayment of compensation in the amount of \$26,106.85 during that period.

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<sup>5</sup> Appellant contended in his appeal to the Board that the Office medical adviser improperly interfered with Dr. Purser, the impartial medical examiner, by rejecting his initial, May 25, 2004 report and giving him instructions on how to arrive at his ultimate impairment rating. This argument, however, was rejected below by the Office and the Board. It was within the Office medical adviser's purview to provide guidelines to the medical examiner regarding his calculation of appellant's impairment, in conformance with the A.M.A., *Guides*. The Board's finding in its May 18, 2006 decision that Dr. Purser's finding of a 41 percent impairment of the left upper extremity and a 4 percent impairment of the right upper extremity represented the weight of the medical evidence is decisive regarding the amount of appellant's schedule award.

## LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Federal Employees' Compensation Act<sup>6</sup> provides that 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." Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would "defeat the purpose of the Act or would be against equity and good conscience," pursuant to the guidelines provided in sections 10.436<sup>7</sup> and 10.437<sup>8</sup> of the implementing federal regulation.

With regard to the "defeat the purpose of the Act" standard, section 10.436 of the regulation 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 regard to the "against equity and good conscience" standard, section 10.437 of the regulation 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.

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<sup>6</sup> 5 U.S.C. § 8129(a)-(b).

<sup>7</sup> 20 C.F.R. §§ 10.436.

<sup>8</sup> 20 C.F.R. § 10.437.

(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 that 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 worse, 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."

A finding that appellant was without fault is insufficient, in and of itself, for the Office to waive the overpayment.<sup>9</sup> The Office must exercise its discretion to determine whether recovery of the overpayment would "defeat the purpose of the Act or would be against equity and good conscience" pursuant to the guidelines provided in sections 10.434-437 of the implementing federal regulations.<sup>10</sup>

Office regulations provide that 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 or 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.<sup>11</sup> The Board has found that an individual is deemed to need substantially all of his or her income to meet current ordinary and necessary expenses by more than \$50.00.<sup>12</sup> Additionally, the guidelines for recovery of an overpayment from an individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that, recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his or her income to meet current ordinary and necessary living expenses and also that his or her assets, those which are not exempted, do not exceed a resource base.<sup>13</sup>

Office procedures provide that recovery will defeat the purpose of the Act if the individual's assets do not exceed the resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent, plus \$600.00 for each additional dependent.

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<sup>9</sup> *James L. Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

<sup>10</sup> 20 C.F.R. § 10.434-437 (1999).

<sup>11</sup> *Frederick Arters*, 53 ECAB 397 (2002).

<sup>12</sup> *Id.*

<sup>13</sup> *John Skarbek*, 53 ECAB 630 (2002).

This base includes all of the claimant's assets that are not exempted from recoupment.<sup>14</sup> The first \$3,000.00 or more, depending on the number of the individual's dependents, is also exempted from recoupment as a necessary emergency resource.<sup>15</sup>

20 C.F.R. § 10.438<sup>16</sup> states:

“(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 2**

In the instant case, appellant stated that he had \$2,500.00 in monthly income and \$2,500.00 in expenses. He, however, failed to submit documentation to support these amounts. Appellant has thus fallen well short of showing that he needs substantially all of the current monthly income to meet living expenses or that the amount of the overpayment was wrongly computed, as requested by the Office in its December 2, 2005 letter. Therefore, he does not qualify for waiver under the “defeat the purpose of the Act” standard.<sup>17</sup> Further, there is no evidence in this case, nor did appellant allege, that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received for the period March 9, 2000 to October 12, 2003. Pursuant to its regulations, the Office, therefore, did not abuse its discretion by issuing its January 13, 2006 final decision denying waiver of recovery of the overpayment in the amount of \$26,106.85.

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<sup>14</sup> The Office procedure manual provides that an individual's assets include liquid assets such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds, certificates of deposit and the like and nonliquid assets such as the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings/supplies therein, any vehicles above the two allowed per family, jewelry, artwork, etc. Assets do not include the value of household furnishing of the primary residence, wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which is maintained as the principal family domicile or income from income-producing property if the income from such property has been included in comparing income and expenses. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.a(4) (September 1994).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.a(1)(b) (September 1994).

<sup>16</sup> 20 C.F.R. § 10.438.

<sup>17</sup> See *Nina D. Newborn*, 47 ECAB 132 (1995).

**LEGAL PRECEDENT -- ISSUE 3**

With regard to the method determined by the Office to recover the amount of the overpayment, section 10.441(b) of Office regulations provides:

“When an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same.... If the individual fails to make such refund, [the Office] may recover the same through any available means, including offset of salary, annuity benefits, or other Federal payments, including tax refunds as authorized by the Tax Refund Offset Program or referral to the debt to a collection agency or to the Department of Justice.”<sup>18</sup>

**ANALYSIS -- ISSUE 3**

The Board lacks the jurisdiction to determine the method of payment for the purpose of the recovery of a finalized overpayment. Section 10.441(b), cited above, gives the Office discretion to determine the method of recovery of the overpayment where an overpayment has been made to an individual who is not entitled to further payments. Further, the Board’s own case law stipulates that it does not have jurisdiction over the amount appellant is required to pay for the purpose of recovery of the overpayment when there is no further entitlement to compensation and appellant is not in receipt of continuing compensation benefits.<sup>19</sup> In the present case, the Board lacks jurisdiction over the method of repayment because appellant is not entitled to disability compensation.

**CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$26,106.85. The Board finds that the Office did not abuse its discretion in denying waiver of the overpayment. The Board lacks jurisdiction over the amount appellant is required to pay and the method employed for the purpose of recovery of the overpayment.

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<sup>18</sup> 20 C.F.R. § 10.441(b) (1999).

<sup>19</sup> *Robert N. Vachon*, 36 ECAB 502 (1985); *Marshall L. West*, 36 ECAB 490 (1985).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 13, 2006 decision of the Office Workers' Compensation Programs be affirmed.

Issued: April 13, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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