

On February 26, 2007 the Office issued a schedule award for a 35 percent permanent impairment of appellant's left upper extremity. On March 2, 2007 it issued a compensation check to appellant for \$63,036.85.

The Office then noted that appellant previously received a schedule award in another case, OWCP File No. xxxxxx018, for a three percent impairment of the left upper extremity resulting from a left trigger thumb with release. It referred both cases to the Office medical adviser for a calculation of appellant's total left upper extremity impairment.

The Office medical adviser combined appellant's previous 3 percent award with her current 35 percent award using the Combined Values Chart in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). He found that she had a 37 percent total left upper extremity impairment from her two injuries.

On March 4, 2008 the Office made a preliminary determination that appellant received a \$1,842.36 overpayment because her 35 percent impairment rating was 1 percent too high, given her preexisting impairment. It found him without fault in creating the overpayment.

Appellant disagreed that an overpayment occurred. She noted that the Office medical adviser found a total 37 percent impairment of the left upper extremity, "yet you stated that you will only compensate me a total of 34%. I do not agree with your calculations." Appellant requested a precoupment hearing before an Office hearing representative.

At the hearing, which was held on September 29, 2008, appellant argued that she did not understand how someone who was not at fault could be asked to repay something. She felt that she should not be penalized in any way. Appellant did not understand "how they came up with 37 percent with 35 plus 3." She testified that she remodeled her home in the past year and spent all the money from the schedule award. After the hearing appellant submitted an overpayment recovery questionnaire showing \$2,303.43 in monthly income, at least \$2,787.00 in monthly expenses and \$1,658.84 in assets, including \$21.00 cash on hand, \$8.41 in her checking account, \$329.44 in her savings account and \$1,300.00 in other personal property and other funds.

In a decision dated December 18, 2008, the Office hearing representative found that appellant was without fault in creating the overpayment. Considering the bills submitted, the hearing representative determined that monthly expenses exceeded monthly income by approximately \$200.00. The hearing representative noted, however, that she received a \$63,036.85 schedule award in early 2007 and although bills showed that she had extensive construction and decorating done on her home, there was still a substantial balance from the award not listed on any asset account. The hearing representative therefore denied waiver, "as I do not find that the evidence supports that it would be against equity and good conscience to collect the overpayment amount."

LEGAL PRECEDENT

Section 8129(a) of the Federal Employees' Compensation Act provides that when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to

which an individual is entitled.¹ 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.² If it finds that, the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.³

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 ordinary and necessary living expenses; and (b) the individual's assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Both conditions in (a) and (b) must be met to defeat the purpose of the Act.⁴

An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).⁵

When an individual exceeds the limits for either disposable current income or assets, on the face of it this provides a basis for establishing a reasonable repayment schedule over a reasonable, specified period of time.⁶

The individual who received the overpayment is responsible for providing the information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.⁷

Recovery of an overpayment is considered to be against equity and good conscience when any 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.⁸ Conversion of the

¹ 5 U.S.C. § 8129(a).

² 20 C.F.R. § 10.433(a).

³ *Id.* at § 10.434.

⁴ *Id.* at § 10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

⁵ Federal (FECA) Procedure Manual, *supra* note 4.

⁶ *Id.* at Chapter 6.200.6.a(1).

⁷ 20 C.F.R. § 10.438(a).

⁸ *Id.* at § 10.437(b).

overpayment into a different form, such as food, consumer goods, real estate, *etc.*, from which the claimant derived some benefit, is not to be considered a loss.⁹

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹⁰

ANALYSIS

On appeal, appellant does not directly dispute the fact or amount of the overpayment. Both are well established. The overpayment arose because the Office issued her second schedule award without taking her first schedule award into account. It first issued an award for a 3 percent impairment of the left upper extremity due to a thumb injury and later issued an award for a 35 percent impairment of the same extremity due to a wrist and elbow injury. The result was to compensate appellant for a 38 percent impairment of her left upper extremity.

Regional impairments resulting from the hand, wrist, elbow and shoulder are not simply added together; they must be combined to provide the upper extremity impairment.¹¹ Otherwise, circumstances could result in an impairment rating greater than 100 percent, which is the maximum loss any injured employee can suffer.¹² Because appellant already had a 3 percent impairment of her left upper extremity, the Office should have combined her later 35 percent impairment using the Combined Values Chart on page 604 of the A.M.A., *Guides*. This chart indicates that her second injury caused an additional 34 percent impairment to her left upper extremity. The Office mistakenly issued the February 26, 2007 schedule award for an additional 35 percent impairment, thereby creating a 1 percent overpayment.

The Act provides 312 weeks of compensation for the complete loss of an upper extremity,¹³ so the one percent overpayment equals 3.12 weeks of compensation. At a weekly

⁹ Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 6.200.6.b(3) (June 2009).

¹⁰ *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984) and cases cited therein.

¹¹ A.M.A., *Guides* 435 (5th ed. 2001).

¹² Consider an employee who sustains left elbow injury causing a 60 percent impairment of the upper extremity. The Office issues a schedule award for the 60 percent rating. Later, the employee sustains an injury to her left wrist causing a 50 percent impairment of the upper extremity. If the Office were to issue a schedule award for the 50 percent rating, the employee would receive compensation for a 110 percent loss of her left upper extremity, more than she would have received for a complete amputation of the extremity. To ensure that the summary value of impairments will not exceed 100 percent, the A.M.A., *Guides* developed the Combined Values Chart. Under this chart, multiple impairments are combined so that the final impairment value is equal to or less than the sum of all the individual values. *Id.* at 9. In this hypothetical, the employee still had use of 40 percent of her left upper extremity before she injured her wrist. So the 50 percent impairment due to the wrist means that she lost half of that 40 percent, not half of an uninjured extremity. The Office should issue a schedule award for an additional 20 percent loss. That would properly compensate the employee for the 80 percent impairment she sustained from both injuries. In appellant's case, she had the use of 97 percent of her left upper extremity after her thumb injury. So a later 35 percent impairment from her elbow and wrist injury was a 35 percent loss of that 97 percent. Multiplying 35 percent by 97 percent gives a combined impairment rating of 33.95 percent, which rounds to 34 percent or one percent less than the Office mistakenly awarded.

¹³ 5 U.S.C. § 8107(c)(1).

pay rate of \$590.50 for compensation purposes (two-thirds appellant's weekly pay rate¹⁴ plus applicable cost-of-living increases), the overpayment amounts to \$1,842.36, as the Office determined. The Board will affirm the hearing representative's December 18, 2008 decision on the issues of fact and amount of overpayment.

Appellant does dispute the hearing representative's denial of waiver of the recovery of the overpayment. She argues on appeal that she needs substantially all of her income to meet current ordinary and necessary living expenses and she specifically addresses certain expenses. This is not really an issue. The hearing representative found that expenses exceeded income, based on the bills appellant submitted. What the hearing representative appeared to decide was that because the submitted financial documentation did not sufficiently account for the whereabouts of the \$63,036.85 schedule award appellant received in early 2007, it was reasonable to conclude that she still had sufficient assets (a resource base greater than \$4,800.00) that recovery of the overpayment would not create a hardship and defeat the purpose of the Act. Appellant contends that she was under the impression that her bank statement would show her available assets. Money need not, however, be kept in one's bank account and if the bank statement does show all her available assets, she should be able to produce enough documentation to satisfy the Office that she spent all of the schedule award on home improvements, as she testified.

Appellant is responsible for providing the financial information necessary to support her request for waiver. She submitted to the Board additional documentation for expenditures on the remodeling of her home, but the Board may not review new evidence.¹⁵ Appellant may submit this evidence to the Office with a new request for waiver.

Because it was reasonable, in the absence of sufficient documentation, for the hearing representative to question whether appellant had spent all of the schedule award on home remodeling and because she was responsible for providing the necessary financial documentation, the Board finds that the Office properly exercised its discretion to find that recovery of the overpayment would not defeat the purpose of the Act.

The Board also finds that the Office properly exercised its discretion to find that recovery of the overpayment would not be against equity and good conscience. The evidence does not show that appellant, in reliance on the \$1,842.36 overpayment, gave up a valuable right or changed her position for the worse. She testified that she converted the overpayment into a

¹⁴ *Id.* § 8107(a).

¹⁵ The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

different form -- home improvement -- from which, the Board notes, she derived some benefit. The conversion is therefore not considered a loss.¹⁶

Because the Office did not abuse its discretion in finding that recovery of the overpayment would not defeat the purpose of the Act and would not be against equity and good conscience, the Board will affirm the hearing representative's December 18, 2008 decision to deny waiver. Appellant must repay the debt. Although she was not at fault in creating the overpayment -- it was the Office's mistake -- that does not mean she gets to keep money that does not belong to her.

CONCLUSION

The Board finds that the Office did not abuse its discretion when it denied waiver of the \$1,842.36 overpayment arising from appellant's February 26, 2007 schedule award.

¹⁶ See Federal (FECA) Procedure Manual, *supra* note 9. (Example 4: A claimant received a large schedule award for her hearing loss. Later it was discovered that the claimant's hearing loss was not noise induced and the entire award was declared to be an overpayment. The claimant contended that she had changed her position for the worse, as she used the entire award to make a down payment on a larger home. The claimant has not met her burden in showing that she changed her position for the worse, since she has not shown that she suffered any loss. She simply converted the money into a different form and did not lose it. Conversion of a liquid asset into real or personal property does not constitute a loss. While the claimant may have made the expenditure in reliance on the award, she must also establish a financial loss before it will be inequitable to recoup the overpayment).

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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