

FACTUAL HISTORY

On January 17, 2002 appellant, then a 37-year-old horse wrangler leader, sustained injury to his right shoulder and leg when he was bucked off a horse.¹ The Office accepted the claim for right shoulder contusion, fractured right femur/medial condyle with partial anterior cruciate ligament (ACL) tear, lumbar sprain, lumbar disc displacement and authorized right ACL reconstruction and patellar tendon allograft, which occurred on March 25, 2002. A right rotator cuff surgery was performed on April 30, 2002. Appellant stopped work on January 17, 2002 and returned to modified work on July 1, 2002. On January 16, 2003 he had surgery for right knee arthroscopy and partial medial meniscectomy. Subsequently, the Office authorized L5-S1 decompression fusion with autograft surgery, which was performed on March 26, 2003 and accepted lumbar radiculopathy, spondylolisthesis and L5-S1 with moderate compression of bilateral L5 nerve roots. Appellant returned to light-duty work on June 1, 2003 work following his back surgery.²

On October 2, 2002 appellant filed a traumatic injury claim alleging that on October 1, 2002 he injured his right knee while stepping off of a hay bale on a feed wagon.³ The Office accepted the claim for a right knee injury.

On October 21, 2004 appellant elected to receive compensation benefits under the Federal Employees' Compensation Act in lieu of benefits provided by the Office of Personnel Management.⁴ The Office placed appellant on the periodic rolls in receipt of temporary total disability effective November 28, 2004.

On November 28, 2005 a vocational rehabilitation counselor reported that appellant had been working for the state of Montana since November 29, 2004 as a livestock inspector earning \$9.50 per hour.

On August 10, 2006 appellant completed an August 1, 2006 EN1032 form covering the prior 15 months. He indicated that he had been working as a brand inspector since November 29, 2004 earning \$9.50 per hour.

On August 23, 2006 the Office issued a loss of wage-earning capacity decision based on appellant's ability to earn wages as a brand inspector. The Office reduced his compensation to \$466.88 per week.

¹ This was assigned claim number 132045347.

² The Office issued schedule awards for an 18 percent permanent impairment of the right upper extremity on July 21, 2003 and a 5 percent permanent impairment of the left lower extremity on October 4, 2004.

³ This was assigned claim number 132063435. On May 13, 2003 the Office combined claim number 132045347, with claim number 132063435, with claim number 132045347 as the master claim number. On December 4, 2003 the Office issued a schedule award for a six percent permanent impairment of the right lower extremity.

⁴ Appellant was separated from the employing establishment effective September 23, 2004. On December 7, 2004 appellant informed the Office that he had relocated to Montana.

On January 26, 2007 the Office made a preliminary determination that appellant received an overpayment in the amount of \$26,162.24, during the period November 29, 2004 to August 5, 2006 because he received compensation benefits for total disability while earning wages as a brand inspector. In an attached memorandum to file, it determined that appellant had been paid \$54,556.25 when he was only entitled to \$28,384.01, resulting in an overpayment of \$26,172.24. The Office found appellant to be with fault in the creation of the overpayment as he should have known that he was not entitled to receipt of compensations for total disability when he was earning wages. 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. He completed the overpayment recovery questionnaire on February 18, 2007. Appellant reported total monthly income of \$3,581.10. He itemized about \$3,228.64 in monthly expenses. Appellant listed assets of \$720.00, cash on hand, savings account balance and checking account. At the May 25, 2007 prerecoupment hearing, an Office hearing representative reviewed the overpayment recovery questionnaire with appellant. Subsequent to the hearing appellant submitted documentation of his expenses regarding credit and utility expenses.

By decision dated July 11, 2007, the hearing representative found that appellant received an overpayment in the amount of \$26,172.24 during the period November 29, 2004 to August 5, 2006 because he was earning wages as brand inspector while receiving compensation benefits for total disability. He determined that appellant was without fault in the creation of the overpayment as appellant did not fully understand that compensation benefits under the Act are offset by actual earnings and he had complied with the Office reporting requirements. The Office hearing representative denied waiver of the recovery of the overpayment as appellant did not need all of his current income to meet monthly expenses. He disallowed appellant's claimed monthly expenses of \$64.00 for satellite television and \$89.00 for internet service as not ordinary and necessary expenses. The hearing representative also disallowed appellant's monthly wireless telephone expense of \$111.00 as not an ordinary and necessary expense, but found the home telephone monthly expense of \$68.00 was acceptable as an ordinary and necessary expense. He also disallowed \$296.00 for Visa expenses as there was no supporting documentation and disallowed \$200.00 for other expenses as "expenses for no more than two motor vehicles may be considered ordinary and necessary." The hearing representative then reduced appellant's monthly expense of \$3,066.00 by \$760.00 to find an allowable total monthly expense of \$2,306.00. Next, he found that appellant's income totaled \$3,694.00, which left excess income in the amount of \$1,388.00. The hearing representative directed recovery of the overpayment by deducting \$250.00 per month from appellant's continuing compensation benefits.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Act⁵ provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. Section 8106(a) provides in pertinent part as noted:

“If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability.”⁶

The Act further provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.⁷ Section 8129(a) of the Act provides that, when an overpayment has been made to an employee because of an error of fact or law, adjustment shall be made by decreasing later payments to which he is entitled.⁸

In determining whether a claimant is entitled to compensation benefits, the Office is required by statute and regulation to make findings of fact.⁹ Office procedure further specifies that a final decision of the Office must include findings of fact and provide clear reasoning which allows the claimant to understand the precise defect of the claim and the kind of evidence which would tend to overcome it.¹⁰ These requirements are supported by Board precedent.¹¹

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$26,172.24, during the period November 29, 2004 to August 5, 2006. The record shows that appellant received an overpayment during the period in question because he received wage-loss compensation for total disability after returning to full-time work on November 29, 2004. The Office calculated the \$26,172.24 overpayment by totaling the amount of temporary total disability compensation appellant received for the period November 29, 2004 to August 5, 2006, \$54,556.25 and subtracting the amount of compensation

⁵ 5 U.S.C. §§ 8101-8193, 8102(a).

⁶ 5 U.S.C. § 8106(a).

⁷ 5 U.S.C. § 8116(a).

⁸ 5 U.S.C. § 8129(a)

⁹ 5 U.S.C. § 8124(a) provides: The Office shall determine and make a finding of facts and make an award for or against payment of compensation. 20 C.F.R. § 10.126 provides in pertinent part that the final decision of the Office shall contain findings of fact and a statement of reasons.

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (March 1997). See also *Paul M. Colosi*, 56 ECAB 294 (2005).

¹¹ See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

to which he was entitled, \$28,384.01, for an overpayment of \$26,172.24. The Office properly found that appellant received an overpayment of compensation in the stated amount during this period.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act¹² provides: 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 the Act or would be against equity and good conscience.¹³ Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.¹⁴

On the issue of fault, 20 C.F.R. § 10.433(a) 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.¹⁵

ANALYSIS -- ISSUE 2

The Office found that appellant was without fault in the creation of the overpayment. However, waiver of the recovery of the overpayment was not warranted. In determining that appellant was not entitled to a waiver of the overpayment, the Office reviewed his income, expenses and assets as listed in his February 18, 2007 OWCP-20 form. The overpayment questionnaire indicates that he had a monthly income of \$3,581.10.

The hearing representative disallowed the following expenses because appellant failed to explain how they were ordinary and necessary. These expenses include \$64.00 for satellite television; \$111.00 for wireless service \$89.00 for internet service; and \$200.00 for expenses for two additional motor vehicles. The hearing representative also disallowed a \$296.00 Visa expense as appellant had not provided supporting documentation.¹⁶ The Board finds the Office properly disallowed these expenses as it is appellant's burden of proof to establish that the expenses are ordinary and necessary.¹⁷

The Board finds that it was reasonable for the Office to allow ordinary and necessary living expenses of \$2,831.24. Appellant's income of \$3,694.00 per month exceeded his

¹² 5 U.S.C. § 8129.

¹³ 5 U.S.C. § 8129(b). *See Terry A. Keister*, 56 ECAB 559 (2005).

¹⁴ *Tammy Craven*, 57 ECAB 689 (2006).

¹⁵ 20 C.F.R. § 10.433(a).

¹⁶ 20 C.F.R. § 10.437(b).

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Action*, Chapter 6.200.6(a)(3) (May 2004).

allowable monthly expenses of \$2,306.00 by \$1,388.00 per month. Even if the Board included the \$760.00 of expenses disallowed by the hearing representative, this would still result in appellant's monthly income exceeding his monthly expenses, but by the lower amount of \$628.00. Therefore, appellant does not qualify for waiver of the recovery of the overpayment under the defeat the purpose of the Act standard.¹⁸

Further, there is no evidence in this case and appellant did not allege, that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received for the period November 29, 2004 to August 5, 2006. Pursuant to its regulations, the Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

The evidence fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. The Board finds that the Office did not abuse its discretion in denying a waiver of recovery of the overpayment of \$26,172.24.

LEGAL PRECEDENT -- ISSUE 3

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.¹⁹

ANALYSIS -- ISSUE 3

After determining that appellant was not entitled to waiver, the Office found that he could repay the overpayment by withholding \$500.00 every 28 days from his continuing compensation. The record indicates that, after \$250.00 is added to his ordinary and necessary monthly expenses, his current monthly income still exceeds expenses by more than \$50.00. The Board finds that the Office gave due regard to appellant's financial circumstances and did not abuse its discretion in determining the rate of repayment in this case in finding that repayment of the overpayment could be accomplished by withholding \$250.00 every 28 days from appellant's compensation.

CONCLUSION

The Board finds that appellant received a \$26,172.24 overpayment of compensation. The Board further finds that the Office properly denied waiver. It also finds that the Office properly directed recovery of the overpayment by deducting \$250.00 from appellant's continuing compensation.

¹⁸ See *George A. Rodriguez*, 57 ECAB 224 (2005) (Office procedures state that 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); *Nina D. Newborn*, 47 ECAB 132 (1995).

¹⁹ 20 C.F.R. § 10.441.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 11, 2007 is affirmed.

Issued: June 13, 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