

FACTUAL HISTORY

On July 9, 2001 appellant, then a 51-year-old clerk, filed an occupational disease claim alleging that she sustained carpal tunnel syndrome due to factors of her federal employment. The Office accepted the claim for recurrent bilateral carpal tunnel syndrome. It previously accepted that appellant sustained carpal tunnel syndrome under file number 12-0156203. In a decision dated January 31, 1997, it granted her a schedule award for a 10 percent permanent impairment of each upper extremity.

By decision dated March 14, 2007, the Office granted appellant a schedule award for an 11 percent permanent impairment of the left upper extremity.² The period of the award ran for 34.32 weeks from June 14, 2006 to February 9, 2007. The Office based its schedule award on the finding by the Office medical adviser that appellant had a total left upper extremity impairment of 11 percent.

On July 23, 2007 the Office notified appellant of its preliminary determination that she received an overpayment of \$22,167.60 for the period July 6, 2006 to February 9, 2007. It found that the overpayment occurred because it issued her a schedule award for an 11 percent left upper extremity impairment without adjusting for the 10 percent schedule award previously paid. The Office calculated the overpayment by subtracting the additional 1 percent owed appellant for a left upper extremity impairment of \$2,216.76 from the 11 percent paid to her of \$24,384.36, to find a total overpayment of \$22,167.60. It determined the period of the overpayment by finding that it owed her a schedule award for an additional 1 percent impairment for the period June 14 to July 5, 2006 and overpaid her from July 6 to February 9, 2007. The Office further advised appellant of its preliminary determination that she was not at fault in the creation of the overpayment. It requested that she complete the enclosed overpayment recovery questionnaire and submit supporting financial documents in support of waiver. Additionally, the Office notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a prerecoumment hearing.

By decision dated September 11, 2007, the Office finalized its finding that appellant received an overpayment of \$22,167.50 for the period June 14, 2006 to February 9, 2007.³ It found that she was without fault in the creation of the overpayment but was not entitled to waiver. The Office noted that appellant had not responded to its preliminary notification of overpayment. It determined that she should forward a check for the entire amount as repayment of the overpayment.⁴

On October 6, 2007 appellant requested a prerecoumment hearing. She contested the overpayment finding and submitted a completed overpayment recovery questionnaire and financial information supporting waiver. By decision dated November 13, 2007, the Office

² By decision dated April 12, 2004, the Office issued appellant a schedule award for a 24 percent permanent impairment of the right upper extremity, less the 10 percent previously paid.

³ In the final decision, the Office did not separate out the period that it paid appellant the one percent of compensation for the additional left upper extremity impairment in determining the period of the overpayment.

⁴ Appellant received disability retirement from the Office of Personnel Management effective April 1, 2006.

denied appellant's request for a prereducement hearing as it was made after the final overpayment decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8108 of the Federal Employees' Compensation Act⁵ provides for the reduction of compensation for subsequent injury to the same member as follows:

"The period of compensation payable under the schedule in section 8107(c) of this title is reduced by the period of compensation paid or payable under the schedule for an earlier injury if --

(1) compensation in both cases is for disability of the same member or function or different parts of the same member or function or for disfigurement; and

(2) the Secretary of Labor finds that compensation payable for the later disability in whole or in part would duplicate the compensation payable for the preexisting disability."

ANALYSIS -- ISSUE 1

Appellant initially received a schedule award for a 10 percent permanent impairment of the left upper extremity on January 31, 1997. On March 14, 2007 the Office granted her a schedule award for an 11 percent permanent impairment of the left upper extremity.⁶ It based the award on its finding that the medical evidence showed that appellant had an 11 percent permanent impairment of the left upper extremity. However, as she previously received an award for a 10 percent impairment of the left upper extremity, she was only entitled to an award for an additional 1 percent impairment.⁷ Appellant received \$24,384.36 from the Office for the period June 14, 2006 to February 9, 2007 but was entitled to receive only \$2,216.76 for the additional one percent impairment. She thus received an overpayment of compensation in the amount of \$22,167.60.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁵ provides that an overpayment must be recovered 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." (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether

⁵ 5 U.S.C. §§ 8101-8193.

⁶ The Board notes that appellant has not appealed the merits of the schedule award decision but is instead pursuing reconsideration of the decision before the Office.

⁷ See 5 U.S.C. § 8108.

recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.⁶

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses and also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.⁸ An individual's liquid assets include but are not limited to case, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.⁹ Nonliquid assets include but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings and supplies.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 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 To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.¹²

ANALYSIS -- ISSUE 2

The Office, in its preliminary notification to appellant of the existence of the overpayment, informed her that she needed to explain her reasons for seeking a waiver, complete the recovery questionnaire form and submit financial documents to support her claimed income and expenses. The overpayment recovery questionnaire is designed to obtain the financial information to determine whether adjustment or recovery would defeat the purpose of the Act. Appellant did not return the overpayment recovery questionnaire provided by the Office and did not otherwise submit financial evidence or supporting documentation to establish that recovery of the overpayment would defeat the purpose of the Act. Neither did she submit evidence to establish that recovery of the overpayment would be against equity and good conscience because, in reliance on the overpaid compensation, she relinquished a valuable right or changed her position for the worse. Although appellant is without fault in the creation of the overpayment, she nevertheless bears responsibility for providing the financial information

⁸ 20 C.F.R. § 10.436. Office procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

⁹ *Id.*

¹⁰ *Id.*

¹¹ 20 C.F.R. § 10.436.

¹² *Id.* at § 10.437(b)(1).

necessary to support her request to waive recovery of the overpayment. Section 10.438 of the regulations states that a claimant who received an overpayment is responsible for providing information about income, expenses and assets to the Office so that it may determine whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹³ Failure to submit the information, which will also be used to determine a repayment schedule if necessary, within 30 days of a request from the Office will result in a denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.¹⁴

As appellant did not submit any evidence in response to the preliminary notice of the overpayment the Board finds that the Office did not abuse its discretion in refusing to waive recovery of the overpayment.¹⁵

LEGAL PRECEDENT -- ISSUE 3

Section 10.440(b) of the Office's regulations provides that the only review of a final decision concerning an overpayment is to the Board. The provisions of 5 U.S.C. § 8124(b) (concerning hearings) and 5 U.S.C. § 8128 (concerning reconsiderations) do not apply to such a decision.¹⁶ The Board has found that the implementation of this regulation is a proper exercise of the Director's discretion and that a claimant has no further right to review by the Office once a final decision on the issue of overpayment has been issued.¹⁷

ANALYSIS -- ISSUE 3

The Office notified appellant of its preliminary determination that she received an overpayment of compensation in a letter dated July 23, 2007. It informed her that she could request a telephone conference, a prerecoupment hearing or a final decision based on the written evidence within 30 days of the date of the letter. By decision dated September 11, 2007, the Office finalized its overpayment determination and denied waiver of the overpayment. On October 6, 2007 appellant requested a prerecoupment hearing after the final overpayment decision. The Office's regulations at section 10.440(b) provides that the only review of a final decision concerning an overpayment is to the Board.¹⁸ The regulation further provides that the hearing provisions of section 8124(b) do not apply to an overpayment decision.¹⁹ The Office

¹³ 20 C.F.R. § 10.438(a).

¹⁴ *Id.* at § 10.438(b); *Robert B. Hutchins*, 52 ECAB 344 (2001).

¹⁵ Subsequent to the Office's September 11, 2007 overpayment decision, appellant submitted information regarding waiver. The Board's jurisdiction is limited to the evidence before the Office at the time of its decision; *see* 20 C.F.R. § 501.2(c).

¹⁶ 20 C.F.R. § 440(b); *see also Jan K. Fitzgerald*, 51 ECAB 659 (2000).

¹⁷ *Charles E. Nance*, 54 ECAB 447 (2003); *Philip G. Feland*, 48 ECAB 485 (1997).

¹⁸ 20 C.F.R. § 440(b).

¹⁹ *Id.*; *see also Charles E. Nance*, *supra* note 17.

thus properly denied appellant's request for a prerecoupment hearing as it was made following the final overpayment decision.

On appeal, appellant's attorney contends that she tried to request a prerecoupment hearing by letter dated August 7, 2007. He enclosed additional evidence on appeal. The case record, however, does not contain a letter to the Office from appellant dated August 7, 2007. The Board has no jurisdiction to review evidence for the first time on appeal.²⁰

CONCLUSION

The Board finds that appellant received an overpayment of \$22,167.60 for the period June 14, 2006 to February 9, 2007. The Board further finds that the Office properly denied waiver of the overpayment and her request for a prerecoupment hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 13 and September 11, 2007 are affirmed.

Issued: September 15, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

²⁰ 20 C.F.R. § 501.2(c).