

FACTUAL HISTORY

This case is before the Board for the second time. In the prior appeal, the Board set aside a July 10, 2006 overpayment decision and remanded for further proceedings.¹ The Office in the July 10, 2006 decision found that an overpayment in the amount of \$22,075.75 was created during the period November 3, 2004 through May 14, 2005 and denied appellant's request for waiver of the recovery of the overpayment. The Board found that the evidence of record was devoid of any evidence that compensation was paid for the period in question. The facts and the circumstances of the case are set forth in the Board's prior decision and are hereby incorporated by reference.²

On February 26, 2007 the Office received appellant's resubmission of his request for waiver of the recovery of the overpayment and information on the transition costs of \$21,399.55 he incurred in relocating from Oklahoma to Utah.

On March 13, 2007 the Office included a payment report which indicated that appellant received a total overpayment of compensation in the amount of \$25,249.47 for the period November 3, 2004 through May 14, 2005. It noted that appellant was paid twice for the time period December 26, 2004 through January 22, 2005 resulting in appellant receiving an extra 28 days of pay for a total of 277 days of pay during the period in question. The Office determined that appellant had a daily pay rate of \$112.8707 (based upon a compensation rate of \$3,160.38 every 28 days) for the period November 3, 2004 through March 19, 2005. On March 20, 2005 appellant's net compensation every 28 days was increased to \$3,274.26 or a daily pay rate of \$116.9378 due to a cost-of-living adjustment. The Office calculated appellant's overpayment by multiplying \$112.8707 by 165³ which equaled \$18,623.67 and \$116.9378 was multiplied by 56⁴ which equaled \$6,548.52. Combining these two amounts resulted in a total overpayment with a \$77.28 which appellant was paid for the cost-of-living adjustment for the period March 1 to 19, 2005 resulted in a total overpayment of \$25,249.47.

¹ Docket No. 06-1748 (issued February 16, 2007).

² On March 29, 2003 appellant, then a 29-year-old special agent, filed a traumatic injury claim alleging that on February 18, 2003 he sustained an injury to his lower back while engaged in exercise drills of the employing establishment and was thrown by a coworker. The Office accepted the claim for lumbar strain and paid appropriate benefits. By letter dated April 27, 2004, it placed appellant on the periodic rolls for temporary total disability. Appellant's compensation benefits were calculated at \$840.53 per week. Subsequently, the Office expanded the claim to include the condition of lumbosacral spondylosis. Appellant resigned from the employing establishment on March 20, 2005 and noted that he had accepted a position in Salt Lake City, Utah. In a letter dated April 26, 2005, he informed the Office that he had been able "to do some work out of my home since November 3, 2004," which subsequently turned into full-time work. In a May 31, 2005 completed overpayment recovery questionnaire (Form OWCP-20), appellant indicated that he had been working since November 3, 2004 with a monthly salary of \$7,000.00.

³ This was the number of days for the period November 3, 2004 to March 19, 2005 including the double payment for the period December 26, 2004 through January 22, 2005.

⁴ This was the number of days for the period March 20 through May 14, 2005.

The record contains copies of computer printouts showing payment of compensation to appellant during the period November 3, 2004 to May 14, 2005. For the period December 26, 2004 to January 22, 2005, the record contains two printouts noting compensation in the amount of \$3,362.12 was paid for this period with the date of check listed January 22, 2005.

By letter dated March 15, 2007, the Office advised appellant of a preliminary determination that an overpayment of compensation in the amount of \$25,249.47 had occurred from November 3, 2004 to May 14, 2005. It stated that appellant had returned to work on November 3, 2005 but continued to receive compensation payments for total disability on the periodic rolls. Additionally, the Office noted that appellant received a double payment for the period December 26, 2004 to January 22, 2005, giving him an extra 28 days of compensation, resulting in 277 days of compensation as opposed to 249 days. With respect to fault, the Office made a preliminary determination that appellant was without fault. 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 of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment and 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.

On April 20, 2007 appellant contended that the overpayment amount was incorrect based upon bank statements that he would be submitting. He also indicated that he would shortly be submitting additional evidence in support of his request.

By letter dated May 1, 2007, appellant requested waiver of recovery of the overpayment on the grounds that it would be against equity and good conscience. He noted that he was submitting copies of his bank statements disputing the fact that a double payment had occurred. In support of his equity argument, appellant submitted an April 19, 2007 letter from Samuel J. Macaluso, assistant special agent in charge, who requested that the overpayment be waived on the grounds that appellant suffered a financial loss due to his relocation from Oklahoma to Utah when the employing establishment was unable to offer him work within his physical restrictions. He also submitted an overpayment waiver of recovery form which contained no financial information.

On November 28, 2007 the Office issued a decision finding that an overpayment in the amount of \$25,249.47 was created during the period November 3, 2004 through May 14, 2005 and that appellant was without fault in the creation of overpayment but not entitled to a waiver of the recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Federal Employees' Compensation Act provides that, while an employee is receiving compensation under the Act the employee may not receive salary, pay or remuneration of any type from the United States. Office procedures provide that an

overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation except in limited specified instances.⁵

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that an overpayment was created as appellant returned to work on November 3, 2004 and continued to receive compensation on the periodic rolls for temporary total disability. Appellant disputed that he had received a double payment for the period December 24, 2004 through January 22, 2005. The Board finds an overpayment of compensation occurred, but that the evidence of record does not support the Office's determination that appellant had received a double payment for the period December 24, 2004 through January 22, 2005.

The Office calculated appellant's overpayment based on payments made for the period November 3, 2004 to May 14, 2005. It noted that it included in its calculation an alleged double payment made for the period December 26, 2004 to January 22, 2005. The record contains two identical computer printouts for the period December 26, 2004 to January 22, 2005. It appears that the Office determined that appellant had received a double payment based on these two identical computer printout pages. These computer printout pages indicate that appellant received a net payment in the amount of \$3,160.38, which was paid on January 22, 2005. It is unclear from the record that appellant received a double payment for the period December 26, 2004 to January 22, 2005 as the check issue date and information contained on both computer forms is identical. It appears that the Office merely printed the same computer print out twice. The Board thus finds that appellant did not receive a double payment for the period December 26, 2004 to January 22, 2005. As appellant did not receive a double payment for the period December 24, 2004 through January 22, 2005, the Board will reduce the overpayment by \$3,160.38 to the amount of \$22,089.09. There is no contrary evidence regarding the fact of and the amount of the overpayment. The Board will affirm as modified the Office's finding on the fact and the amount of the overpayment. Accordingly, appellant received an overpayment as he returned to work and continued to receive compensation.

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.⁶ The statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or 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."⁷

⁵ 5 U.S.C. § 8116(a); *see Danny E. Haley*, 56 ECAB 393 (2005) (Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation).

⁶ *See Robert Atchison*, 41 ECAB 83 (1989).

⁷ *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361 (1994).

Section 10.436 of the implementing regulation⁸ provides that recovery of an overpayment would 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.⁹ 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 \$50.00.¹⁰

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in 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.¹¹

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 waiver.¹²

ANALYSIS -- ISSUE 2

The Office properly found that appellant was without fault in the creation of the overpayment as he did not meet any of the above-mentioned criteria for determining fault. Although it requested financial information, appellant did not provide it within 30 days of the May 1, 2007 request or at any time thereafter. The overpayment recovery form appellant submitted contains no financial information at all. While appellant noted that he submitted copies of his bank statements, no financial records are contained in the record as of November 28, 2007. The only information received by the Office was a piece of paper detailing the costs of relocating from Oklahoma to Utah. Appellant submitted no financial documentation supporting the costs involved in his relocation. As no financial information was provided, the

⁸ 20 C.F.R. § 10.436.

⁹ An individual's assets must exceed a resource based on \$4,800.00 for an individual or \$8,000.00 or an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. This base includes all of the claimant's assets not exempted from recumbent. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (October 2004). See also *W.F.*, 57 ECAB 705 (2006).

¹⁰ See *George A. Rodriguez*, 57 ECAB 224 (2005); *Sherry A. Hunt*, 49 ECAB 467 (1998).

¹¹ 20 C.F.R. § 10.437.

¹² 20 C.F.R. § 10.438.

Office was directed by 20 C.F.R. § 10.438(b) to deny waiver. Therefore, the Office properly denied his request for waiver of the recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$22,089.09 and that the Office properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 28, 2007 is affirmed as modified.

Issued: August 6, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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