

**United States Department of Labor
Employees' Compensation Appeals Board**

D.M., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
MARYLAND HEALTH CARE CENTER,
Baltimore, MD, Employer**

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**Docket No. 07-1947
Issued: February 4, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 17, 2007 appellant filed a timely appeal from the July 3, 2007 decision of the Office of Workers' Compensation Programs finding an overpayment of \$988.81, that waiver of the overpayment was not warranted and that recovery should be accomplished by deducting \$164.80 every four weeks from continuing compensation payments. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the issue of overpayment.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$988.81; (2) whether it properly determined that waiver of the overpayment was not warranted; and (3) whether the Office properly required payment of the overpayment by deducting \$164.80 every four weeks from appellant's continuing compensation.

FACTUAL HISTORY

On October 2, 2003 appellant, then a 46-year-old information technology specialist, injured his back while lifting equipment onto a shelf. He stopped work on October 15, 2003. On December 2, 2003 the Office accepted appellant's claim for displacement of an intervertebral disc in the lumbar spine. On May 28, 2004 he underwent the surgical excision of his herniated L4-5 disc.

On July 21, 2004 the Office placed appellant on the periodic rolls effective June 13, 2004 and informed him that he was entitled to receive compensation in the net amount of \$2,768.68, every 28 days until he returned to work. On August 26, 2004 he returned to full duty. Appellant stopped work again on October 7, 2004 due to back pain.¹ On August 15, 2005 he was released to work in a light-duty position.

On August 30, 2005 appellant filed a claim, Form CA-2a, alleging that he experienced a recurrence of disability resulting from his return to work the previous year. On January 7, 2006 the employing establishment terminated him from its employ because it did not have a position compatible with his physical restrictions.

By decision dated March 20, 2006, the Office accepted appellant's claim of recurrence of disability. He was accepted for medical benefits and monetary benefits through August 15, 2005, when he was released to light-duty employment. On June 27, 2006 appellant received a lump-sum payment for the period October 7, 2004 through August 15, 2005. On March 7, 2007 he received a lump-sum payment for the period December 2, 2005 to February 17, 2007 due to his termination by the employing establishment. Appellant was also placed on the periodic rolls and began receiving wage-loss compensation of \$3,019.00 every four weeks.²

On June 12, 2007 the Office made a preliminary determination that appellant had been overpaid in the amount of \$988.81. It stated that he had received compensation from the periodic rolls for the full payment cycle ending September 4, 2004, though he had returned to work on August 26, 2004. The Office found that appellant incorrectly received 10 calendar days of disability compensation. It calculated that 10 calendar days at the weekly rate of \$703.39, which was two thirds of the weekly date-of-injury pay rate, yielded an overpayment of \$1,007.70. This amount was reduced by health insurance deductions of \$18.89 for a net overpayment of \$988.81. The Office determined that appellant was at fault in the creation of the overpayment because he should have known that he was not entitled to disability compensation after returning to work.

On June 17, 2007 appellant contested that an overpayment had occurred. He indicated that a review of his banking and financial records showed no deposit of \$988.81. Appellant further stated that, if an overpayment had occurred because of his return to work, he was not at fault as he timely informed the Office of his return to work on August 26, 2004. On the

¹ Appellant filed a traumatic injury claim on October 13, 2004 alleging that he was totally disabled due to a new injury. The Office denied this claim, File No. 032033631, on December 3, 2004.

² The Office deducted \$69.88 for health insurance, yielding a net payment of \$2,949.12.

overpayment recovery questionnaire he stated that, on a monthly basis, he received no income, \$114.00 in veteran's disability and \$200.00 in interest savings for retirement. Appellant listed \$1,792.00 in monthly expenses, including \$1,192.00 for rent or mortgage, \$100.00 for food, \$50.00 for clothing, \$350.00 for utilities and \$100.00 for other expenses. He stated that he had funds of \$70,600.00 in cash and bank accounts.

By decision dated July 3, 2007, the Office found that an overpayment existed, that appellant was not at fault in its creation and that waiver of repayment was not warranted. The Office found that he did not knowingly accept incorrect payments and therefore was not at fault in the creation of the overpayment. In determining whether waiver should be made, the Office noted that, in addition to the sources of income that appellant listed, he received monthly disability compensation from the Office in the amount of \$3,272.88.³ When added to the income he reported, the Office found that his total monthly income was \$3,586.88, which exceeded his monthly expenses of \$1,792.00 by \$1,794.88. Because appellant did not need all of his current income to meet his ordinary and necessary living expenses and repayment would not require severe financial hardship, the Office found that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience. The Office stated that the overpayment would be recovered by withholding \$164.80 from his continuing compensation payments from August 5 through December 23, 2007, with a final withholding of \$6.12 on January 20, 2008.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act⁴ and its implementing regulations⁵ sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. When an overpayment has been made because of an error of fact or law, the Office is required to adjust it in accordance with its regulations.⁶

ANALYSIS -- ISSUE 1

The record establishes that appellant was placed on the periodic rolls effective June 13, 2004 and received payments in the amount of \$2,768.68, every four weeks thereafter. He was compensated for the entire payment cycle ending on September 4, 2004. As appellant returned to work at the employing establishment during the course of that cycle on August 26, 2004 the Board finds that he received disability compensation for 10 calendar days after he returned to work.

³ The Board notes that the Office based its calculations on a periodic rolls payment of \$3,021.12. The record indicates that the periodic payment was \$3,019.00, which, by using the same formula as the Office would result in a gross monthly income of \$3,270.58. Although the amounts are slightly different, the Board finds that it constitutes harmless error as it does not affect the outcome of the appeal.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ 5 U.S.C. § 8129(a).

The Office properly calculated that 10 calendar days at the weekly rate of \$703.39, which was two thirds of the weekly date-of-injury pay rate, yielded a gross overpayment of \$1,007.70. This amount was properly reduced by \$18.89 for health insurance deductions for a net overpayment of \$988.81. The Board concludes that the Office properly determined that appellant was overpaid by \$988.81.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁷ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of the Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁸

Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.⁹ Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.¹⁰ Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹¹

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹²

ANALYSIS -- ISSUE 2

The Office found that appellant was not at fault in the creation of the overpayment, but that waiver was not warranted. Therefore, the issue is whether he has established that recovery

⁷ 20 C.F.R. § 10.433(a).

⁸ 20 C.F.R. § 10.434.

⁹ 20 C.F.R. § 10.436.

¹⁰ 20 C.F.R. § 10.437(a).

¹¹ 20 C.F.R. § 10.437(b).

¹² 20 C.F.R. § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

On the overpayment recovery questionnaire appellant stated that on a monthly basis he received \$114.00 in veterans' disability benefits and \$200.00 in interest savings for retirement. Though he did not list it, the record establishes that he received a monthly income averaging \$3,270.58, for his disability compensation.¹³ When combined with his other income sources, appellant had a monthly income of \$3,584.58. He reported that he had funds of \$70,600.00 in cash and bank accounts. Appellant listed \$1,792.00 in monthly expenses, including \$1,192.00 for rent or mortgage, \$100.00 for food, \$50.00 for clothing, \$350.00 for utilities and \$100.00 for other expenses.

Office procedures provide that an individual is deemed to need substantially all of his or her 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 \$50.00.¹⁴ Appellant's monthly income of \$3,584.58 exceeded his monthly expenses of \$1,792.00 by \$1,792.58, well in excess of the \$50.00 base provided in Office procedures. The Board, therefore, finds that the Office properly concluded that recovery at the rate of \$164.80 per compensation period from continuing compensation would not cause financial hardship to him or defeat the purpose of the Act. Furthermore, appellant made no argument that he gave up a valuable right or changed his position for the worse in reliance on the overpaid compensation. The Office properly determined that recovery would not be against equity and good conscience.

The Board finds that the Office properly denied waiver of the overpayment and is required by law to recover the debt by decreasing later payments to which appellant is entitled.

LEGAL PRECEDENT -- ISSUE 3

The Office's implementing regulations 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 any hardship.¹⁵

ANALYSIS -- ISSUE 3

The Board finds that the Office gave due regard to the relevant factors noted above in setting a rate of recovery of \$164.80 per compensation period. The record indicates that

¹³ The monthly average is reached by multiplying appellant's periodic roll payment by 13, the number of periodic roll payments in a year and dividing the result by 12.

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(3)(3) (December 2004).

¹⁵ 20 C.F.R. § 10.441(a).

appellant had discretionary income of \$1,792.58 per month and funds of \$70,600.00. The Board finds, therefore that the Office did not abuse its discretion in finding that appellant should repay his overpayment at the rate of \$164.80 per compensation period.

CONCLUSION

The Board finds that appellant received an overpayment in compensation in the amount of \$988.81 because he received disability compensation for 10 days that he was working, that the Office properly denied waiver of the overpayments and that it properly required repayment of the overpayment by deducting \$164.80 every four weeks from appellant's continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 3, 2007 is affirmed.

Issued: February 4, 2008
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