

**United States Department of Labor
Employees' Compensation Appeals Board**

A.G., Appellant)

and)

**DEPARTMENT OF THE INTERIOR, LASSEN
VOLCANIC NATIONAL PARK, Mineral, CA,
Employer**)

**Docket No. 08-2265
Issued: September 28, 2009**

Appearances:
Brian L. Pocock, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 15, 2008 appellant, through his attorney, filed a timely appeal from a July 3, 2008 merit decision of an Office of Workers' Compensation Programs' hearing representative finding that he received an overpayment of compensation and denying waiver of the recovery of the overpayment. He also appeals an April 10, 2008 merit decision which affirmed the termination of his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$15,378.79 because he was paid at an inaccurate pay rate for the period September 29, 1994 to October 2, 2004; (2) whether the Office properly denied waiver of the recovery of the overpayment; and (3) whether the Office properly terminated appellant's monetary compensation benefits effective February 2, 2007 on the grounds that he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). On appeal, appellant's attorney contends that the Office failed to provide information as to how the overpayment was calculated.

FACTUAL HISTORY

On September 29, 1994 appellant, then a 48-year-old seasonal motor vehicle operator, filed a traumatic injury claim alleging that on that date he strained his lower back and skinned his left jaw while in the performance of duty. On the back of the form, the employing establishment noted that he worked 10-hour days Monday through Thursday. The Office accepted the claim for left jaw contusion and low back strain, which was subsequently expanded to include postconcussion syndrome, aggravation of preexisting migraines and suboccipital neuralgia.¹ Appellant stopped work on September 29, 1994 and was placed on the periodic rolls for temporary total disability by letter dated March 19, 2002. The Office based his compensation upon a weekly pay rate of \$420.63 and noted that with the 75 percent rate pay and cost-of-living adjustments it increased his gross compensation to \$365.75.²

On a January 23, 1995 wage-loss computation sheet, the Office noted appellant's weekly pay rate as \$420.63 and paid him at the $\frac{3}{4}$ rate for the period October 2 to November 18, 1994.³

On April 10, 1995 the employing establishment submitted a notification of personnel action which contained information on appellant's pay rate which was a base pay of \$13.86 per hour.

In a letter dated September 20, 1995, the Office informed appellant that his pay rate was calculated based upon his hourly rate for 10 hours per day at \$13.86 per hour plus \$7.22 per day quarters allowance for a total daily pay rate of \$145.82. It then multiplied the \$145.82 by 150/52 to find a total weekly pay rate of \$420.63.

On January 29, 2002 appellant elected to receive benefits under the Federal Employees' Compensation Act.

On March 12, 2004 Dr. Stephen C. Zinsmeister, a second opinion Board-certified psychiatrist and neurologist, diagnosed lumbar strain, concussion with postconcussion syndrome, difficult concentrating, feeling loss of balance, aggravation of preexisting migraine headaches, left jaw contusion and preexisting cervical spondylosis and lumbar degenerative disc disease, which was not caused by the employment injury. A physical examination revealed a gait which "is slow and wide-based, seeming somewhat unsteady, saying he can fall to either side" and mild lumbar paraspinal, upper thigh and left upper buttock tenderness. Dr. Zinsmeister stated that appellant's current symptoms are likely permanent as the injury occurred approximately 10½ years ago and no improvement has been seen in the symptoms. He opined that appellant was

¹ The employing establishment terminated appellant's employment effective September 29, 1994.

² The computer printout showing payment for the period September 30 to November 18, 1994 based upon a weekly pay rate of \$340.67 while a weekly pay rate of \$420.63 was used to calculate his compensation for the period November 19, 1994 to March 13, 1995 and April 26 to March 23, 2002. The record also contains appellant's pay stubs from July 9 to October 1, 1994 showing an hourly pay rate of \$13.86 and a deduction of \$72.18.

³ The Office noted that it deducted the amount he had been paid for the period September 29 to November 3, 1994.

capable of performing sedentary work part time initially and then working up to eight hours a day within four to six months.

On March 27, 2004 Dr. David B. Hagie, a treating osteopath, reported that appellant's "low back injury has degenerated over the years with a now quite significant spondylolisthesis not present at the time of the initial injury."

On April 26, 2004 Dr. Hagie reviewed Dr. Zinsmeister's report and noted his disagreement with the findings.

On June 9, 2004 the Office referred appellant for an impartial medical examination with Dr. Mary Reif, a Board-certified neurologist, to resolve the conflict in the medical opinion evidence between Dr. Hagie, a treating osteopath, who opined that appellant's current condition was employment related and he was totally disabled, and Dr. Zinsmeister, a second opinion Board-certified psychiatrist and neurologist, who opined that appellant was capable of performing sedentary work for eight hours a day.

On July 8, 2004 Dr. Reif, based upon a review of the medical evidence, statement of accepted facts and physical examination, concluded that appellant was capable of working with restrictions. She reported that from a work-related disability standpoint that appellant would continue to have climbing and balancing problems, which she attributed to his concussion. Dr. Reif opined that appellant had no neck limitations and that "[a]ny limitations on his lumbar spine are not related to the industrial injury but related to the preexisting degenerative changes." She provided restrictions of very occasional lifting of not more than 50 pounds and limited twisting, bending, pushing, twisting, pulling. In an attached work capacity evaluation form, Dr. Reif indicated that appellant was capable of working with restrictions. These included sitting up to six hours per day, two hours of walking per day, minimum bending, stooping and operating a motor vehicle at work, less than 50 pounds of pushing or pulling, minimum squatting and kneeling, no excessive climbing, a 15-minute break every four hours and lifting of up to 25 pounds.

An August 27, 2004 computer worksheet reflected that appellant was paid at the weekly pay rate of \$319.85 for the periods September 29, 1994 to September 15, 1999 and September 16, 1999 to September 4, 2004.

In an October 13, 2004 daily rolls payment form, the Office noted that appellant was not entitled to any supplement to his salary. It noted that appellant was a temporary employee who was paid at \$13.86 per hour. Using the 150-hour rule it calculated appellant's weekly pay rate as follows $\$13.86 \times 8 \times 150$ divided by 52, resulting in a weekly pay rate of \$319.85. The Office noted that he had been paid \$153,667.11 when he had only been entitled to a payment of \$138,288.32 resulting in an overpayment of \$15,378.79.

On October 13, 2004 the employing establishment offered appellant a temporary position of park guide for the period November 29, 2004 through March 4, 2005. The duty station was Lassen Volcanic National Park and housing was offered at a biweekly cost of \$126.00. The duties of the position were providing visitor information, operating an adding machine, cash register and other office equipment and selling merchandise. Physical duties required occasional

lifting of up to 25 pounds and carrying up to 25 pounds for up to 10 feet. It noted that the position required limited bending, stooping, pushing, twisting and pulling and no ladder climbing. Appellant was advised that he would be earning \$10.19 per hour. He was given until November 18, 2004 to accept or reject the offered position.

On October 22, 2004 the Office advised appellant that the offered position was suitable. Appellant was notified that, if he failed to accept the position or demonstrate that the failure was justified, his right to wage-loss compensation would be terminated pursuant to section 8106. He was given 30 days from the date of this letter to respond.

On November 2, 2004 the Office received a September 8, 2004 report from Edwin Pearson, Ph.D. and psychologist, who noted that appellant had been referred by his vocational rehabilitation counselor to assist in developing a vocational plan. Dr. Pearson diagnosed cognitive disorder, limited panic disorder and migraine headaches. He opined that he believed it was unrealistic "to assume that this man can make a transition to competitive employment" due to his vertigo/inner ear disorder, cognitive inefficiencies and chronic headaches. Dr. Pearson reported that "[t]o a lesser extent, this individual's functioning is going to be affected by his ability to tolerate certain situations that he perceives to be claustrophobic in one way or another."

On November 2, 2004 the Office requested Dr. Reif review Dr. Pearson's September 8, 2004 report and asked whether it altered her opinion regarding appellant's work restrictions and work capability.

On November 8, 2004 appellant declined the offered position. He could not commute 225 miles one way every Saturday and Sunday particularly during winter storm season.

In a November 23, 2004 letter, the Office advised appellant that the offered position was still found to be suitable work and remained available. It afforded him 15 days to accept the position or incur the termination of his compensation benefits. The Office stated that no further reasons for refusal would be considered.

In a letter dated December 2, 2004, the employing establishment informed the Office that appellant was not entitled to a housing allowance which the Office erroneously included in his compensation. It noted that housing was available and that rent was deducted directly from the employee's pay check. The employing establishment specified that his date-of-injury pay rate was \$13.86 per hour.

On December 2, 2004 Dr. Hagie reviewed Dr. Reif's report and provided comments and requested that a functional capacity evaluation and neuropsychiatric testing be performed.

In a December 2, 2004 report, Dr. Reif noted that she had reviewed Dr. Pearson's neuropsychological report and stated that she believed the testing was incomplete. She stated that there was nothing in the report that altered her opinion that appellant was capable of performing sedentary work.

On December 17, 2004 the Office received an undated letter from appellant explaining why he refused the offered position. Appellant contended that physical restrictions were beyond his capability and the 224 miles one way from home only allows him 24 hours at home per week.

Lastly, he contended that the cost of housing and fuel to get to and from the job on the weekends was too expensive.

By decision dated December 27, 2004, the Office terminated appellant's wage-loss compensation as he had refused an offer of suitable work.

On December 5, 2005 appellant filed a request for reconsideration of the termination of his benefits and submitted medical and factual evidence in support of his request.

By decision dated March 13, 2005, the Office vacated the December 27, 2004 decision and reinstated his benefits retroactive to that date. In vacating the prior decision, it noted that Dr. Reif's opinion constituted the weight of the evidence as to his ability to work from a neurological standpoint. However, Dr. Pearson's report required additional development on the issue of whether appellant was capable of working from a psychiatric standpoint. It was recommended that appellant be referred for a second opinion evaluation with a Board-certified psychiatrist.

In a March 13, 2006 letter, the Office explained the adjustment to appellant's weekly pay rate. It noted that appellant's weekly pay rate had erroneously included housing quarter's allowance. Appellant was informed that his current pay rate was calculated as using the 150-formula which is based on multiplying the hourly pay rate by the hours worked per day. The Office then multiplied his hourly rate of \$13.86 by eight hours per day to find a daily pay rate of \$110.88. The daily pay rate was then multiplied by 150 which resulted in a minimum annual pay of \$16,632.00. The Office then divided \$16,632.00 by 52 to find a weekly pay rate of \$319.85.

On May 4, 2006 Jack M. Davies, Psy.D. and Office referral psychologist, diagnosed chronic pain disorder, white matter tract lesions secondary to ischemia and vasculitis and passive-dependent and histrionic personality traits. He reported the neuropsychological evaluation to be within normal limits. Dr. Davies stated that he could not evaluate physical limitations, but concluded that from a psychological or neuropsychological standpoint appellant was capable of working.

On June 12, 2006 the employing establishment reoffered appellant the position it had previously offered on November 8, 2004 with a salary adjustment for 2006. The position was temporary and offered housing at a biweekly cost of \$126.00 so that appellant would be within walking distance of his job. The position was at Lassen Volcanic National Park, where he had been employed at the time of his injury and was based on restrictions noted by Dr. Reif. Appellant was advised that he would be earning \$10.82 per hour. The employing establishment did not provide a date by which appellant was to accept or reject the position, but did note an entrance date for the position of June 26, 2006.

In a July 25, 2006 letter, the Office advised appellant that the offered park guide position was found suitable work within his medical restrictions. It afforded him 30 days in which to either accept the position or provide good cause for refusal. The Office also advised appellant that, under section 8106(c) of the Act, he would lose his entitlement to compensation if he refused suitable work.

On August 18, 2006 appellant refused the offered position as being beyond his mental and physical abilities. He noted that Dr. Pearson's September 8, 2004 examination found that he "could not be gainfully employed."

In a November 16, 2006 letter, the Office advised appellant that the offered position was still found to be suitable work and remained available. It afforded him 15 days to accept the position or incur the termination of his compensation benefits. The Office stated that no further reasons for refusal would be considered.

In a November 24, 2006 letter, appellant contended that he had not seen Dr. Davies' report and that he was unable to perform the duties of the offered position. He also contended that driving 225 miles one way was beyond his work restrictions. Appellant also states that being asked to live away from home during the winter except for 24 hours a week is unacceptable and the money offered by the position is financially unfeasible. Lastly, he contends that Dr. Reif's report is outdated and should not be used as a basis for determining his work capability.

By decision dated February 2, 2007, the Office terminated appellant's wage-loss benefits effective that day on the grounds that he refused an offer of suitable work. It further found that he did not provide good cause for refusing the position, which remained open and available to him. The Office noted that appellant did not have to commute as arrangements for temporary housing would be provided, which was the same arrangement appellant had before his injury on September 29, 1994.

On September 6, 2007 the Office notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$15,378.79 because he received compensation at an inaccurate pay rate for the period September 29, 1994 to October 2, 2004. It determined that it had erroneously included a housing allowance in calculating his pay rate for the period September 29, 1994 to October 2, 2004. The Office indicated that appellant's pay rate without the housing allowance was \$13.86 per hour. It noted that a biweekly housing allowance of \$72.18 had been included in appellant's pay rate compensation. The Office calculated that appellant received \$153,667.11 in compensation, but should have been paid only \$138,288.32 which resulted in an overpayment of \$15,378.79. It found that appellant was without fault in the creation of the overpayment and requested that he complete an overpayment recovery questionnaire. The Office additionally 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.

On September 28, 2007 appellant's attorney requested a prerecoupment hearing. A telephonic hearing was held on April 18, 2008 at which appellant was represented by counsel and testified.

On January 15, 2008 appellant requested reconsideration and submitted evidence in support of his request. The evidence consisted of a May 25, 2005 neuropsychological report by Francis Gilbert, Ph.D., magnetic resonance imaging scans dated August 24, 2005 and January 10, July 19 and December 7, 2007, a November 1, 2005 report by Dr. Kevin Sullivan, and various reports from Dr. David Hagie, a treating osteopath.

By decision dated April 10, 2008, the Office denied modification of the February 20, 2007 decision.

By decision dated July 3, 2008, a hearing representative found that there was an overpayment of \$15,378.79. The hearing representative found that appellant was not entitled to a housing allowance from September 29, 1994 to October 4, 2004 and, thus, received an overpayment of \$15,378.79. The hearing representative further determined that appellant was not at fault in the creation of the overpayment. However, the hearing representative found that he was not entitled to waiver of the recovery of the overpayment as he did not complete an overpayment recovery questionnaire.⁴

LEGAL PRECEDENT -- ISSUE 1

The Act provides that monthly pay means the monthly pay at the time of injury, or the time disability begins, or the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment, whichever is greater.⁵ Section 8114(d) of the Act provides:

Average annual earnings are determined as follows:

“(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --

(A) was fixed, the average annual earnings are the annual rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week, and 260 if employed on the basis of a 5-day week.⁶

“(2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee for the same class working substantially the whole immediately preceding year in the same or similar employment by the

⁴ The Board notes that, following the July 3, 2008 decision, the Office received additional pay stub evidence from 1983 to 1992. On July 29, 2008 the Office received a July 25, 2008 and financial documentation. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c); *J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB ___ (Docket No. 06-1564, issued February 27, 2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁵ 5 U.S.C. § 8101(4).

⁶ *Id.* at § 8114(d).

United States in the same or neighboring place as determined under paragraph (1) of this subsection.”⁷

If sections 8114(d)(1) and (2) of the Act are not applicable, such as in cases where the date-of-injury employment was seasonal work that would not have provided employment for substantially the whole year preceding the injury, section 8114(d)(3) provides as follows:

“If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of injury having regard to the previous earnings of the employee in [f]ederal employment and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within one year immediately preceding his injury.”⁸

The Act, at section 8114(e), provides:

“The value of subsistence and quarters, and of any other form of remuneration in kind for services if its value can be estimated in money, and premium pay under section 5545(c)(1) of this title are included as part of pay, but account is not taken of overtime pay; additional pay or allowance authorized outside the United States because of differential in cost of living or other special circumstances; or bonus or premium pay for extraordinary service including bonus or pay for particularly hazardous service in time of war.”⁹

ANALYSIS -- ISSUE 1

The Office found an overpayment in this case on the grounds that appellant had received compensation based on an incorrect pay rate. The initial pay rate used by the Office, as of the date disability began July 29, 2003, was \$420.63 per week. This was based on an hourly wage of \$13.86 working 40 hours per week¹⁰ plus a daily housing allowance of \$7.22.

The Office found that appellant received an overpayment of compensation because he received wage-loss compensation at an incorrect pay rate. It determined the correct pay rate pursuant to section 8101(4) and section 8114 of the Act. Appellant’s pay rate for compensation purposes is the rate of pay he was receiving as of the time of disability on September 29, 1994.

⁷ *Id.* at § 8114(d)(1), (2).

⁸ *Id.* at § 8114(d)(3).

⁹ *Id.* at § 8114(e).

¹⁰ This was based on four 10-hour workdays.

The evidence shows that appellant was a temporary employee who did not work substantially the whole year immediately preceding the injury nor was employed in a position that would have afforded employment for substantially a whole year.¹¹ For these reasons, section 8114(d)(3)¹² applies to the computation of appellant's pay rate.¹³ This section specifies that an employee's average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within one year immediately preceding his injury.¹⁴ The two formulas used by the Office to calculate appellant's rate of pay are found at section 8114(d)(3). The Office used the statutory mathematical formula incorporated at section 2.807.11(e) of the Office's procedure manual, dealing with calculation of initial payments for a claimant who is not a full-time worker.¹⁵ The Board finds that the Office properly utilized section 8114(d)(3) of the Act.

The Office used appellant's earnings and leave statements to find that he had a weekly salary of \$1,108.80 each pay period based upon a 40-hour week or an hourly wage of \$13.86. It compared this amount to the amount derived by multiplying the average daily wage by 150. Using the 150-hour rule it calculated appellant's weekly pay rate as follows \$13.86 multiplied by 8 hours a day multiplied by the minimum 150 days which equaled \$16,632.00 divided by 52, resulting in a weekly pay rate of \$319.85. The Office determined appellant's actual hourly earnings to be \$14.14 (\$23,080.39 annual earnings divided by 1632.75 hours worked), multiplied by 8 hours a day multiplied by the minimum 150 days, equaled \$16,963.08 a year or \$326.21 a week. The Board therefore finds that an overpayment in compensation was created.

On appeal, appellant contends that the Office erred in using 8 hours when it calculated his pay rate using the 150-formula as he worked 10 hours per day. The Board finds, however, that the Office properly used the 150 formula and 8 hours a day as this formula is based on a 40-hour work week. While appellant is correct in stating that he worked 10 hours per day, the record reveals that he worked four days a week or 40 hours per week. The 8 hours used in the 150-rule is based on a 5-day workweek or 40 hours per week. As appellant worked a 40-hour week the Office properly used 8 hours a day when calculating the 150-rule.

On appeal appellant contends that the \$7.22 housing allowance which the Office included in his pay rate in 1995 was correct. Thus, he argues that the Office erred in using this payment to contribute to his overpayment. We disagree. The employing establishment clearly explained why appellant was not at any time eligible for a housing allowance. It noted that it was simply an error on this part. Section 8114(e) provides that subsistence and quarters and of any other form of remuneration in kind for services shall be included in determining the pay rate. Unlike

¹¹ Office procedures indicate the phrase substantially the whole year means 11 months. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(a) (April 2002).

¹² 5 U.S.C. § 8114(d)(3).

¹³ See *H.S.*, 58 ECAB ___ (Docket No. 06-1774, issued May 10, 2007); *Ricardo Hall*, 49 ECAB 390 (1998).

¹⁴ See 5 U.S.C. § 8114(d)(2); see also *L.C.*, 60 ECAB ___ (Docket No. 08-224, issued December 23, 2008).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.807.11(e) (March 2004).

the claimant in *Robert J. Lima*,¹⁶ where the claimant received remuneration in kind for services in the form of living quarters while working overseas, appellant was not required to stay in housing provided by the employing establishment. In fact, he regularly paid rent for his housing. There is no evidence in the record showing that it was a requirement for employees to stay at housing provided by the employing establishment. Thus, the Office properly determined that the cost of his housing should not be included in his compensation rate and that section 8114(e) was not applicable.

The record demonstrates that, for the period September 29, 1994 through October 4, 2004, appellant received compensation in the amount of \$153,667.11 based on the incorrect pay rate of \$420.63 per week, when he should have received compensation totaling \$138,288.32 based on the correct pay rate of \$319.85 per week, yielding an overpayment in compensation in the amount of \$15,378.79, as determined by the Office. The Board will affirm fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery by the United States may not be made when 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.”¹⁷

Office regulations, at 20 C.F.R. § 10.438, state:

“(a) The 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 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.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”¹⁸

ANALYSIS -- ISSUE 2

Although appellant was found without fault in creating the \$15,378.79 overpayment, he bears responsibility for providing the financial information necessary to support a request for

¹⁶ 55 ECAB 546 (2004).

¹⁷ 5 U.S.C. § 8129.

¹⁸ 20 C.F.R. § 10.438.

waiver of the recovery. The Office requested that he provide financial information and submit any request for waiver within 30 days of the preliminary overpayment determination. Appellant did not respond within the 30-day time period. The Office noted that his failure to submit the requested information would result in the denial of waiver. Appellant failed to respond within 30 days, as requested by the Office, under the implementing federal regulations, the Board finds that the Office properly denied waiver of the recovery of the overpayment pursuant to 20 C.F.R. § 10.438(b).¹⁹

LEGAL PRECEDENT -- ISSUE 3

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.²⁰ Under section 8106(c)(2) of the Act, the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.²¹ To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.²² Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.²³

Office regulations provide that, in determining what constitutes suitable work for a particular disabled employee, the Office should consider the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.²⁴ It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.²⁵ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.²⁶

In assessing medical evidence, the number of physicians supporting one position or another is not controlling, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical

¹⁹ *Id.* at § 10.438(b) provides that failure to submit requested information within 30 days shall result in the denial of waiver of an overpayment. *See R.W. (A.T.)*, 59 ECAB ____ (Docket No. 07-1845, issued December 7, 2007); *Madelyn Y. Grant*, 57 ECAB 533 (2006).

²⁰ *A.W.*, 59 ECAB ____ (Docket No. 08-306, issued July 1, 2008).

²¹ 5 U.S.C. § 8106(c)(2); *see also Mary E. Woodard*, 57 ECAB 211 (2005); *Geraldine Foster*, 54 ECAB 435 (2003).

²² *T.S.*, 59 ECAB ____ (Docket No. 07-1686, issued April 24, 2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

²³ *Richard P. Cortes*, 56 ECAB 200 (2004); *Joan F. Burke*, 54 ECAB 406 (2003).

²⁴ 20 C.F.R. § 10.500(b).

²⁵ *Richard P. Cortes*, *supra* note 4.

²⁶ *Id.*; *Bryant F. Blackmon*, 56 ECAB 752 (2005).

evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.²⁷ Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer, medical evidence of inability to do the work or travel to the job or the claimant found other work which fairly and reasonably represents his or her earning capacity (in which case compensation would be adjusted or terminated based on actual earnings).²⁸ Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.²⁹

The Office's procedures states that, to be valid, an offer of light-duty must be in writing and must include the following information: (1) a description of the duties to be performed; (2) the specific physical requirements of the position and any special demands of the workload or unusual working conditions; (3) the organizational and geographical location of the job; (4) the date on which the job will first be available; and (5) the date by which a response to the job offer is required.³⁰ The employer must make any job offer in writing.

ANALYSIS -- ISSUE 3

On June 12, 2006 the employing establishment reoffered appellant the position it had previously offered on November 8, 2004 based upon a July 8, 2004 report by Dr. Reif, the impartial medical examiner.³¹ On July 25, 2006 the Office informed appellant that the temporary job offered by the employing establishment constituted suitable work. It found that the position was commensurate with the medical restrictions set forth in the July 8, 2004 report of Dr. Reif. On February 2, 2007 the Office terminated his wage-loss compensation effective that date based upon his refusal of a suitable job offer. The Board finds that the Office improperly relied on Dr. Reif's opinion when determining that the position offered by the employing establishment constituted suitable employment.

Dr. Reif's July 9, 2004 report is stale with regard to the modified job offer extended to appellant on June 8, 2006. The Board has recognized the importance of medical evidence being contemporaneous with a job offer in order to ensure that a claimant is medically capable of returning to work.³² Although Dr. Reif performed an impartial medical examination in 2004, she

²⁷ See *Connie Johns*, 44 ECAB 560 (1993).

²⁸ *Les Rich*, 54 ECAB 290 (2003).

²⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (July 1997).

³⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (December 1993).

³¹ The Board notes that the June 12, 2006 offer did not identify the term of the offered position. At the time appellant was injured in 1994 he was a seasonal employee. In the November 2004 job offer, the employing establishment did not identify the term of the appointment for the temporary position.

³² See generally *Eileen R. Kates*, 46 ECAB 573 (1995).

examined appellant some 23 months prior to the job offer. In similar cases, the Board held that medical opinions that were nearly two years old were not reasonably current.³³ The Office also notes that appellant's record demonstrated that he had a history of medical conditions, including migraine headaches, suboccipital neuralgia and degenerative disc disease that were likely to deteriorate over time. Because of the likelihood that his condition had changed since July 2004, the Office did not reasonably rely on Dr. Reif's reports to determine appellant's current physical limitations in July 2006. The Board finds that the medical evaluation relied on by the Office was not reasonably current.

The Board finds that the Office did not establish the suitability of the offered position because it relied on Dr. Reif's opinion which was not reasonably current.

CONCLUSION

The Board finds that appellant received an overpayment of \$15,378.79 because he was paid at an inaccurate pay rate for the period September 29, 1994 to October 2, 2004. The Board further finds that the Office properly denied waiver of recovery of the overpayment of compensation. Lastly, the Board finds that the Office improperly terminated appellant's monetary compensation benefits effective February 2, 2007 on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106(c).

³³ See *M.A.*, 59 ECAB ____ (Docket No. 07-349, issued July 10, 2008) (the Board stated that the medical evidence upon for a wage-earning capacity determination must provide a detailed description of the claimant's condition and must be based on a reasonably current medical evaluation); *Keith Hanselman*, 42 ECAB 680 (1991) (two-year-old medical report and year-old work restriction evaluation form were not reasonably current for wage-earning capacity determination); *Ellen G. Trimmer*, 32 ECAB 1878 (1981) (two-year old work tolerance limitation report was outdated).

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2008 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed. The Office decision dated April 10, 2008 is reversed.

Issued: September 28, 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