

On appeal, appellant contends that he was entitled to all compensation received. He also asserts that he provided financial information as requested by the Office.

FACTUAL HISTORY

The Office accepted that on April 25, 2008 appellant, then a 41-year-old firefighter working a 72-hour weekly schedule, sustained a ruptured left biceps tendon when carrying a heavy bag in the performance of duty. Appellant underwent a left distal biceps tendon repair on May 21, 2008, authorized by the Office. He received total disability compensation through July 10, 2008, when he returned to light-duty work for 40 hours a week.

Beginning July 10, 2008, appellant received wage-loss compensation on the supplemental rolls for 44 hours a week: 32 hours due to the schedule reduction from 72 to 40 hours a week, and 12 additional hours to attend physical therapy appointments. As of January 2, 2009, his compensation every four weeks was \$2,416.24. On March 4, 2009 the Office issued an electronic compensation payment for \$4,349.24, for 176 hours of wage loss from January 6 to 30, 2009.

By notice dated April 6, 2009, the Office advised appellant of its preliminary determination that an overpayment of \$1,933.00 was created as payment from January 6 to 30, 2009 was based on a 40-hour workweek and not his 72-hour date-of-injury work schedule. It issued appellant \$4,439.24 in compensation whereas he was only entitled to \$2,416.24, a difference of \$1,933.00. The Office found he was not at fault in creation of the overpayment. It afforded him 30 days to submit additional evidence and argument, including an overpayment recovery questionnaire. Appellant did not respond prior to May 7, 2009.

By decision dated May 7, 2009, the Office finalized the April 6, 2009 overpayment in the amount of \$1,933.00 from January 6 to 30, 2009. It found that, although appellant was not at fault in creation of the overpayment, he was not eligible for waiver as he did not submit financial information as requested. The Office directed appellant to repay the debt in full within 30 days or make arrangements for its recovery.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of 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 his duty.³ Section 8129(a) of the Act provides, in pertinent part, that 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."⁴ The Office's procedure manual identifies various situations when overpayments of compensation

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8129(a).

may occur, including when a claimant receives compensation for total disability after returning to work.⁵

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a ruptured left biceps tendon on April 25, 2008. At the time of the injury, he worked 72 hours a week as a firefighter. On July 10, 2008 appellant returned to work for 40 hours a week. He received compensation for 44 hours of wage loss a week, based on his 72-hour-a-week date-of-injury schedule. For the period January 6 to 30, 2009, the Office issued \$4,439.24 in compensation, based on a 40-hour-a-week schedule. Appellant was entitled to only \$2,416.24 based on his 72-hour weekly date-of-injury schedule. The Office therefore found a \$1,933.00 overpayment. The Board finds that the Office's calculations are correct.

On appeal, appellant contends that he was entitled to all compensation paid to him from January 6, to 30, 2009. The evidence of record, however, establishes that the \$4,439.24 compensation payment issued for that period was based on an incorrect work schedule. Appellant was not entitled to the full amount. The Board finds that the Office correctly determined that appellant received an overpayment of compensation in the amount \$1,933.00 for the period in question.⁶

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.⁷ 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 the Act or would be against equity and good conscience.⁸ Since the Office found appellant to be without fault in the creation 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 10.436 of the implementing regulations⁹ provide that recovery of an overpayment will defeat the purpose of the Act if 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

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2.a (May 2004).

⁶ *Alberto Pineiro*, 51 ECAB 310 (2000).

⁷ *Robert Atchison*, 41 ECAB 83 (1989).

⁸ *See* 5 U.S.C. § 8129(b).

⁹ 20 C.F.R. § 10.436.

ordinary and necessary living expenses; and (b) the beneficiary's asserts do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.¹⁰ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹¹

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 in 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 The overpaid individual is responsible for providing information regarding income, assets and expenses as specified by the Office 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 found that as appellant was not at fault in the matter of the \$1,933.00 overpayment, he was eligible for consideration of waiver.

Appellant bears responsibility for providing the financial information necessary to support a request for waiver. The Office requested that he provide financial information and submit an overpayment recovery questionnaire within 30 days of the preliminary overpayment notification. Appellant did not submit the requested documentation within the 30-day time period. Although he contends on appeal that he submitted financial information, the record does not establish that it was received by the Office prior to the final decision or the overpayment. The Office denied waiver based on appellant's failure to provide financial information as requested. The Board finds that the Office properly denied waiver of the overpayment.¹⁴

As appellant did not submit financial information, there is no evidence that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

¹⁰ An individual's assets must exceed a 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. This base includes all of the individual's assets not exempt from recoupment; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (May 2004).

¹¹ *Sherry A. Hunt*, 49 ECAB 467 (1998).

¹² 20 C.F.R. § 10.437 (1999).

¹³ *Id.* at § 10.438. *See Madelyn Y. Grant*, 57 ECAB 533 (2006).

¹⁴ 20 C.F.R. § 10.438.

Therefore, the Office properly denied waiver. The Board will affirm the Office's May 7, 2009 decision.¹⁵

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,933.00. The Board further finds that the Office properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 7, 2009 is affirmed.

Issued: April 16, 2010
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

¹⁵ The Board notes that it does not have jurisdiction to review the Office's finding regarding how the overpayment should be recovered. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).