



## **FACTUAL HISTORY**

This is the second appeal in this case. On August 17, 2007 the Board reversed the Office's determination that appellant received an overpayment in the amount of \$61,975.57 because it did not properly notify him that he had a right to inspect and copy government records with regard to the overpayment.<sup>1</sup> The law and the facts as set forth in the previous Board decision are incorporated herein by reference.<sup>2</sup>

By letter dated September 24, 2007, the Office made a new preliminary determination that appellant had been overpaid in the amount of \$61,975.57. The overpayment occurred because he was paid based on the augmented compensation rate of 75 percent for the period August 13, 2000 to April 18, 2004. The Office found that appellant should have been paid at the 66.6 percent pay rate from October 21, 2000 to April 18, 2004. It also found that he was paid for total disability compensation during the period April 13, 1987 to April 18, 2004 when he should have been paid based on his loss of wage-earning capacity as he returned to work four hours a day as a modified clerk on April 13, 1987. The Office noted that appellant was paid compensation from August 13, 2000 to April 18, 2004 in the amount of \$112,140.28 but he should have only been paid \$50,164.71. The difference in the amount represented an overpayment of \$61,975.57.<sup>3</sup> The Office made a preliminary determination that appellant was at fault with the creation of the overpayment as he knew or should have known that he was not entitled to compensation at the 75 percent rate when he no longer had an eligible dependent and that he also should have been aware that he was not entitled to full compensation when he returned to work part time. With the preliminary determination, the Office advised him of actions he could take including "the right to inspect and copy [the Office's] records with respect to this debt, and to dispute any information contained in those records concerning the debt."

Appellant responded to the Office's overpayment questionnaire on October 7, 2007. He listed his sole source of income a Department of Labor monthly compensation check in the amount of \$1,328.00 before deductions. Appellant listed his expenses as \$1,100.00 for rent or mortgage; \$320.00 for food; \$75.00 for clothing; and \$65.00 for telephone. He listed other expenses as \$200.00 per month, and totaled this to indicate monthly expenses of \$1,760.00. Appellant listed no cash on hand and \$8.00 in his checking account as his only asset. He requested a hearing. Appellant also requested the right to inspect and copy all records with respect to this debt.

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<sup>1</sup> Docket No. 07-675 (issued August 17, 2007).

<sup>2</sup> *Id.*

<sup>3</sup> In supporting documentation, the Office indicated that appellant was paid \$112,140.28 for the period August 14, 2000 to April 18, 2004 based on a pay rate of \$766.80 per week, no wage-earning capacity and a compensation rate of three-quarters. It indicated that he should have been paid \$2,793.34 for the period August 14 through October 20, 2000 based on a pay rate of \$766.80 per week, a wage-earning capacity of \$383.40 and a compensation rate of two-thirds. The Office further found that appellant should have been paid \$47,371.37 for the period October 21, 2000 to April 18, 2004 based on a wage-earning capacity of \$383.40 and a compensation rate of two-thirds. The correct amount that he should have been paid for the period August 14, 2000 to April 18, 2004 is represented by adding \$47,371.37 plus \$2,793.34 for a total amount of \$50,164.71.

At the hearing held on February 27, 2008, appellant's attorney contended that the Office had not complied with the Board's decision in that appellant did not receive notice from the Office of his right to inspect and copy government records pertaining to the overpayment.

By decision dated October 22, 2008, the hearing representative finalized the overpayment determination.

### **LEGAL PRECEDENT -- ISSUE 1**

The Act<sup>4</sup> 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.<sup>5</sup> If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of her monthly pay, which is known as her basic compensation for total disability.<sup>6</sup> Where the employee has one or more dependents as defined in the Act, he or she is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.<sup>7</sup> If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation he was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-quarters rate constitutes an overpayment of compensation.<sup>8</sup>

Furthermore, a claimant is not entitled to receive total disability compensation and actual earnings for the same period. Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment in the amount of \$61,975.57. Appellant was not entitled to receive compensation at the augmented rate of 75 percent after August 14, 2000 as he no longer had any dependents. He also received compensation based on total disability after he had returned to part-time work.<sup>10</sup> For the period July 31, 2000 to April 18, 2004, appellant was paid \$112,140.28 in compensation. However, he was only entitled to compensation in the amount of \$50,164.71. The difference between these amounts,

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Id.* at § 8102(a).

<sup>6</sup> *Id.* at § 8105(a).

<sup>7</sup> *Id.* at § 8110(b).

<sup>8</sup> *Diana L. Booth*, 52 ECAB 370 (2001).

<sup>9</sup> *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

<sup>10</sup> Appellant returned to work for the employing establishment on March 27, 1999 at an annual salary of \$38,650.00.

\$61,975.57, is the amount of the overpayment.<sup>11</sup> Appellant received compensation for total wage loss as opposed to compensation based on his loss of wage-earning capacity determination and based on an incorrect pay rate, the Board finds that an overpayment of compensation was created.

The Board notes that appellant does not contest the amount of the overpayment. Rather he contends that the Office did not properly notify him of his right to inspect government records with regard to the overpayment. The Board previously remanded this case to allow the Office to inform appellant of this right. On remand, the Office properly addressed this issue. When the Office issued its November 24, 2007 preliminary determination, it clearly advised appellant that he had the right to inspect and copy Office records with regard to the debt and to dispute any information contained in those records. Accordingly, appellant's argument is not persuasive on this appeal.

### **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. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following may be found to be at fault with respect to creating an overpayment: (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 knew or should have known to be material; or (3) accepted a payment which he knew or should have known to be incorrect (this provision applies only to the overpaid individual).<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

Appellant knew or should have known that he was not entitled to receive wage-loss compensation based on total disability after he returned to part-time work. Furthermore, he had sufficient notice from prior correspondence from the Office that he was not entitled to augmented compensation after he had no eligible dependents. The Board notes that, even if an overpayment resulted from negligence by the Office, this does not excuse a claimant from accepting payments that the claimant knew or should have known were incorrect.<sup>13</sup> The Board finds, therefore, that appellant is at fault in the creation of the overpayment. As he is at fault in the creation of the overpayment, he is not eligible for waiver of the recovery of the overpayment.

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<sup>11</sup> See *supra* note 3.

<sup>12</sup> 20 C.F.R. § 10.433.

<sup>13</sup> *Danny E. Haley*, *supra* note 9.

**LEGAL PRECEDENT -- ISSUE 3**

The amount of adjustment of continuing compensation to recover an overpayment lies within the Office's discretion. The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.<sup>14</sup> With regard to the amount withheld from appellant's continuing compensation payments to recover the amount of the overpayment, section 10.441(a) of the Office's regulations provides:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If 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.”<sup>15</sup>

**ANALYSIS -- ISSUE 3**

In the instant case, appellant alleged that he had income of \$1,328.00. He listed expenses of \$1,760.00. However, the Office hearing representative noted that appellant is in receipt of total disability compensation benefits of \$2,200.12 every 28 days or \$2,383.46 a month. As appellant listed his monthly expenses as \$1,760.00, the hearing representative correctly calculated that this left him \$623.46 in excess income. His income exceeded his expenses by \$623.46 per month and the hearing representative properly exercised her discretion in directing recovery of the overpayment at a rate of \$500.00 per month from his continuing compensation benefits.

**CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$61,975.57; properly found that he was with fault in the creation of the overpayment thereby precluding waiver; and properly determined that the overpayment would be repaid by deducting \$500.00 from each of his continuing compensation payments.

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<sup>14</sup> *Howard R. Nahikian*, 53 ECAB 406 (2002).

<sup>15</sup> 20 C.F.R. § 10.441(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 22, 2008 is affirmed.

Issued: October 14, 2009  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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