

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

D.C., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Flushing, NY, Employer)

**Docket No. 09-1460
Issued: April 19, 2010**

Appearances:
Appellant, pro se
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 May 26, 2009 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated December 1, 2008, which found that he received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$2,556.00; (2) whether the Office properly denied waiver of recovery; and (3) whether the Office properly determined that it would recover the overpayment by deducting \$100.00 from his continuing compensation payments.

FACTUAL HISTORY

On January 14, 2003 appellant, then a 50-year-old transportation security screener, was loading baggage when he sustained an injury to his left shoulder in the performance of duty. The

Office accepted his claim for cervical spine spondylitis. Appellant stopped work on February 8, 2003 and was placed on the periodic rolls.

On July 2, 2008 appellant completed his EN1032 form and informed the Office that he had been employed as a tutor at John Jay College at the rate of \$15.00 an hour since February 2008. He noted that he worked approximately 12 hours per week.

In a letter dated July 7, 2008, directed to John Jay College, the Office requested information about appellant's employment. In a response received on July 21, 2008, the college payroll coordinator advised the Office that appellant was employed as a college assistant for 14.5 hours per week at a rate of \$15.00 an hour since March 3, 2008. This response was "certified by the Payroll Department."

On July 24, 2008 the Office notified appellant that he was reemployed as a college assistant with wages of \$15.00 dollars an hour at 14.5 hours per week. It noted that the employment was effective March 3, 2008. The Office advised appellant that it was reducing his compensation effective July 6, 2008 based on his actual earnings in the position.

On October 27, 2008 the Office made a preliminary finding that an overpayment of \$2,556.00 arose because appellant was in receipt of benefits for total disability for the period March 3 through July 5, 2008, when he received earnings from employment with John Jay College. It found he was without fault in creating the overpayment. Appellant was informed of his review options if he wished to challenge the overpayment or to request waiver of recovery of the overpayment. If he wished a waiver of the overpayment, he was specifically directed to submit, within 30 days, financial information by completing an overpayment recovery questionnaire. In an accompanying memorandum, the Office noted that the evidence showed that appellant was employed by John Jay College at the rate of \$15.00 an hour as of March 3, 2008. It reduced his compensation using the *Shadrick* formula¹ to reflect the earnings. The Office determined that, on the date of injury, January 14, 2003, appellant was earning \$572.66 per week. The current pay rate for the same grade and step in that position was \$672.19. The Office determined that appellant earned \$217.50 per week as a tutor (14.5 hours per week multiplied by \$15.00 an hour). It explained that, for the period March 3 through July 5, 2008, he was paid \$7,123.44 in net compensation. However, appellant should have received \$4,567.44. The Office subtracted this from the amount he received and determined that a \$2,556.00 overpayment had occurred. No response was received to the preliminary notice.

In a decision dated December 1, 2008, the Office finalized its preliminary findings on the fact and amount of overpayment. It found that appellant was without fault. The Office denied waiver of recovery of the overpayment noting that he had not submitted financial information. It determined that \$100.00 would be withheld from appellant's continuing compensation beginning November 23, 2008 and advised that the overpayment would be absorbed by approximately December 19, 2010.

¹ See *Albert C. Shadrick*, 5 ECAB 376 (1953).

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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.² 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.³ A claimant, however, is not entitled to receive temporary total disability 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.⁴

If the claimant has been receiving compensation on the periodic rolls, the claims examiner should delete the payment record from the periodic rolls as soon as possible. If the deletion can be made effective with the current roll period, any additional compensation due should be paid on the daily rolls. Any compensation paid for total wage loss subsequent to the date of return to work should be declared an overpayment.⁵ If the claimant is entitled to compensation for partial wage loss after returning to work, the claims examiner should compute entitlement using the *Shadrick* formula and authorize compensation on a 28-day payment cycle.⁶

ANALYSIS -- ISSUE 1

The record establishes that an overpayment occurred because appellant was employed on a part-time basis from March 3 to July 5, 2008, while he remained on the periodic rolls and received compensation for total disability. Once the Office learned that appellant had actual earnings, it advised him that he was paid at an incorrect rate and that an overpayment was created.

As noted, an overpayment of compensation is created when a claimant returns to work but continues to receive wage-loss compensation. If a reduction of benefits based upon actual earnings is not accompanied by a determination that the actual earnings fairly and reasonably represent wage-earning capacity, an informal reduction of benefits utilizing the *Shadrick* formula is proper rather than a formal loss of wage-earning capacity determination.⁷ The Office did not make a finding that appellant's reemployment as a part-time college assistant fairly and reasonably represented his wage-earning capacity and thus it properly provided an informal determination of the amount owed based on his actual earnings using the *Shadrick* formula.⁸ The

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8129(a).

⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004). *L.S.*, 59 ECAB ___ (Docket No. 07-1961, issued February 14, 2008).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.814.7(b)(1) (July 1997).

⁶ *Id.* at Chapter 2.814.7(b)(2) (July 1997). *See* 20 C.F.R. § 10.403; *Shadrick supra* note 1.

⁷ *See L.S., supra* note 4. *See Shadrick, supra* note 1.

⁸ *See id.*

Board finds that the Office properly calculated the amount of compensation owed under this formula as well as the resulting overpayment of compensation. The Office determined that on the date of injury appellant had a weekly pay of \$572.66, the current weekly pay rate for the position was \$672.19 and his weekly actual earnings as a tutor were \$217.50. It applied the formula to find that he should have been paid net compensation of \$4,567.44 for the period in question. The Office noted that appellant received \$7,123.44 in net compensation for this period. It subtracted \$4,567.44 from \$7,123.44, leaving the difference of \$2,556.00 as an overpayment of compensation.

Although appellant, on appeal, asserts that he worked a lesser number of weekly hours, the evidence from the college where appellant worked supports the Office's finding that he worked 14.5 hours per week.

The Board finds that the Office properly found that appellant received a \$2,556.00 overpayment of compensation from March 3 to July 5, 2008.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act provides: "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."⁹ Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.¹⁰

Section 10.436 of the implementing federal regulations¹¹ provide that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to defeat the purpose of the Act.

Section 10.437 provides that 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 or her position for the worse.¹²

⁹ 5 U.S.C. § 8129(b).

¹⁰ See *L.S.*, *supra* note 4.

¹¹ 20 C.F.R. § 10.436.

¹² *Id.* at § 10.437.

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. 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.¹³

ANALYSIS -- ISSUE 2

The Office, in its preliminary determination to appellant of the existence of the overpayment, informed him that he needed to explain his reasons for seeking a waiver, complete the recovery questionnaire form and submit financial documents to support his claimed income and expenses. It advised him to submit his response within 30 days.

The overpayment recovery questionnaire is designed to obtain the financial information to determine whether adjustment or recovery would defeat the purpose of the Act. Appellant did not respond to the preliminary determination or return the overpayment recovery questionnaire provided by the Office and did not otherwise submit financial evidence or supporting documentation to establish that recovery of the overpayment would defeat the purpose of the Act. Further, he did not submit evidence establishing that recovery of the overpayment would be against equity and good conscience because, in reliance on the overpaid compensation, he relinquished a valuable right or changed his position for the worse. Although appellant is without fault in the creation of the overpayment, he nevertheless bears responsibility for providing the financial information necessary to support a request to waive recovery of the overpayment. Section 10.438 of the regulations state that a claimant who received an overpayment is responsible for providing information about income, expenses and assets to the Office so that it may determine whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁴ Failure to submit the information, which will also be used to determine a repayment schedule if necessary, within 30 days of a request from the Office, will result in a denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.¹⁵

Appellant submitted no evidence in this case to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. The Board finds that the Office did not abuse its discretion in refusing to waive recovery of the overpayment.

¹³ *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

¹⁴ 20 C.F.R. § 10.438(a).

¹⁵ *Id.* at § 10.438(b); *Robert B. Hutchins*, 52 ECAB 344 (2001).

LEGAL PRECEDENT -- ISSUE 3

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.¹⁶

ANALYSIS -- ISSUE 3

The Board finds that the Office properly required repayment by withholding the overpayment amount of \$100.00 from appellant's compensation checks until the overpayment was recouped. On October 27, 2008 the Office advised appellant of his right to request a hearing or telephone conference regarding its preliminary determination that an overpayment had occurred and that, if he wished a waiver of recovery of the overpayment, he was specifically directed to submit financial information. As noted above, appellant did not respond or submit any financial documentation. The Board finds that the Office properly considered his circumstances and imposed a repayment schedule of \$100.00 from his compensation every 28 days. The Office acted properly in determining that the overpayment would be recovered by deducting this amount from appellant's continuing compensation.

On appeal, appellant indicated that he was not aware of the overpayment of compensation until the evening of December 22, 2008. He noted that he reported the disruption in his mail service to the post office and to the Office. The Board notes that there is no evidence to rebut the assumption that the documents were not timely received. Under the mailbox rule, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course.¹⁷ Appellant also submitted additional evidence on appeal. However, the Board has no jurisdiction to review this evidence for the first time on appeal.¹⁸

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$2,556.00 overpayment of compensation that occurred for the period March 3 to July 5, 2008. The Office properly denied waiver of recovery and set the rate of recovery in the amount of \$100.00 from appellant's continuing compensation.

¹⁶ 20 C.F.R. § 10.441(a).

¹⁷ See *James A. Gray*, 54 ECAB 277 (2002); *Charles R. Hibbs*, 43 ECAB 699 (1992).

¹⁸ 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 19, 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