

FACTUAL HISTORY

On August 10, 2005 appellant, then a 50-year-old part-time regular mail handler, injured his back while pushing a hamper of mail and stopped work. On October 26, 2005 the Office accepted his claim for thoracic lumbar neuritis and radiculitis. By letter dated November 1, 2005, appellant was informed that he would receive compensation payments commencing October 15, 2005. The Office informed him that compensation payments were only payable while he was unable to work. If appellant returned to work, he was to immediately inform the Office and return any payment.

On April 23, 2006 the employing establishment offered appellant a position at no loss of salary. On May 4, 2006 an Office field nurse advised that appellant returned to work on April 24, 2006. On May 5, 2006 the employing establishment informed the Office that appellant returned to work part-time regular duty at his regular schedule. The Office ceased wage-loss compensation on May 14, 2006.

On December 5, 2007 the Office made a preliminary determination that appellant was overpaid in the amount of \$1,103.20 because he received wage-loss compensation for total disability after having returned to work at his regular part-time schedule on April 24, 2006. This resulted in an overpayment from April 24 through May 13, 2006 for which he was at fault as he knew or should have known that he was not entitled to wage-loss compensation following his return to his regular salary. Appellant received a check for the period April 16 through May 13, 2006 in the amount of \$1,470.93. Of this amount, he was entitled to \$376.73, wage loss from April 16 to 22, 2006. The difference, an amount of \$1,103.20, was an overpayment. Appellant was sent financial forms and instructions for contesting the preliminary finding.

On December 28, 2007 appellant requested a prerecoupment hearing. He contended that the overpayment occurred through no fault of his own and requested a waiver. Appellant completed financial forms, listing monthly income of \$4,350.00 and monthly expenses of \$3,971.00.

At the prerecoupment hearing held on June 10, 2008, appellant testified that he had retired on July 2006. He was not currently working for the employing establishment and reinjured his back in 2007. At the hearing, appellant discussed his financial situation and stated that he would submit further financial documentation.

On June 29, 2008 appellant submitted updated income and expense information. He listed monthly income of \$1,296.64 from a State of Massachusetts retirement, \$1,785.90 from the Office and \$1,045.92 from his wife's income, a total income of \$3,928.46. Appellant listed monthly expenses of \$2,175.31 for a mortgage, \$296.88 for a home equity loan, \$304.96 in real estate tax, \$92.01 for electricity, \$150.00 for gas, \$126.20 for cable bill, \$122.00 for automobile insurance, \$540.00 for gasoline and \$159.87 for medicine, a total expense of \$3,967.23.

In a July 28, 2008 decision, the Office hearing representative found that appellant received an overpayment in the amount of \$1,103.20, that he was at fault in the creation of this overpayment and therefore not entitled to waiver of the recovery, and was to repay at the rate of

\$100.00 every four weeks. The hearing representative found, however, that appellant had monthly income of \$4,352.10.¹

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act² 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 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 the individual is entitled.⁴

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,103.20 for the period April 24 through May 13, 2006.

Appellant returned to work at the employing establishment on April 24, 2006 at his regular part-time salary and was no longer entitled to receive wage-loss compensation benefits after that date. However, he received compensation through May 13, 2006. The record reflects that appellant received a compensation check for the period April 16 through May 13, 2006 in the amount of \$1,470.93 for a total of 28 days of compensation. Appellant was only entitled to compensation from April 16 through 22, 2006 in the amount of \$363.73. The difference created an overpayment in the amount of \$1,103.20 (\$1,470.93 minus \$363.73), as properly determined by the Office.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and its implementing regulations, an overpayment must be recovered unless 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.⁵ Section 10.433 of the implementing regulations provide that the Office may

¹ The hearing representative determined that appellant's federal workers' compensation was \$1,922.38, not \$1,785.90 as listed. He calculated this amount by taking appellant's net income for four weeks compensation of \$1,774.50 (he deducted appellant's life insurance payments, noting this was an allowable expense) and multiplied this by 13 (four-week compensation periods in the year) which totaled \$23,068.50. The hearing representative then divided this amount by 12 (months in the year) to total \$1,922.38. Although appellant listed his wife's monthly income from the City of Boston workers' compensation as \$1,045.92, this amount was calculated by multiplying her weekly payment of \$261.48 by 4. The hearing representative determined that appellant should have multiplied the weekly net payment of \$261.48 by 52 weeks to equal \$13,596.96 per year and divided this by 12 to total \$1,133.08 per month.

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ *Id.* at § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁶ The regulations further provide that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.⁷ Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.⁸ Whether the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.⁹

ANALYSIS – ISSUE 2

By accepting wage-loss compensation after he returned to employment, appellant accepted a payment that he knew or should have known to be incorrect. Therefore, the Board finds that he was at fault in the creation of the overpayment.¹⁰

At the time appellant was placed on the periodic rolls, he was advised that he was not to receive compensation benefits if he returned to work and received his salary. He returned to work on April 24, 2006 but received compensation benefits through May 13, 2006. Appellant's compensation check was mailed to him and he endorsed it after being notified on November 1, 2005 that he was not entitled to receive compensation after reemployment. The fact that the Office may have been negligent in issuing the payment does not mitigate this finding.¹¹ As appellant was at fault in the creation of the overpayment, he is not eligible for waiver of the overpayment. The Office is required to recover this overpayment.

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.¹² Section 10.441(a) of the Office regulations provides:

“When an overpayment has been made to an individual who is entitled to further payment, 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

⁶ 20 C.F.R. § 10.433(a).

⁷ *Id.*

⁸ *Id.* at § 10.433(a)(3).

⁹ *Id.* at § 10.433(b).

¹⁰ See *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

¹¹ See 20 C.F.R. § 10.435(a); *D.R.*, 59 ECAB ____ (Docket No. 07-823, issued November 1, 2007). *William E. McCarty*, 54 ECAB 525 (2003).

¹² *Howard R. Nahikian*, 53 ECAB 406 (2002).

the 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.¹³

ANALYSIS -- ISSUE 3

The Board finds that the Office hearing representative properly considered appellant's financial information in setting the rate of recovery of \$100.00 from appellant's continuing compensation payments. Appellant listed monthly expenses of \$3,967.23. Although he alleged that he had a monthly income of \$3,928.46, the hearing representative reviewed the income information from his compensation payments and from his wife's income by listing the amounts received every four weeks. The hearing representative properly adjusted these amounts into monthly income and found actual monthly income of \$4,352.10. Therefore, appellant's monthly income exceeded his expenses by \$423.64. Accordingly, the Board finds that the Office hearing representative properly determined a rate of recovery of \$100.00 from continuing compensation payments until the amount was paid in full.

CONCLUSION

The Board finds that the Office properly found an overpayment in the amount of \$1,103.20 from April 24 through May 13, 2006 for which he was at fault. The Board further finds that the Office properly directed that \$100.00 be recovered from appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 28, 2008 is affirmed.

Issued: September 22, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹³ 20 C.F.R. § 10.441(a).