

FACTUAL HISTORY

On February 11, 2003 appellant, then a 43-year-old transportation security screener, filed a traumatic injury claim alleging that on that date he injured his back after lifting a large bag. The Office accepted the claim for lumbar strain.

By letter dated August 2, 2004, the Office advised appellant that he was being placed on the periodic rolls and noted his responsibility to return to work.

Appellant submitted completed EN1032-0494 forms for entitlement to compensation dated October 10, 2005, December 5, 2006 and July 27, 2007.¹ He noted that he worked for Computer Merchant Ltd. for the period July 29 to August 1, 2005, for Impact Solutions for the period September 5, 2006 to March 5, 2007 and Skill Storm for the period April 7, 2007 to February 8, 2008. Appellant also submitted W2 forms which indicated he earned \$2,188.22 during 2005; he earned \$282.09 for the Computer Merchant, Ltd. during 2005; he earned \$4,292.25 during 2006 for Impact Solutions; he earned \$2,152.15 during 2007 for Navy Exchange Service Command; and he earned \$20,109.59 during 2007 for Skillstorm, Inc.

On August 26, 2008 the Office notified appellant of its preliminary determination that he received an overpayment of \$24,018.08 for the period January 1, 2005 to February 29, 2008 because he returned to intermittent employment during the period January 1, 2005 through February 29, 2008 but continued to receive compensation for total disability. It calculated that he had gross earnings of \$32,504.24 which was divided by 165 weeks to find an average weekly salary of \$197.00. Next, the Office stated that appellant was paid \$75,082.55 when he was only entitled to compensation in the amount of \$51,064.40 which resulted in an overpayment of \$24,018.08. It informed appellant of its preliminary determination that he was at fault in the creation of the overpayment because he accepted a payment that he knew or should have known to be incorrect. The Office requested that he complete an overpayment recovery questionnaire. It advised appellant that, within 30 days of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

In a letter dated September 26, 2008, appellant requested an extension on the overpayment issue. He noted that he had informed the Office when he had returned to work and believed that his actual earnings had been deducted from the direct deposits.

By decision dated October 30, 2008, the Office finalized its finding that appellant received a \$24,018.08 overpayment because he received compensation for total disability after he resumed intermittent employment. It found that he was at fault in the creation of the overpayment and therefore not entitled to waiver of the recovery.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act² provide that the United States shall pay compensation as specified for the disability or death of an employee resulting

¹ Appellant did not indicate the date he signed the July 27, 2007 form.

² 5 U.S.C. §§ 8106-8193, 8102(a).

from personal injury sustained while in the performance of his duty. A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period.³ Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁴

ANALYSIS -- ISSUE 1

The Office determined that appellant received an overpayment of compensation in the amount of \$24,018.08 for the period January 1, 2005 to February 29, 2008 because he received compensation for total disability after he returned to intermittent employment. In order to confirm the continuing compensation payments, the record should establish the specific payments that were made, the date issued and the compensation period covered by the specific payments. The Board finds that the record is devoid of any evidence that compensation was paid for the period in question. The Office's statements and calculations are not enough; proof of payment must be in the record. Otherwise, the Board does not have sufficient evidence to review whether the Office properly determined the amount of the overpayment. There is no evidence such as a computer printout establishing the payment of compensation from January 1, 2005 to February 29, 2008. Accordingly, the Office has failed to establish that an overpayment occurred in this case.⁵

CONCLUSION

The Board finds that the Office failed to establish the existence of an overpayment.⁶

³ *Id.* at § 8116(a).

⁴ *Danny E. Haley*, 56 ECAB 393, 400 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁵ *See F.A.*, Docket No. 07-1520 (issued October 23, 2007) (the Board found that the Office failed to establish that an overpayment existed as the record was devoid of any evidence that the specific payments were made); *J.C.*, Docket No. 06-1229 (issued September 14, 2006) (the Board found that the Office failed to establish an overpayment when there was no evidence with respect to individual payments issued during the relevant time period); *Salvator A. Schembari*, Docket No. 05-1309 (issued December 6, 2005) (the Board found that the Office failed to establish that an overpayment existed as the record was devoid of any evidence that specific payments were made, the date issued and the period covered by the specific payments).

⁶ In view of the Board's disposition of the first issue, the issue of fault is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 30, 2008 is reversed.

Issued: October 5, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board