

FACTUAL HISTORY

On January 12, 2005 appellant, then a 39-year-old correction officer, filed a traumatic injury claim alleging that on January 11, 2005 he injured his left knee when he slipped on a wet floor and fell.¹ The Office accepted the claim for left medial meniscus tear, aggravation of left patellar chondromalacia and aggravation of left patellar tendinitis. Appellant began receiving compensation for temporary total disability for the period April 17 through August 29, 2005.² He returned to work on August 30, 2005.

On March 31, 2006 appellant filed a claim for a schedule award. By decision dated March 17, 2006, the Office issued a schedule award for a 22 percent impairment of the left lower extremity. The period of the award ran from November 17, 2005 through February 3, 2007. The weekly pay rate was \$2,476.18. The record establishes the Office paid appellant, the weekly pay rate of \$2,476.18.

On August 31, 2006 the Office made a preliminary determination that appellant received a \$41,114.56 overpayment because he was paid at the incorrect pay rate of \$2,194.50 for both total disability for the period April 17 to August 29, 2005 and a schedule award for the period November 17, 2005 through July 8, 2006. The Office explained that the correct pay rate was \$1,203.46 for the period April 17, 2005 to June 28, 2006 and \$1,244.67 for the period June 29 to July 8, 2006. The Office also made a preliminary determination that he was without fault in the matter.

In a letter dated September 18, 2006, appellant responded to the Office's preliminary overpayment determination. He did not dispute fact or amount of overpayment, but requested a waiver of the overpayment. Appellant contended that he was entitled to waiver on the grounds of detrimental reliance. In the belief that the Office correctly calculated his pay rate, appellant stated that he and his wife decided to pay off a loan on an automobile, purchase a used vehicle for his teenage son and purchase a new automobile. Appellant contends that neither he nor his wife would have "committed to purchases and financial obligations that we normally would not have." Lastly, he contends that repayment of the overpayment would place a heavy financial burden on him. Appellant submitted an overpayment recovery questionnaire Form (OWCP-20) and supporting documentation, reporting assets of \$3,070.10 (\$1,746.81 in a checking account and \$1,323.29 in a savings account). He reported monthly expenses of \$5,218.18 and monthly income including other benefits of \$5,725.98.

In a decision dated October 12, 2006, the Office finalized its preliminary determinations and found that appellant was without fault in creating a \$41,114.56 overpayment from April 17 to August 29, 2005 and November 17, 2005 through July 8, 2006. The Office stated that the overpayment would be reduced by the remaining amount of the schedule award he was owed, which was \$27,940.99. The Office noted appellant's monthly income of \$5,725.98 exceeded his

¹ The employing establishment reported appellant's pay rate as of the January 11, 2005 injury and April 16, 2005, the date he stopped work, as \$26.08 per hour or \$54,439.00 annually for base pay, \$28.69 per hour for night differential and \$25.21 per hour for special pay.

² The weekly pay rate was listed as \$2,476.18 on the computer printouts.

monthly expenses of \$5,218.18 by \$507.80. Thus, he was not entitled to waiver of the overpayment as he did not substantially require all his monthly income for ordinary and necessary expenses. With respect to appellant's allegation of detrimental reliance, the Office found that he did not change his position for the worse or lose a valuable right. The Office advised him that he should forward a check for the remaining amount of \$13,173.47 or contact the Office so that appropriate arrangements for recovery, such as installment payments, could be made.

LEGAL PRECEDENT -- ISSUE 1

Pay rate for compensation purposes is defined by the Federal Employees' Compensation Act and in Office regulation as the employee's pay at the time of injury, time disability began or when compensable disability recurred, if the recurrence began more than six months after the employee resumed regular full-time employment with the United States, whichever is greater.³

Sections 8114(d)(1) and (2) of the Act provide methodology for computation of pay rate for compensation purposes, by determination of average annual earnings at the time of injury. Sections 8114(d)(1) and (2) of the Act specify methods of computation of pay for employees who worked in the employment for substantially the whole year prior to the date of injury and for employees who did not work the majority of the preceding year, but for whom the position would be available for a substantial portion of the following year. Section 8114(d)(3) of the Act provides an alternative method for determination of pay to be used for compensation purposes when the methods provided in the foregoing sections of the Act cannot be applied reasonably and fairly.⁴

ANALYSIS -- ISSUE 1

Appellant does not contest that an overpayment of compensation was created. His pay rate for compensation purposes would be the rate of pay he was receiving on the date of his recurrence of disability, April 17, 2005. The record indicates that, for the period April 17, 2005 through July 8, 2006, he received compensation based on a weekly pay rate of \$2,476.18. Pay rate information provided by the employing establishment indicated that, at the time of appellant's April 17, 2005 recurrence of disability, his annual rate of pay was \$1,203.45 per week and \$1,244.67. The Board, therefore, finds that an overpayment in compensation had been created. The record demonstrates that, for the period April 17, 2005 through July 8, 2006, appellant received total compensation of \$89,170.79 based on the incorrect pay rate of \$2,476.18, when he should have received compensation totaling \$48,056.23 based on the correct pay rate, yielding an overpayment in compensation in the amount of \$41,114.56, as properly determined by the Office.

³ 5 U.S.C. § 8101(4); 20 C.F.R. § 10.5(s); *see John M. Richmond*, 53 ECAB 702 (2002).

⁴ 5 U.S.C. § 8101(d); *see Ricardo Hall*, 49 ECAB 390 (1998).

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁵ The statutory guidelines are found in section 8129(b) of the Act which states: Adjustment recovery of an overpayment by the United States may not be made when an 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.⁶

Section 10.436 of the implementing regulation⁷ provides that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship in a currently or formerly entitled beneficiary because: 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.⁸ An individual is deemed to need substantially all of his income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁹

Section 10.437 provides that recovery of an overpayment is considered 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.¹⁰

⁵ See *George A. Rodriguez*, 57 ECAB ____ (Docket No. 05-490, issued November 18, 2005); *Robert Atchison*, 41 ECAB 83 (1989).

⁶ See 5 U.S.C. § 8129(b); *W.F.*, 57 ECAB ____ (Docket No. 06-769, issued August 11, 2006); *Joan Ross*, 57 ECAB ____ (Docket No. 06-887, issued July 24, 2006); *Carroll R. Davis*, 46 ECAB 361 (1994).

⁷ 20 C.F.R. § 10.436

⁸ An individual's assets must exceed a resource based on \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This based includes all of the individual's assets not exempt from recoupment. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.6(a)(1)(b) (December 23, 2004).

⁹ See *George A. Rodriguez*, *supra* note 5; *Sherry A. Hunt*, 49 ECAB 467 (1998).

¹⁰ 20 C.F.R. § 10.473. See *Madelyn Y. Grant*, 57 ECAB ____ (Docket No. 06-164, issued April 18, 2006); *Keith H. Mapes*, 56 ECAB ____ (Docket No. 03-1747, issued October 20, 2004).

ANALYSIS -- ISSUE 2

As the Office found appellant without fault in the creation of the overpayment in compensation, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹¹

Appellant furnished the Office with an overpayment questionnaire, which indicated that he had monthly expenses totaling \$5,218.18 and monthly income of \$5,725.98. Office procedures provide that an individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00, *i.e.*, the amount of monthly funds available for debt repayment is the difference between current income and adjusted-living expenses plus \$50.00,¹² which in this case would be \$507.80. The record also indicates that appellant reported assets of \$1,746.81 in a checking account and \$1,323.29 in a savings account. The Board, therefore, finds that the Office properly concluded that recovery of the overpayment would not cause financial hardship to appellant and thus defeat the purpose of the Act.

Appellant contended that recovery of the overpayment remaining after the deduction of the amount owed on his schedule award would be against equity and good conscience because he and his wife made financial decisions they would not have made otherwise. Specifically, appellant stated that he and his wife decided to pay off a loan on an automobile, purchase a used vehicle for his teenage son and purchase a new automobile based upon the belief that the Office had correctly calculated his weekly pay rate. Appellant contends that neither he nor his wife would have “committed to purchases and financial obligations that we normally would not have.”

The Board has previously explained that the detrimental reliance provision is not applicable to conversion of the overpayment into a different form, such as food, consumer goods, real estate, *etc.*, from which the claimant derived some benefit.¹³ Any purchase of personal property or consumer goods which appellant made in expectation of the augmented compensation rate does not establish detrimental reliance. Further, the Office procedure manual provides that the detrimental reliance provision is not applicable to conversion of the overpayment into a different form, such as consumer goods or real estate, from which the claimant derives some benefit.¹⁴ Appellant’s conversion of his overpayment into paying off a car loan and purchasing a new car for himself and a used car for his son would, therefore, not be considered detrimental reliance.

¹¹ 20 C.F.R. §§ 10.436, 10.437.

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1), (a)(4) (April 2003).

¹³ *Robert Crow*, 38 ECAB 253 (1986).

¹⁴ *Id.*

To show detrimental reliance under section 10.437(b) appellant must show that he made a decision he otherwise would not have made in reliance on the overpaid compensation and that this decision resulted in a loss.¹⁵ The facts reveal that appellant paid off his old car loan, purchased a new car for himself and his wife and a used car for his son. Appellant stated that neither he nor wife would have decided to pay off a loan on an automobile, purchase a used vehicle for their teenage son and purchase a new automobile for themselves if they had known of the overpayment. While appellant has alleged he made a decision he would not have made in reliance on the overpaid compensation, there is no evidence a loss resulted. Appellant retains the use of a car he purchased for himself and is a conversion of the overpayment into consumer goods. With respect to the car he purchased for his son with a loan, there is no evidence of a loss. While his son has use of the car, appellant retained ownership of the car. The Board finds that appellant has failed to establish that he changed his position for the worse in reliance on the overpaid funds. As the evidence fails to establish that adjustment or recovery of the overpayment would be against equity and good conscience, the Office properly denied his request for waiver.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of the Act provides that, 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.¹⁶ The implementing regulations provide that, when an overpayment has been made to an individual who is 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 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.¹⁷

ANALYSIS -- ISSUE3

In its October 12, 2006 decision, the Office asked appellant to forward a check for \$13,173.57 or to contact the Office to make appropriate arrangements for recovery.

The Board may review, however, the Office's partial recovery of the \$41,114.56 overpayment. By decision dated March 17, 2006, the Office issued a schedule award for a 22 percent impairment of the left lower extremity. The period of the award ran from November 17, 2005 through February 3, 2007. Appellant received payment for his schedule award for the period November 17, 2005 to July 8, 2006. As the schedule award was to run until February 3, 2007, there is a remaining amount due appellant for the period July 9, 2006 to February 3, 2007.

¹⁵ *Forrest E. Brown, II*, 44 ECAB 278, 285-86 (1992); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (September 1994).

¹⁶ 5 U.S.C. § 8129(a).

¹⁷ 20 C.F.R. § 10.441(a).

Rather than refund this amount to appellant, the Office used it to reduce the \$41,114.56 overpayment, thereby affecting an immediate partial recovery.¹⁸ It cannot be said that he refunded this \$27,940.99 to the Office. The Office, therefore, had an obligation, when it kept the amount remaining on the schedule award to which appellant was entitled, to take 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.

The record reflects that appellant's current monthly income was \$5,725.98 and his monthly expenses were \$5,218.18 per month, which resulted in an excess of \$507.80 per month. The Office properly determined that recovery of \$27,940.99 of the overpayment from the amount remaining on a schedule award owed to appellant would not cause any hardship. Moreover, appellant indicated he was not appealing the Office's decision to reduce his overpayment by using the amount remaining on his schedule award. The Office did not abuse its discretion by using the \$27,940.99 owed appellant on his schedule award to reduce the amount of his overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of \$41,114.56 for the period April 17, 2005 through July 8, 2006, when the Office paid him at an incorrect pay rate, and that he was without fault in the creation of the overpayment. The Board also finds that the Office properly denied waiver of the recovery of the overpayment and properly recovered a portion of the overpayment by offsetting the amount remaining on the schedule award appellant was entitled to.

¹⁸ In cases where the claimant is not at fault and may be entitled to waiver, the Board has held that the Office's offset practice precludes the proper consideration of waiver of the entire amount of the overpayment. *Diana L. Booth*, 52 ECAB 370, 373 (2001) (finding that the Office's offset practice denied administrative due process rights with respect the amount offset); *Michael A. Grossman*, 51 ECAB 673, 678 (2000). In other cases, if a sufficiently large lump-sum payment of compensation is due for a single period of past entitlement, the debt should be recovered in full by a single deduction from compensation owed. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.0300.8 (May 2004). But the lump-sum payment due appellant in this case was not sufficiently large to allow recovery of the overpayment in full by a single deduction.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 12, 2006 is affirmed.

Issued: June 5, 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