

periods of disability.¹ In February 2007, appellant was working seven hours per day as a custodian for the employing establishment and claiming wage loss for one hour per day. The record contains documents in which the Office calculated her wage loss for the period beginning February 19, 2007 based on her actual wages as a custodian. The record reflects that appellant received \$1,423.30 in compensation for the period February 19 to August 24, 2007.²

In a December 19, 2008 decision, the Office reduced appellant's compensation to zero effective August 23, 2007 based on its determination that her actual wages as a custodian for the employing establishment fairly and reasonably represented her wage-earning capacity effective that date. It determined that her actual earnings met or exceeded the current wages of the job she held when injured and terminated her wage-loss compensation. Appellant remained entitled to medical benefits related to her accepted injuries.

In a February 5, 2009 notice, the Office advised appellant of its preliminary determination that she received a \$1,141.01 overpayment of compensation for the period February 19 to August 24, 2007 because "the Office used incorrect pay rate and effective pay rate dates when adjusting for your actual earnings." It also made a preliminary determination that she was not at fault in the creation of the overpayment. Regarding the calculation of the overpayment, the Office stated that for the period February 19 to August 24, 2007 appellant's pay rate had been improperly based on her date of disability (June 6, 2003) pay of \$505.31 rather than the higher pay she received on the date of injury (April 21, 2003) of \$505.87, a figure which included differential pay. It then recalculated her wage-earning capacity for the period February 19 to August 24, 2007 using the proper amounts for her pay rate when injured, the current pay rate for her date-of-injury job and her actual wages in the custodian position. It confirmed that appellant's actual earnings of \$16,644.77 for the period February 19 to August 24, 2007 exceeded the current wages of the job she held when injured and found that therefore she had no wage loss. The Office indicated that she was paid a total of \$1,423.30 for the period February 19 to August 24, 2007 but that she was only entitled to receive \$282.29 in medical benefits for Office-scheduled medical appointments for this period.

The Office further advised appellant that she could submit evidence challenging the fact, amount or finding of fault and request waiver of the overpayment. It informed her that she could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the notice of the preliminary overpayment determination. The Office requested that appellant complete and return an enclosed financial information questionnaire within 30 days of the date of the notice even if she was not requesting waiver of the overpayment.

¹ Appellant received continuation of pay from April 21 to June 5, 2003 and began receiving Office compensation for wage loss effective June 6, 2003.

² In December 2007, the Office indicated that appellant's pay rate had been improperly based on her date of disability (June 6, 2003) pay of \$505.31 rather than the higher pay she received on the date of injury (April 21, 2003) of \$505.87, a figure which included differential pay. The record contains documents from the employing establishment confirming this amount of differential pay.

In a March 13, 2009 decision, the Office determined that appellant received a \$1,141.01 overpayment of compensation. The Board found that she was not at fault in the creation of the overpayment but that the overpayment was not subject to waiver.³

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁴ 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.⁵ Section 8129(a) of the Act provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter 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.”⁶

Section 8116(a) of the Act provides that while an employee is receiving compensation or if she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁷

Section 8105(a) of the Act provides: “If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.”⁸ Section 8101(4) of the Act defines “monthly pay” for purposes of computing compensation benefits as follows: “[T]he monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...”⁹ The word “disability” is used in several sections of the Act. With the exception of certain sections where the statutory context or the legislative history clearly shows that a different meaning was intended, the word as used in the Act means “Incapacity because of

³ The Office indicated that no waiver was possible because appellant did not submit the requested financial information within the allotted time.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(a).

⁸ *Id.* at § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

⁹ *Id.* at § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002).

injury in employment to earn wages which the employee was receiving at the time of such injury.” This meaning, for brevity, is expressed as “disability for work.”¹⁰

Section 8115(a) of the Act provides that the “wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.”¹¹ The Board has stated, “Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee’s wage-earning capacity, must be accepted as such measure.”¹²

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$1,141.01 overpayment of compensation. In the present case, appellant received \$1,423.30 in compensation for the period February 19 to August 24, 2007 but was only entitled to receive \$282.29 in medical benefits for Office-scheduled medical appointments for this period. The Office has supported its finding that she was not entitled to any wage-loss compensation for this period. It correctly found that for the period February 19 to August 24, 2007 appellant’s pay rate should be based on the date-of-injury pay (April 21, 2003) of \$505.87 because this pay was higher than the date of disability (June 6, 2003) pay of \$505.31.¹³ The Office then conducted a proper wage-earning capacity determination for the period February 19 to August 24, 2007 using various figures such as her pay rate when injured, the current pay rate for her date-of-injury job and her actual wages in the custodian position. It correctly determined that appellant’s actual earnings of \$16,644.77 for the period February 19 to August 24, 2007 exceeded the current wages of the job she held when injured and found that therefore that she had no wage loss.¹⁴ Appellant has not submitted any evidence showing that the Office’s reasoning and calculations were improper. Therefore, the Office properly determined that she received a \$1,141.01 overpayment.¹⁵

¹⁰ See *Charles P. Mulholland, Jr.*, 48 ECAB 604, 606 (1997).

¹¹ 5 U.S.C. § 8115(a).

¹² *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as “the incapacity, because of an employment injury, to earn the wages the employee was receiving *at the time of injury*.” (Emphasis added.) 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent a employee’s wage-earning capacity, the Office applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee’s compensation.

¹³ See *supra* note 9.

¹⁴ See *supra* notes 10 through 12.

¹⁵ As recovery from continuing compensation benefits under the Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹⁶ These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] 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 this subchapter or would be against equity and good conscience."¹⁷ If the Office finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of her income (including compensation benefits) to meet current ordinary and necessary living expenses and also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.¹⁸ According to 20 C.F.R. § 10.437, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.¹⁹ To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.²⁰

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.²¹ These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] 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 this subchapter or would be against equity and good conscience."²² Since the Office found

¹⁶ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁷ 5 U.S.C. § 8129(b).

¹⁸ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). Office procedure provides that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

¹⁹ 20 C.F.R. § 10.437(a), (b).

²⁰ *Id.* at § 10.437(b)(1).

²¹ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

²² 5 U.S.C. § 8129(b).

appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.438 of the Office's regulations provide:

“(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.”²³

ANALYSIS -- ISSUE 2

In the February 5, 2009 notice of the preliminary overpayment determination, the Office requested that appellant complete and return an enclosed financial information questionnaire within 30 days of the date of the notice even if she was not requesting waiver of the overpayment. Appellant did not submit such information within the allotted time. Therefore, the Office properly determined that she did not establish entitlement to waiver of the overpayment under the above-described standards. Appellant did not provide financial information within the appropriate time period to show that she was entitled to waiver of the overpayment.²⁴

CONCLUSION

The Board finds that appellant received a \$1,141.01 overpayment of compensation. The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

²³ 20 C.F.R. § 10.438.

²⁴ On appeal, appellant argued that she could not afford to repay the overpayment, but she was provided an opportunity to submit financial information supporting such inability to pay and failed to submit such information. She argued that she did not realize that there was a time limit for submitting financial information, but the Office's February 5, 2009 notice clearly advised her that she had 30 days from the date of the notice to submit this information.

ORDER

IT IS HEREBY ORDERED THAT the March 13, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 6, 2010
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