

properly directed that this overpayment should be recovered by deducting \$400.00 from appellant's continuing monthly compensation payments; (4) whether appellant received an overpayment of compensation in the amount of \$1,159.45 from August 22, 1993 to June 17, 2000 and September 7, 2003 to June 11, 2005, due to an incorrect loss of wage-earning capacity pay rate; (5) whether the Office properly denied waiver of this overpayment; (6) whether the Office properly directed that this overpayment should be recovered by deducting \$116.00 from appellant's continuing monthly compensation payments; and (7) whether the Office properly determined that the issue presented was whether appellant's October 3, 2005 request for reconsideration was timely filed and established clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board on three occasions. In an order issued on August 31, 1994,¹ the Board dismissed appellant's appeal of the Office's January 24, 1994 decision, denying his request for reconsideration of its August 6, 1993 decision which found that the constructed position of orthotist represented his wage-earning capacity.² Appellant wished to submit new evidence to the Office in support of a request for reconsideration. By decision dated February 7, 1997, the Board affirmed the Office's January 24, 1994 decision.³ It found that the Office properly denied appellant's request for a merit review of the Office's August 6, 1993 loss of wage-earning capacity decision. The Board also affirmed the Office's November 16, 1994 decision, denying appellant's August 10, 1994 request for reconsideration of the August 6, 1993 decision. It found that his reconsideration request was not timely filed and failed to establish clear evidence of error. In a July 14, 2003 decision, the Board found that the Office did not meet its burden of proof to terminate appellant's wage-loss and medical compensation effective June 18, 2000.⁴ It found that a conflict existed in the medical opinion evidence between Dr. Rommel G. Childress, appellant's attending physician, and Dr. James T. Gaylon, an Office referral physician, as to whether appellant had any residuals of his February 18, 1987 employment-related acromioclavicular separation, cervical strain and post-traumatic stress syndrome. The facts and the circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.⁵ The facts and the history relevant to the present issues are hereafter set forth.

¹ Docket No. 94-2190 (issued August 31, 1994).

² The Office's August 6, 1993 decision found that appellant had a weekly wage-earning capacity of \$430.00. On September 20, 1993 he advised the Office that he obtained work as an orthotist as of August 23, 1993. On December 11, 1993 appellant advised the Office that he had been laid off from this position because his physical limitations caused him to work slowly.

³ Docket No. 95-917 (issued February 7, 1997).

⁴ Docket No. 03-838 (issued July 14, 2003).

⁵ On March 3, 1987 appellant, then a 38-year-old correctional officer, filed a traumatic injury claim alleging that on February 28, 1987 he separated his acromioclavicular joint separation of the right shoulder as a result of a motor vehicle accident while in the performance of his work duties. The Office accepted his claim for acromioclavicular joint separation of the right shoulder, post-traumatic stress disorder and cervical strain.

Following the issuance of the Board's July 14, 2003 decision, the Office, by letter dated December 9, 2003, advised appellant that he received a check, dated October 3, 2003 for an incorrect payment in the amount of \$89,672.79 for the period June 18, 2000 to September 6, 2003.⁶ It stated that the check was incorrectly issued for total disability compensation as he was only entitled to partial disability compensation based on its August 6, 2003 loss of wage-earning capacity decision. The Office informed appellant that it was currently calculating the amount of the overpayment and that he would be notified by a separate letter.

On December 16, 2003 the Office made a preliminary determination that appellant received an overpayment in the amount of \$63,628.63 because he received a check in the amount of \$89,627.79 for retroactive compensation for temporary total disability covering the period June 18, 2000 to September 6, 2003 based on the Board's July 14, 2003 decision when he was only entitled to compensation in the amount of \$26,285.51 based on its August 6, 1993 loss of wage-earning capacity decision.⁷ The Office further determined that he was at fault in the creation of the overpayment because he was aware that the compensation he received prior to the termination of his compensation on June 18, 2000 was based on its loss of wage-earning capacity determination. It stated that it was reasonable to assume that appellant knew that the retroactive check he received for the period June 18, 2000 to September 6, 2003 in the amount of \$89,914.14 was incorrect as his compensation prior to termination was based on his loss of wage-earning capacity determination. The Office related that a day after this check was issued appellant's first regular 28-day compensation check in the amount of \$647.00 was issued and included his loss of wage-earning capacity. It stated that simple mathematics would have indicated that the retroactive amount was incorrect. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. The Office requested that he complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

In a letter dated January 15, 2004, appellant, through his attorney, disagreed with the Office's preliminary determination and requested a hearing. He submitted an OWCP-20 form dated January 14, 2004 which provided his monthly income and expenses. Appellant explained that he thought he was entitled to the incorrect payment because the Board twice ruled in his favor and the basis for its decisions, was based at least in part, on medical reports of record

⁶ A computer printout of record indicates that appellant was issued a compensation check dated October 3, 2003 in the amount of \$89,627.79 for the period June 18, 2000 to September 6, 2003 by direct deposit into his checking account. The check was based on a pay rate of \$455.80 effective February 28, 1987. The October 4, 2003 check in the amount of \$647.00 was based on a pay rate of \$455.80 and a wage-earning capacity of \$322.60. By letter dated November 25, 2003, appellant advised the Office that the \$455.80 pay rate was incorrect. He argued that the Board's July 14, 2003 decision clearly indicated that the medical evidence of record established that he sustained a recurrence of disability.

⁷ The Board notes that, in a memorandum accompanying the December 16, 2003 overpayment preliminary notice, the Office stated that appellant received compensation for total disability in the amount of \$89,914.14 for the period June 18, 2000 to September 6, 2003 and not \$89,627.79 as stated in its preliminary notice. In the memorandum, the Office subtracted \$26,285.51, the amount appellant should have received during the stated period, from \$89,914.14, resulting in an overpayment of \$63,628.63.

establishing that he was totally disabled and unable to work. He stated that he believed that the Board's ruling entitled him to full disability benefits.

Following an October 20, 2004 hearing, appellant submitted copies of checks pertaining to his expenses.

By decision dated February 2, 2005, an Office hearing representative found that appellant was with fault in the creation of the overpayment in the amount of \$63,628.63. She found that appellant's belief that his recurrence of disability claim had been accepted by the Office based on the Board's July 14, 2003 decision was not reasonable. The hearing representative noted that his March 1997 recurrence of disability claim had been denied by the Office and he continued to receive compensation based on his loss of wage-earning capacity. She also noted that appellant did not appeal the denial of his recurrence of disability claim to the Board. The hearing representative determined that it was reasonable for him to recognize that the check he received in the amount of \$89,628.63, which was just over three years of compensation, was significantly higher than the amount he was receiving at the time his compensation was terminated by the Office. She found that appellant had monthly income of \$4,747.00 and expenses of \$2,730.94 which established that his monthly income exceeded his monthly expenses by \$2,016.06. The hearing representative stated that appellant was receiving compensation of \$647.00 every 28 days and directed that \$400.00 per month be deducted from his continuing compensation.

By letter dated October 3, 2005, appellant, through his attorney, requested reconsideration of the Board's July 14, 2003 decision. Counsel noted that, at the end of the hearing, the hearing representative advised him that he could file a request for reconsideration for appellant's full monthly amount of disability "if there was new evidence of his full disability at this time." Counsel argued that accompanying medical evidence established that appellant was currently totally disabled. In a September 20, 2005 report, Dr. Childress noted his prior opinion that appellant had made significant efforts at being retrained to work but the efforts were unsuccessful due to his inability to function even with retraining. He stated that appellant had increasing numbness, tingling and pain in his upper extremities with repetitive activities of more than one and one-half hours. He also had increasing post-traumatic stress disorder that required continued treatment and monitoring by Dr. Antoine Jean-Pierre, a psychiatrist. Dr. Childress reviewed a September 13, 2001 magnetic resonance imaging (MRI) scan of appellant's cervical spine which demonstrated a small herniated disc at C3-4. An MRI scan of his right shoulder and electromyogram/nerve conduction studies (EMG/NCS) of the right and left upper extremities was normal. Dr. Childress opined that in light of these relatively recent test results, his opinion remained that appellant was unable to be gainfully employed and that he was totally disabled due to a combination of physical and post-traumatic stress difficulties. He stated that his bilateral ulnar nerve neuropathy had reverted to normal due to conservative measures; he was not performing activities and functions that would aggravate or accelerate the condition. Dr. Childress stated:

"[T]hat [appellant] had deterioration of his cervical problem, in that his original diagnosis of cervical strain, now includes evidence of a C3-4 disc rupture. This is a late result of injury and can be a potential situation that may need surgical intervention if the small disc rupture increases or worsens.

“My opinion is that [appellant] continues to be totally disabled and note, indeed his MRI scan documenting the cervical disc pathology is even more reason to limit his work function. His post-traumatic stress syndrome is also active and is directly related to his original injury and is still requiring active treatment by psychiatrist, Dr. Jean-Pierre, and I would recommend a full status report regarding this to show its significance in [appellant’s] overall status.”

On November 28, 2005 the Office issued a decision, modifying its August 6, 1993 loss of wage-earning capacity decision. It stated that the prior wage-earning capacity calculation was based on a date-of-injury pay rate of \$430.13. The Office indicated that in October 1995 appellant’s date-of-injury pay rate was increased to \$455.80 to include Sunday pay and night differential.⁸ It stated that an adjustment was made to appellant’s compensation payments and a retroactive adjustment was made back to April 17, 1987. However, no adjustment was made to his date-of-injury pay rate or the addition of the night differential and Sunday pay to his current date-of-injury pay rate. Pursuant to 5 U.S.C. § 8128, the Office modified its August 6, 1993 decision to reflect the adjustment for all future compensation payments beginning with the November 26, 2005 payment.⁹ It advised that overpayment deductions which began with the July 9, 2005 compensation check had been stopped and appellant would be reimbursed for all deductions previously made. The Office stated that the change in appellant’s loss of wage-earning capacity amount made the February 2, 2005 overpayment amount of \$63,628.63 incorrect. It also stated that any retroactive compensation due back to August 22, 1993 to October 29, 2005 would be calculated and applied to a new overpayment amount. The Office advised that a new overpayment decision would be issued. It concluded that this decision only applied to the change in the calculations pertaining to appellant’s loss of wage-earning capacity and not to any other issue involved in its August 6, 1993 decision.

On January 25, 2006 the Office assigned appellant’s October 3, 2005 request for reconsideration to a senior claims examiner for review. It determined that he was requesting reconsideration of its August 6, 1993 decision and not the Board’s July 14, 2003 decision which reversed the termination of his compensation and directed the Office to put him back on the rolls. The Office stated that, based on appellant’s statement that the hearing representative’s decision indicated that he could request reconsideration of the loss of wage-earning capacity determination if he submitted medical evidence establishing that he was totally disabled, it appeared that he was requesting reconsideration of this decision.

On March 17, 2006 the Office made a preliminary determination that appellant received an overpayment in the amount of \$63,595.14. He received a check in the amount of \$89,627.79 for retroactive compensation for total disability covering the period June 18, 2000 to September 6, 2003 based on the Board’s July 14, 2003 decision. The Office, however, stated that he was only entitled to compensation in the amount of \$26,032.65 based on its August 6, 1993 loss of wage-earning capacity decision. It determined that appellant was at fault in the

⁸ The Board notes that the Office’s November 2, 2005 note stated that appellant’s pay rate changed in 1994 and not in October 1995 to include night differential and Sunday pay.

⁹ The Office’s November 28, 2005 decision found that appellant had a 71 percent wage-earning capacity or weekly wages of \$323.62.

creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect. The Office stated that the day after he received a retroactive compensation check in the amount of \$89,914.14 for the period June 18, 2000 to September 6, 2003 appellant received a compensation check in the amount of \$647.00 for his regular 28-day compensation which included the loss of wage-earning capacity determination. It further stated that simple mathematics would have indicated that the retroactive amount was incorrect. The Office requested that appellant complete an accompanying OWCP-20 form and submit financial documents in support thereof within 30 days. He did not respond within the allotted time period.

On March 20, 2006 the Office made a preliminary determination that appellant received an overpayment in the amount of \$1,159.45 because he was paid at an incorrect wage-earning capacity rate for the period August 22, 1993 to June 17, 2000 and September 7, 2003 to June 11, 2005. It stated that when it determined that appellant was entitled to a higher loss of wage-earning capacity for the period June 18, 2000 to September 6, 2003 retroactive payments were made back to the start of his compensation payments. The Office further stated that, due to the modification of his loss of wage-earning capacity amount, he was overpaid and it had to calculate a new overpayment amount for the period August 22, 1993 to June 17, 2000 and September 7, 2003 to June 11, 2005. It indicated that, for the period August 22, 1993 to June 17, 2000, appellant received \$50,147.17 in compensation based on a weekly loss of wage-earning capacity pay rate of \$323.62 when he should have received compensation in the amount of \$49,117.75 based on a weekly loss of wage-earning capacity pay rate of \$322.60. The Office subtracted \$49,117.75 from \$50,147.17 to calculate an overpayment of \$1,029.42. For the period September 7, 2003 to June 11, 2005, it determined that appellant received compensation in the amount of \$15,121.93 based on a weekly loss of wage-earning capacity pay rate of \$323.62 when he should have received \$14,991.90 in compensation based on a weekly loss of wage-earning capacity pay rate of \$322.60. The Office subtracted \$14,991.90 from \$15,121.93 to calculate an overpayment in the amount of \$130.03. The payments totaled \$1,159.45. The Office found that appellant was without fault in the creation of the overpayment. It informed him of the options available to him, asked him to submit financial information and informed him that waiver could be denied if he failed to submit financial information within 30 days. Appellant did not respond within the allotted time period.

By decision dated April 20, 2006, the Office found that appellant was at fault in the creation of the overpayment in the amount of \$63,595.14 because he accepted a payment that he knew or reasonably should have known was incorrect. It ordered repayment of the overpayment by deducting \$400.00 every 28 days from appellant's compensation because he did not provide any additional evidence or arguments following the issuance of its March 17, 2006 preliminary overpayment notice.

In a decision dated April 21, 2006, the Office found that appellant was without fault in the creation of the overpayment in the amount of \$1,159.45 but denied waiver of recovery of the overpayment because he did not respond to its March 20, 2006 preliminary overpayment notice.

By decision dated June 15, 2006, the Office found that appellant's letter requesting reconsideration was dated October 3, 2005, more than one year after the Board's July 14, 2003 decision and was untimely. It further found that he did not submit evidence to establish clear evidence of error in the prior decision which reinstated his entitlement to partial disability

compensation based on its loss of wage-earning capacity determination and not total disability compensation.

LEGAL PRECEDENT -- ISSUES 1 & 4

The Federal Employees' Compensation Act provides that the United States shall pay compensation as specified by this subchapter for disability or death of an employee resulting from personal injury sustained while in the performance of duty.¹⁰ If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his or her monthly pay, which is known as basic compensation for total disability.¹¹ If a claimant receives compensation for total disability after returning to work with a loss of wage-earning capacity, this results in an overpayment of compensation.¹²

Compensation benefits are computed based on an employee's pay rate during the relevant timeframe.¹³ In computing one's pay rate, section 8114(e) of the Act provides for the inclusion of certain "premium pay" received.¹⁴ However, overtime pay, among other things, is excluded from consideration in determining one's rate of pay.¹⁵ As pay rate is a critical component in the determination of the amount of compensation to which one is entitled, an incorrect pay rate may result in either the underpayment or overpayment of compensation. In cases where compensation payments were based erroneously on a pay rate greater than that to which the employee was entitled, the difference between the compensation the employee should have received and did receive constitutes an overpayment of compensation.¹⁶

ANALYSIS -- ISSUES 1 & 4

A loss of wage-earning capacity determination was made on August 6, 1993. The Office found that appellant was no longer totally disabled and he had the capacity to earn wages in a constructed position of orthotist. At that time, the Office calculated a weekly loss of wage-earning capacity of \$430.00. On November 28, 2005 the Office modified its loss of wage-earning capacity determination to reflect appellant's correct pay rate in his date-of-injury job. It determined that he had a 71 percent wage-earning capacity or weekly wages of \$323.62. He received retroactive compensation for total disability for the period June 18, 2000 to September 6, 2003.

¹⁰ 5 U.S.C. § 8102(a).

¹¹ 5 U.S.C. § 8105(a); *see also Duane C. Rawlings*, 55 ECAB 366 (2004).

¹² *Tammi L. Wright*, 51 ECAB 463 (2000).

¹³ 5 U.S.C. §§ 8101(4), 8114; *see Marco Padilla*, 51 ECAB 202, 207-08 (1999).

¹⁴ 5 U.S.C. § 8114(e).

¹⁵ *Id.*

¹⁶ *See generally Monte Fuller*, 51 ECAB 571 (2000) (discussion of proper determination of pay rate).

On December 9, 2003 the Office determined that appellant's compensation payments for the stated period were incorrectly processed after the Board's July 14, 2003 decision which reversed the Office's termination of appellant's compensation. The record reflects that he was incorrectly paid compensation for total disability. As a result, appellant received compensation in the amount of \$89,627.79. However, his compensation should have been \$26,032.65 based on the Office's November 28, 2005 wage-earning capacity determination. The difference paid to appellant created an overpayment of compensation. The Office calculated that during the period June 18, 2000 to September 6, 2003 appellant received compensation for total disability in the amount of \$89,627.79, but was only entitled to compensation for partial disability in the amount of \$26,032.65. The Board finds that this created an overpayment of \$63,595.14.

The Office further recalculated appellant's entitlement to compensation based on the correct pay rate and determined that he received a total overpayment of \$1,159.45 for the periods August 22, 1993 to June 17, 2000 and September 7, 2003 to June 11, 2005. In the instant case, the record reflects that appellant received compensation in the amount of \$50,147.17 during the period August 22, 1993 to June 17, 2000 and \$15,121.93 during the period September 7, 2003 to June 11, 2005. These payments were based on an erroneous weekly pay rate of \$323.62. Applying the correct pay rate of \$322.60, the Office determined that appellant should have received \$49,117.75 for the period August 22, 1993 to June 17, 2000 and \$14,991.90 for the period September 7, 2003 to June 11, 2005. The Office, therefore, subtracted the amount appellant should have received from the amount he was paid for each stated period and added these amounts to correctly calculate an overpayment of compensation in the amount of \$1,159.45. The Board finds that for the periods August 22, 1993 to June 17, 2000 and September 7, 2003 to June 11, 2005 appellant received an overpayment of \$1,159.45 due to his receipt of benefits calculated using an incorrect loss of wage-earning capacity pay rate. Appellant does not dispute that he received the overpayments in question nor does he dispute the amount of the overpayments. The Office explained how the overpayments occurred and provided this to appellant with the preliminary notices of overpayment. The Board finds that the Office properly determined the amount of the overpayments that covered the periods June 18, 2000 to September 6, 2003, August 22, 1993 to June 17, 2000 and September 7, 2003 to June 11, 2005.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act¹⁷ provides that an overpayment of compensation shall be recovered by the Office 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.¹⁸ Thus, the Office may not waive the overpayment of compensation

¹⁷ 5 U.S.C. § 8129(b).

¹⁸ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

unless appellant was without fault.¹⁹ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.²⁰

On the issue of fault, section 10.433 of the Office's regulations, provides that an individual will be found at fault if he or she has done any of the following:

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

“(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 was incorrect.”²¹

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

“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.”²²

In determining fault under section 10.433(a)(3), where the claimant receives compensation through direct deposit, the payment goes directly from the U.S. Treasury to the claimant's account. The Office may not deposit compensation into a claimant's account without authorization. The claimant must first complete a form authorizing the electronic transfer of payment to a named financial institution to be deposited to a designated account. It is only with the claimant's intent that these payments are deposited to his or her account which is something more than receipt; it is acceptance. When control of the funds passes to the claimant upon deposit, the acceptance necessary under section 10.433(a)(3) is established.²³

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment of \$63,595.14. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant

¹⁹ *Norman F. Bligh*, 41 ECAB 230 (1989).

²⁰ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

²¹ 20 C.F.R. § 10.433(a).

²² *Id.* at § 10.433(b).

²³ *Tammy Craven*, 57 ECAB ____ (Docket No. 05-249, issued July 24, 2006).

received the compensation checks in question, he knew or should have known that the payment was incorrect.²⁴

Based on the circumstances of this case, the Board finds that appellant is not with fault in creating the overpayment. The Office found that appellant should have known that he received an incorrect payment for his retroactive compensation because the next regular compensation check he received was for \$647.00 and that based on simple mathematics he should have determined that the amount of the \$89,914.14 check was incorrect. The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.²⁵ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.²⁶

In this case, appellant received compensation in the amount of \$89,914.14 by direct deposit. Since Office regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit.²⁷ Appellant had no reason to suspect at the time the \$89,914.14 payment was deposited into his checking account that the Office had issued an incorrect payment, given that this was the first incorrect payment made by the Office.²⁸ Furthermore, because the funds were deposited directly into his bank account, appellant was not in a position to immediately decline acceptance of the amount paid by the Office. Thus, the Board finds that he was not at fault in either creating or accepting the overpayment of \$63,595.14 for the period June 18, 2000 to September 6, 2003.²⁹ A finding of no fault does not mean, however, that the claimant may keep the money, only that the Office must consider eligibility for waiver for this period, and the case must be remanded for the Office to determine whether he is entitled to waiver for this period. After such further development as the Office may find necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived.

Based on the Board's determination in the second issue in this case, issue three regarding recovery of the \$63,595.14 overpayment need not be addressed at this time.

²⁴ *Diana L. Booth, supra* note 20.

²⁵ *See Karen K. Dixon, 56 ECAB ____* (Docket No. 03-2265, issued November 9, 2004).

²⁶ *See K.H., Docket No. 06-191* (issued October 30, 2006).

²⁷ *See Karen K. Dixon, supra* note 25.

²⁸ *See Tammy Craven, supra* note 23.

²⁹ *Id.*

LEGAL PRECEDENT -- ISSUE 5

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.³⁰ As noted, 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."³¹

Section 10.436 of the implementing regulation³² 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.³³ 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 \$50.00.³⁴

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 or her position for the worse.³⁵

Section 10.438 of the regulations provide that 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. Failure to submit the requested information within 30 days of the request shall result in the denial of the waiver.³⁶

³⁰ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

³¹ See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

³² 20 C.F.R. § 10.436.

³³ 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 base 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).

³⁴ See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

³⁵ 20 C.F.R. § 10.437.

³⁶ *Id.* at § 10.438.

ANALYSIS -- ISSUE 5

The Office found appellant to be without fault and eligible for consideration of waiver with regard to its finding that he received an overpayment in the amount of \$1,159.45. However, he did not timely submit any requested information regarding his financial situation. The applicable regulations provide that the individual who receives an overpayment is responsible for providing financial information and that failure to submit the requested financial information within 30 days of the request shall result in the denial of waiver.³⁷ Appellant failed to submit any evidence 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. Therefore, he does not qualify for waiver under the defeat the purpose of the Act standard.³⁸ Further, there is no evidence in this case, nor did appellant allege, that he relinquished a valuable right or change his position for the worse in reliance on the excess compensation he received from August 22, 1993 to June 17, 2000 and September 7, 2003 to June 11, 2005. The Office properly denied waiver based on appellant's failure to respond to the preliminary notice of overpayment. Pursuant to its regulations, the Office properly denied waiver of recovery of the overpayment amount of \$1,159.45.

LEGAL PRECEDENT -- ISSUE 6

Section 10.441 provides that, if an overpayment of compensation has been made to an individual entitled to further payments and 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 hardship.³⁹

ANALYSIS -- ISSUE 6

With respect to the Office's decision to deduct \$116.00 every four weeks from appellant's continuing compensation to recover the overpayment in the amount of \$1,159.45, the Board finds that such a repayment schedule is in accordance with section 10.441(a). In exercising its authority under section 10.441(a), the Office must 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.⁴⁰ Appellant did not respond to the Office's request for relevant financial information. Accordingly, the Board finds that the Office properly imposed repayment from continuing compensation at the rate of \$116.00 every four weeks pursuant to its recovery procedures.⁴¹

³⁷ *Id.*

³⁸ See *Nina D. Newborn*, 47 ECAB 132 (1995).

³⁹ 20 C.F.R. § 10.441 (1999).

⁴⁰ *Id.*

⁴¹ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.8 (May 2004).

LEGAL PRECEDENT -- ISSUE 7

A wage-earning capacity decision is a determination that either actual earnings or earnings in a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁴²

The Office's procedure manual provides that, "[i]f a formal [loss of wage-earning capacity] decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance, the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal [loss of wage-earning capacity]."⁴³

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.⁴⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴⁵

ANALYSIS -- ISSUE 7

The Office developed the evidence and determined that the issue presented was whether appellant's October 3, 2005 request for reconsideration was timely filed and presented clear evidence of error. Under the circumstances of this case, however, the Board finds that the issue presented was whether the August 6, 1993 wage-earning capacity determination should be modified.

According to the evidence of record, the Office found that the constructed position of orthotist represented appellant's wage-earning capacity. On December 11, 1993 appellant was laid off from this position because his physical limitations caused him to work slowly. On October 3, 2005 he contended that his condition had worsened to the extent that he became totally disabled for work in the selected position. Appellant submitted Dr. Childress's September 20, 2005 report. In this report, Dr. Childress stated that appellant had increasing numbness, tingling and pain in his upper extremities with repetitive activities of more than one and one-half hours. He also had increasing post-traumatic stress disorder that required continued treatment and monitoring by Dr. Jean-Pierre. Based on a September 13, 2001 MRI scan of appellant's cervical spine which demonstrated a deterioration of appellant's cervical problem, Dr. Childress opined that his original cervical strain had now resulted in a small herniated disc at C3-4. He recommended surgical intervention if the small disc rupture increased or worsened.

⁴² See *Sharon C. Clement*, 55 ECAB 552 (2004).

⁴³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁴⁴ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁴⁵ *Id.*

Dr. Childress further stated that his opinion remained that appellant was unable to be gainfully employed and that he was totally disabled due to a combination of physical and post-traumatic stress difficulties. Although he indicated that appellant's bilateral ulnar nerve neuropathy had reverted to normal, Dr. Childress opined that it was due to conservative measures as he was not performing activities and functions that would aggravate or accelerate the condition.

The Board has held that, when a wage-earning capacity determination has been issued, and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of wage-earning capacity is warranted.⁴⁶ The Office's procedure manual directs the claims examiner to consider the criteria for modification when the claimant requests resumption of compensation for total wage loss. This section of the procedure manual covers the situation when a claimant has stopped working, but the principle is equally applicable to a claim of increased disability. As appellant submitted medical evidence addressing his increased employment-related disability, the Board finds that the Office should have considered the issue as a request for modification of the wage-earning capacity determination. For this reason, the case must be remanded for an appropriate decision on this issue.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$63,595.14 from June 18, 2000 to September 6, 2003, due to receipt of total disability compensation instead of partial disability compensation based on the loss of wage-earning capacity determination. The Board, however, finds that he was not at fault in the creation of this overpayment. The Board further finds that appellant received an overpayment of compensation in the amount of \$1,159.45 from August 22, 1993 to June 17, 2000 and September 7, 2003 to June 11, 2005, due to an incorrect pay rate regarding his wage-earning capacity determination. The Board finds that the Office properly denied waiver of this overpayment and directed that the overpayment should be recovered by deducting \$116.00 from appellant's continuing monthly compensation payments. The Board finds that appellant's claim for compensation for total disability raised the issue of whether modification of the August 6, 1993 loss of wage-earning capacity decision was warranted.

⁴⁶ See *Sharon C. Clement*, *supra* note 39. The Board notes that consideration of the modification issue does not preclude the Office from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *Id.* at 556, n.10; *Cf. Elsie L. Price*, 54 ECAB 734 (2003) (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 15, 2006 decision is set aside and the case remanded for further proceedings consistent with this decision of the Board with respect to appellant's request for modification of the loss of wage-earning capacity determination. The Office's April 21, 2006 decision is affirmed. The Office's April 20, 2006 decision is affirmed in part as to the fact and amount of overpayment. The decision is reversed with respect to the fault determination and remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: October 11, 2007
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