

FACTUAL HISTORY

On February 14, 1997 appellant, then a 44-year-old engineering technician, injured his left knee. The Office accepted that his claim for left cruciate ligament strain and sprain and authorized surgery to repair the cruciate ligament. Appellant stopped work on October 9, 1988 and did not return to federal employment.

By letter dated May 6, 1999, the Office notified appellant that he would be paid temporary total disability compensation every 28 days. The Office indicated that to avoid overpayment appellant should notify the Office immediately when he returned to work and to return to the Office any compensation check covering a period in which he also worked. On May 21, 1999 appellant signed the certification attached to the May 6, 1999 Office letter indicating that he understood the conditions under which he would receive compensation.

Appellant was referred for vocational rehabilitation on June 11, 1999.

In a letter dated October 31, 2002, the Office requested that appellant provide information regarding any wages earned from June 1, 2001 to September 1, 2002 and attached an authorization form to obtain wage information from the Social Security Administration (SSA). The Office also sent appellant an EN1032 form to report income from other sources and dependents. The Office informed him that he was to report all income from employment during the past 15 months. Part H, Certification, provides:

“I know that anyone who fraudulently conceals or fails to report income or other information which would have an effect on benefits or who makes a false statement or misrepresentation of a material fact in claiming a payment or benefit under the Federal Employees’ Compensation Act may be subject to criminal prosecution, from which a fine or imprisonment or both, may result.

“I understand that I must immediately report to [the Office] any improvement in my medical condition, any employment and change in the status of claimed dependents, any third[-]party settlement and any change in income from federally assisted disability or benefit programs.

“I certify that all the statements made in response to questions on this form are true, complete and correct to the best of my knowledge and belief....”

On November 2, 2002 appellant completed the EN1032 and noted under Part A(3), Employment, that he was not employed. Under Part H, Certification, appellant signed his name and indicated that he understood the conditions under which he would continue to receive compensation.

In a rehabilitation action report dated November 25, 2002, the rehabilitation counselor advised that appellant accepted a part-time, on-call security guard position at Olympic College and began working on November 21, 2002. In a vocational rehabilitation report dated December 20, 2002, the counselor noted that appellant’s prior employer was unable to develop a suitable job offer. Appellant accepted a part-time job as a security officer at Olympic College in November 2002. His vocational rehabilitation case was closed on November 25, 2002.

In a letter dated February 4, 2003, the Office requested that appellant provide information regarding any wages earned from September 2, 2002 to January 30, 2003 and attached an authorization form to obtain wage information from the SSA.

In an undated letter received on June 2, 2003, appellant indicated that he continued to work as a security guard on an on-call basis and attached pay stubs from December 10, 2002 to May 9, 2003.

In a letter dated December 19, 2003, the Office requested that appellant provide information regarding any wages earned from January 1, 2000 to December 31, 2002 and attached an authorization form to obtain wage information from the SSA. The Office also sent appellant a EN1032 form to report income from other sources and dependents. The Office informed appellant that he was to report all income from employment during the past 15 months.

On January 6, 2004 appellant completed the EN1032 and noted under Part A(3), Employment, that he had been working from November 2002 through the present time as a security guard with Olympic College. He submitted pay stubs from December 10, 2002 to September 10, 2003. Appellant also submitted a signed authorization form to obtain SSA information.

On January 28, 2004 the Office notified appellant that he was recently employed as a security guard with wages of \$233.29 per week from December 10, 2002 through December 10, 2003. The Office indicated that the employment was effective November 2002. The Office advised appellant that his monetary compensation would be reduced or terminated effective November 2002 based upon his actual earnings.

In an overpayment worksheet dated March 1, 2004, the Office indicated that appellant had earnings for the period December 11, 2002 to December 10, 2003. The Office noted that appellant was paid compensation benefits effective February 14, 1997 at an augmented compensation rate of three-fourths and a weekly pay rate of \$902.00. The Office noted that appellant was entitled to compensation benefits from December 11, 2002 to December 10, 2003 in the amount of \$31,889.11 and was paid temporary total disability for the period December 11, 2002 to December 10, 2003 in the amount of \$39,769.04. The Office noted that appellant was overpaid benefits in the amount of \$7,879.93.

By letter dated March 4, 2004, the Office advised appellant that an overpayment of compensation had occurred in the amount of \$7,879.93, from December 11, 2002 to December 10, 2003. The Office found that appellant was at fault in creating the overpayment because he should have known that he was not entitled to wage-loss compensation for temporary total disability when he was working and receiving a salary.

Appellant requested a prerecoupment hearing and disagreed with the Office's finding that he was at fault. He asserted that he notified the Office that he was working on January 6, 2004. In addition, appellant submitted pay stubs from October 10, 2003 to September 10, 2004 which revealed that he worked from 16 hours to 137 hours per month. He indicated that he was on an "on-call" basis and was permitted to work a maximum number of hours per year as determined by his employer. Appellant indicated that starting on October 18, 2004 his hours as a security

guard would be cut to 24 hours per month. In addition, appellant submitted a completed overpayment questionnaire form outlining his income and assets as well as his household expenses and debts. He noted income of \$2,880.24 and expenses of \$2,756.60 which included “other miscellaneous expenses” of \$771.34. Appellant did not provide any further clarification or documentation of the miscellaneous expenses.

At the hearing on November 16, 2004 appellant testified that in November 2002 he accepted a part-time position with Olympic College and notified the Office on December 20, 2002. He indicated that in February 2003 he received a letter from the Office requesting earnings information and in response he sent copies of his pay stubs. Appellant indicated that he never received correspondence from the Office indicating that he was in overpayment status. He noted that he was not sure how worker’s compensation benefits were paid and asserted that he was not aware that it was improper to receive total disability compensation and earn wages at the same time. Appellant advised that he was unsure how the Office treated income from an “on-call” job which did not have set work hours. He indicated that the Office never requested that he return any funds. Appellant indicated that he supplied all the information that the Office requested and the Office improperly delayed in requesting information from the SSA regarding his wages.

In a decision dated March 7, 2005, the hearing representative found that appellant was at fault in creating the overpayment of \$7,879.93 on the grounds that he either knew or reasonably should have known that the payments he accepted were incorrect. The hearing representative stated that appellant listed \$2,880.24 in monthly income on the overpayment recovery questionnaire and had regular monthly expenses of \$2,523.60, which left a balance of \$356.64 per month. The hearing representative concluded that \$200.00 a month from appellant would allow the Office to recover the overpayment in a reasonable manner while at the same time minimizing any financial hardship on appellant. The hearing representative indicated that the recovery would be made from appellant’s continuing compensation payments.

In a decision dated April 7, 2005, the Office found that appellant was at fault in creating the overpayment of \$7,879.93 on the grounds that he either knew or reasonably should have known that the payments he accepted were incorrect. The Office stated that appellant listed \$2,880.24 in monthly income on the overpayment recovery questionnaire and had regular monthly expenses of \$2,523.60, which left a balance of \$356.64 per month. The Office concluded that \$184.62 a month from appellant would allow the Office to recover the overpayment in a reasonable manner while at the same time minimizing any financial hardship on appellant. The Office indicated that the recovery would be made from appellant’s continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

The Act 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 duty.¹ When an overpayment has been made to an individual because of an error of fact or law,

¹ 5 U.S.C. § 8102(a).

adjustments shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.²

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.³ Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁴

ANALYSIS -- ISSUE 1

The record indicates that appellant's claim was accepted for a sprain/strain of the left knee and leg and he was paid compensation benefits under Act.

In this case, the record reveals that on November 21, 2002 appellant returned to part-time limited duty at full salary and continued to receive wage-loss compensation for temporary total disability through December 10, 2003. Thus, an overpayment occurred in the amount of \$7,879.93. Appellant did not dispute the fact and amount of the overpayment. During the period December 11, 2002 to December 10, 2003, the Office calculated that appellant received total disability compensation in the amount of \$39,769.04 but should have received only \$31,889.11 for partial disability. The Office subtracted \$31,889.11 from \$39,769.04 and found that the difference between the amount of compensation appellant received and the amount he should have received was \$7,879.93 and therefore this is the amount of the overpayment. The Office explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$7,879.93 for the period December 11, 2002 to December 10, 2003.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁵ provides as follows:

“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.”⁶ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁷

² *Id.* at § 8129(a).

³ *Danny E. Haley*, 56 ECAB ____ (Docket No. 04-853, issued March 18, 2005); *Donna M. Rowan*, 54 ECAB 698 (2003).

⁴ *Haley, id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8129(b).

⁷ *Gregg B. Manston*, 45 ECAB 344 (1994).

Section 10.433(a) of the Office's implementing regulations provides:

"On the issue of fault, 20 C.F.R. § 10.433(a) provides in pertinent part: An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."⁸

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

"(b) 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."⁹

ANALYSIS -- ISSUE 2

In this case, the Office applied the third standard -- appellant accepted payments which he knew or should have known were incorrect -- in finding appellant to be at fault in the creation of the overpayment in the amount of \$7,879.93. By letter dated May 6, 1999, the Office notified appellant that he would be paid temporary total disability compensation every four weeks. The Office indicated that to avoid overpayment appellant should notify the Office immediately when he returned to work. On May 21, 1999 appellant signed the certification attached to the May 6, 1999 Office letter indicating that he understood the conditions under which he would receive compensation and that he must return any compensation check that covered a period in which he also worked. By letter dated October 31, 2002, the Office sent appellant an EN1032 form to report income from other sources and dependents. Part H, Certification, provides: "I understand that I must immediately report to [the Office] any improvement in my medical condition, any employment and change in the status of claimed dependents, any third[-]party settlement and any change in income from federally assisted disability or benefit programs. I certify that all the statements made in response to questions on this form are true, complete and correct to the best of my knowledge and belief..." On November 2, 2002 appellant completed the EN1032 and signed the certification and indicated that he understood the conditions under which he would receive compensation. In a vocational rehabilitation report dated November 25, 2002, the counselor noted that appellant accepted a part-time job as a security officer at Olympic College on November 21, 2002. In an undated letter received on June 2, 2003, appellant indicated that he continued to work as a security guard and attached pay stubs from December 10, 2002 to May 9, 2003. On January 6, 2004 appellant completed the EN1032 instructing him to report any employment in the 15-month period prior to the date of the form. He noted under Part A(3),

⁸ *Kenneth E. Rush*, 51 ECAB 116 (1999).

⁹ 5 U.S.C. § 10.433(b).

Employment, that he had been working from November 2002 through the present time as a security guard with Olympic College. Although the Office may have been negligent in continuing to issue appellant checks for total disability after it was informed he had returned to work and had earnings, this does not excuse appellant's acceptance of such checks to which he should have been expected to know he was not entitled.¹⁰

The Board finds that the May 6, 1999 instructions for receiving compensation together with the reporting instructions contained in the front of the Form EN1032 and the certification under Part H, which was signed and certified by appellant on November 2, 2002, prior to him starting his job on November 21, 2002, indicate that appellant should have known that total disability compensation amounts received while also receiving compensation for his position as a security guard at Olympic College contained an amount to which he was not entitled. The Board finds that, under the circumstances of this case, appellant reasonably knew or should have known that he accepted wage-loss compensation payments from December 11, 2002 to December 10, 2003 that were incorrect. Because he was not without fault in creating the overpayment, recovery of the overpayment in the amount of \$7,879.93 may not be waived.

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.¹¹ Section 10.441(a) of the regulations¹² provides:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.”¹³

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive wage-loss compensation under the Act. When, as in this case, an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is

¹⁰ *Lee B. Bass*, 40 ECAB 334 (1988); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹¹ *Lorenzo Rodriguez* 51 ECAB 295 (2000); *Albert Pineiro*, 51 ECAB 310 (2000).

¹² 20 C.F.R. § 10.441(a).

¹³ *Id.*

accepted, the installments should be large enough to collect the debt promptly.¹⁴ The Board finds that the Office did not abuse its discretion in following those guidelines in this case, where appellant has not submitted complete financial information and deducting \$184.62 every four weeks.¹⁵

CONCLUSION

The Board finds that appellant received an overpayment of \$7,879.93, in compensation from December 11, 2002 to December 10, 2003 and that he was not “without fault” in the creation of the overpayment. The Board further finds that the Office properly determined to recover the overpayment from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2005 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: June 7, 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

¹⁴ *Gail M. Roe*, 47 ECAB 268 (1995); *Robin D. Calhoun*, (Docket No. 00-1756, issued May 21, 2001).

¹⁵ The overpayment questionnaire indicates that appellant has monthly income of \$2,880.24 and total monthly expenses of \$2,756.60 which included “other miscellaneous expenses” of \$771.34. Appellant failed to provide any further clarification or documentation to support the miscellaneous expenses. The Office considered the amount of appellant’s assets and the extent his monthly income exceeded his monthly expenses. Therefore, the Office properly required repayment of the overpayment as noted.