

injure his low back. The Office accepted appellant's claim for a lumbar strain. Appellant stopped work on February 10, 2005 and returned to work part time, four hours per day on February 14, 2005. He was placed on the periodic rolls for temporary partial disability on December 24, 2006.

On December 20, 2007 the employing establishment advised the Office that appellant returned to work full time on November 14, 2007. It noted that appellant worked in the field for the first two days and then in the office until November 29, 2007. The employing establishment advised that it did not have a light-duty position to accommodate appellant and his position was subsequently terminated.

In a worksheet dated January 2, 2008, the Office noted that appellant was released and returned to work full-time regular duty on November 14, 2007 but remained on the periodic rolls cycle until December 22, 2007. It noted that appellant was entitled to compensation through November 13, 2007. Appellant's weekly pay rate was \$934.69 and his compensation rate was three-quarters. The Office calculated that, from October 28 to December 22, 2007, a period of 56 days, he was paid \$6,640.00 in compensation. For the period October 28 to November 13, 2007, a period of 17 days, appellant was entitled to \$1,804.43, which created an overpayment of \$4,835.57.

On January 7, 2008 the Office issued a preliminary determination that appellant received a \$4,835.57 overpayment of compensation. It found that, for the period November 14 to December 22, 2007, appellant was overpaid compensation as he returned to work full time on November 14, 2007 but continued to receive total temporary disability compensation. The Office determined that appellant was without fault in the creation of the overpayment. In an attached memorandum it noted that appellant was never issued a CA-1049 when he was placed on the periodic rolls effective December 24, 2006, which instructs a claimant to contact the Office when he returns to work to avoid an overpayment. The Office allotted appellant 30 days to request a prerecoupment hearing and to submit a completed overpayment recovery questionnaire (Form OWCP-20), together with supporting financial information to support any request for waiver.¹

In a January 31, 2008 letter, appellant noted that his wife was unwilling to provide her financial information for the overpayment questionnaire. He noted that he did not cash the compensation check for \$3,034.30 issued December 22, 2007 and requested the Office confirm receipt before determining the overpayment amount. Appellant advised that he had no income or assets other than benefits and retirement funds, deferred compensation and his personal home and joint personal possessions. In a letter dated February 5, 2008, he indicated that he was in receipt of and never cashed a compensation check in the amount of \$3,034.30 issued December 22, 2007. Appellant indicated that he worked only 10 days because his employer could not accommodate his work restrictions and currently had no income. He noted returning the check to the Office.

¹ On January 31, 2008 the Office issued a decision denying appellant's claim for recurrence of disability. On February 10, 2008 appellant requested an oral hearing for this decision. The Board notes that this decision is not before the Board in the present appeal. *See* 20 C.F.R. § 501.2(c).

In a letter dated February 21, 2008, the Office requested that appellant return the December 22, 2007 compensation check. On March 7, 2008 the claims examiner acknowledged receipt of the treasury check for the period November 25 to December 22, 2007 in the amount of \$3,034.30. The Office requested that appellant complete the overpayment questionnaire attached to the correspondence. Without this document, there was no basis to consider undue hardship and assured appellant that any financial information provided would be private. The Office advised that the overpayment of \$4,835.57 would be reduced by the returned check of \$3,034.30 and the remaining balance would be \$1,801.27.

In an electronic mail dated March 13, 2008, the employing establishment noted that the compensation check issued to appellant in the amount of \$3,034.30 on December 22, 2007 was cancelled by the Department of Treasury.

By decision dated April 9, 2008, the Office determined that appellant received a \$4,835.57 overpayment of compensation. It advised that for the period November 14 to December 22, 2007 appellant was overpaid compensation in the amount of \$4,835.57 because he returned to work full time on November 14, 2007 during a period in which he was in receipt of total temporary disability compensation. The Office determined that appellant was without fault in the creation of the overpayment but denied waiver of recovery of the overpayment on the basis that he failed to complete the overpayment questionnaire and provide any additional documents or financial information in support of waiver. As appellant returned a compensation check in the amount of \$3,034.30, this reduced the outstanding balance to \$1,801.27. The Office requested that appellant send a \$1,801.27 check or contact the Office regarding repayment.

On March 15, 2008 appellant submitted the overpayment questionnaire. He also sent a letter dated March 17, 2008 noting that he had no income. On May 5, 2008 appellant requested a prerecoupment hearing and asserted that the overpayment occurred through no fault of his own.

In a decision dated May 13, 2008, the Office denied appellant's prerecoupment hearing request, as it was not postmarked until May 5, 2008, more than 30 days after the January 7, 2008 preliminary repayment notice and following the April 9, 2008 final overpayment decision. It advised appellant that a final overpayment decision was not subject to the hearing provision of 5 U.S.C. § 8124(b). The Office noted that appellant could appeal to the Board if he disagreed with the Office's decision.²

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³ When an overpayment has been made to an individual

² The Office noted it was still processing his hearing request of the January 31, 2008 recurrence denial. *See supra* note 1.

³ 5 U.S.C. § 8102(a).

because of an error of fact or law, adjustments shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁴

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁵ Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁶

ANALYSIS -- ISSUE 1

The record establishes that appellant's claim was accepted for a lumbar sprain and he was paid compensation benefits under Act. Appellant was released and returned to work full-time regular duty on November 14, 2007 at full salary but continued to receive wage-loss compensation for total disability through December 22, 2007. Thus, an overpayment was created as he received wage-loss compensation for the same period in which he received earnings from his employment. Appellant did not dispute that an overpayment occurred and returned the December 22, 2007 compensation check that he had not cashed. The Office calculated that, from October 28 to December 22, 2007, appellant received \$6,640.00 in total disability compensation but should have received only \$1,804.43 for partial disability. It subtracted \$1,804.43 from \$6,640.00 and found that the difference between the amount of compensation appellant received and the amount he should have received was \$4,835.57. The Board will affirm the overpayment in this amount. The Office explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. As appellant returned the compensation check for the period November 25 to December 22, 2007 in the amount of \$3,034.30, this reduced the outstanding balance to \$1,801.27. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$4,835.57 for the period November 14 to December 22, 2007.

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.⁷ These 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."⁸ Since the Office found that appellant to be without fault in the creation of the overpayment, then, in accordance with section

⁴ *Id.* at § 8129(a).

⁵ *Danny E. Haley*, 56 ECAB 383 (2005); *Donna M. Rowan*, 54 ECAB 698 (2003).

⁶ *Haley, id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁷ *See Robert Atchison*, 41 ECAB 83, 87 (1989).

⁸ *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

8129(b), it may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulations⁹ provide that 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 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.¹⁰ 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 \$50.00.¹¹

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.¹²

Section 10.438 of the regulations provide that: “[t]he 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 on 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 denial of waiver.¹³

ANALYSIS -- ISSUE 2

On January 7, 2008 the Office notified appellant of the preliminary overpayment and requested that she provide necessary financial information by completing an overpayment recovery questionnaire, Form OWCP-20, together with supporting financial documentation, if he sought waiver of the overpayment. Appellant did not respond with a completed OWCP-20 form or submit financial information supporting his income and expenses. Moreover, he did not request a precoupment hearing. On January 31, 2008 appellant advised that his wife refused to submit any financial information and he alleged that he had no income or assets other than his benefits, retirement funds, his home and joint personal possessions. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment

⁹ 20 C.F.R. § 10.436.

¹⁰ An individual's assets must exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment. *See Robert F. Kenney*, 42 ECAB 297 (1991).

¹¹ *See Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹² 20 C.F.R. § 10.437.

¹³ *Id.* at § 10.438.

would defeat the purpose of the Act or if recovery would be against equity and good conscience.¹⁴

As appellant failed to submit the requested financial information, under section 10.438, the Office properly denied waiver of recovery of the overpayment. The individual who receives an overpayment is responsible for providing information about income, expenses and assets. Failure to submit such information within 30 days of the request shall result in a denial of waiver.¹⁵ The Board finds that the Office properly denied waiver of recovery of the overpayment of compensation in the amount of \$1,801.27.

On appeal, appellant asserts that the recovery of the overpayment would be inequitable and against good conscience because he has no assets. However, he failed to timely submit a completed overpayment questionnaire. Therefore, there was no basis for finding that the overpayment would constitute a financial hardship or that he relinquished a valuable right or detrimentally relied on the payments in question.¹⁶

The Board further finds that it does not have jurisdiction regarding repayment of the overpayment as the Office is not seeking recovery from continuing compensation benefits. The Board's jurisdiction to review recovery of an overpayment is limited to the situation where recovery is made from continuing Act benefits.¹⁷

LEGAL PRECEDENT -- ISSUE 3

Section 10.440(b) of the Office's regulations provide 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(a) (concerning reconsiderations) do not apply to such a decision.¹⁸ The Board has found that the implementation of this regulations 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.¹⁹

ANALYSIS -- ISSUE 3

The Office issued a final overpayment decision in this case on April 9, 2008. Appellant requested a precoupment hearing regarding his overpayment on May 5, 2008. In a decision dated May 13, 2008, the Branch of Hearings and Review denied his request for an oral hearing

¹⁴ *See id.*

¹⁵ *See Madelyn Y. Grant*, 57 ECAB 533 (2006).

¹⁶ Following issuance of the April 9, 2008 decision, appellant submitted an overpayment recovery questionnaire and other evidence. However, as the Office has not considered this evidence in reaching a decision, the Board may not consider it for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

¹⁷ *Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez* 51 ECAB 295 (2000).

¹⁸ 20 C.F.R. § 10.440(b). *See also Jan K. Fitzgerald*, 51 ECAB 659 (2000).

¹⁹ *Charles E. Nance*, 54 ECAB 447 (2003); *Philip G. Feland*, 48 ECAB 485 (1997).

on the grounds that the only review of the April 9, 2008 overpayment decision was by the Board. As noted, this decision is in accordance with the Office's regulations and the findings of the Board. As appellant was not entitled to an oral hearing following the final overpayment decision of April 9, 2008, the Branch of Hearings and Review properly denied his request on May 13, 2008.

CONCLUSION

The Board finds that the Office properly found that appellant received an overpayment of compensation and that he was not entitled to waiver of the overpayment and properly denied his request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the May 13 and April 9, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 12, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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