

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

G.P., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Charlotte, NC, Employer)

**Docket No. 09-1753
Issued: August 13, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 29, 2009 appellant filed a timely appeal from an April 6, 2009 overpayment decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$17,316.10 from April 13, 2008 through January 17, 2009, because his compensation was not adjusted to reflect his wage-earning capacity as plant protection superintendent; (2) whether appellant is entitled to waiver of recovery of the overpayment; and (3) whether the Office properly directed recovery at the rate of \$400.00 every four weeks from his continuing compensation.

FACTUAL HISTORY

On June 20, 2005 appellant, then a 33-year-old federal air marshal, injured his neck during cardiopulmonary resuscitation (CPR) training. The Office accepted the claim for a cervical strain and herniated disc. It authorized cervical fusion surgery, which was performed on January 26, 2006. Appellant was placed on the periodic rolls in receipt of wage loss for total disability.

In a September 29, 2006 report Dr. Thomas A. Sweasey, an attending Board-certified neurosurgeon, reported that appellant had 10 percent impairment of his right upper extremity. His reports noted sensory loss involving the C5 nerve root. Dr. Sweasey reported that appellant experienced some neck pain with activity but was at a point where he could return to work, if it was desk work. On January 17, 2007 appellant filed a claim for a schedule award.¹

On July 20, 2007 appellant was referred to Sabrena Bagby for vocational rehabilitation based on the determination of Dr. Sweasey that he was capable of performing sedentary work with restrictions. In a January 23, 2008 report, Ms. Bagby identified the constructed position of plant protection superintendent as within the sedentary strength category, consistent within his work restriction and qualifications and reasonably available in his local labor market. She noted that appellant chose to attend law school full time and declined rehabilitation services.

In a letter dated February 20, 2008, the Office proposed to reduce appellant's wage-loss compensation on the grounds that the medical and factual evidence established that he was no longer totally disabled. Appellant was found partially disabled with the capacity to earn wages in the constructed position as a plant protection superintendent. The Office determined that he had a 37 percent wage-earning capacity of \$576.87 and that it resulted in a weekly compensation rate of \$763.69. Appellant was advised to submit evidence if he disagreed with the proposed reduction. He did not respond.

In a March 26, 2008 decision, the Office adjusted appellant's compensation benefits to reflect his wage-earning capacity as a plant protection superintendent effective April 13, 2008.

The record contains a log of compensation paid from April 13, 2008 through January 17, 2009. Starting April 13, 2008, the Office did not reduce appellant's compensation to reflect the wage-earning capacity decision. Appellant received wage-loss benefits in the amount of \$46,783.60 but was only entitled to receive \$29,467.50, the difference reflecting an overpayment in the amount of \$17,316.10.

In a February 5, 2009 notice, the Office advised appellant of its preliminary determination that an overpayment of compensation of \$17,316.10 was created as he was paid compensation for total disability from April 13, 2008 through January 17, 2009. Appellant was

¹ Appellant was referred to Dr. Surendrapal Singh Mac, a Board-certified orthopedic surgeon. On June 14, 2007 he found four percent sensory impairment and seven percent motor impairment of the right arm based on radiculopathy involving the C7 and C8 nerve roots. Following review by an Office medical adviser on June 17, 2009 the Office issued a schedule award for eight percent impairment of the right arm. On appeal, appellant did not seek review of the June 26, 2009 schedule award and it is not before the Board in this appeal.

only entitled to wage loss at the reduced rate set forth in the wage-earning capacity determination. The Office found that he was at fault in the creation of the overpayment because he accepted payments which he knew or should have known to be incorrect. It notified appellant that he had the right to submit evidence or argument regarding the overpayment and the preliminary finding of fault within 30 days.

On February 25, 2009 appellant submitted an overpayment recovery questionnaire (Form OWCP-20). He listed total monthly income of \$3,900.00, total assets of \$61,660.00 and total monthly expenses of \$4,530.00. The monthly expenses included \$1,500.00 for rent or mortgage, \$1,000.00 for food, \$200.00 for clothing, \$525.00 for utilities and \$1,655.00 in miscellaneous expenses. Appellant noted that the \$3,800.00 monthly income from his spouse would cease June 1, 2009 as she had been laid off from her job. He requested review of the written record.

In a March 25, 2009 memorandum, the Office noted that appellant had monthly income of \$3,800.00 from his wife's salary, \$2,926.35 in wage-loss compensation payments and \$100.00 in other income or total monthly income of \$6,826.35. At the conference he informed the Office that his wife was being laid off from her job effective June 1, 2009. Monthly, expenses included \$1,150.00 mortgage and insurance, \$680.00 for food, \$370.00 in utilities, \$200.00 for clothing, \$380.00 for an automobile loan, \$80.00 for automobile insurance and \$250.00 for gas or total monthly expenses of \$3,352.50.² Other assets included \$100.00 cash on hand, \$1,500.00 in a checking account, \$60.00 in a savings account and \$60,000.00 in other savings, a total of \$61,660.00. The claims examiner noted that appellant borrowed approximately \$11,000.00 in student loans a semester to attend law school. She found that appellant had a total asset balance of \$52,700.00 (\$61,660.00 less \$8,960.00, the exemption for three people). The claims examiner found that he had \$3,373.85 left over after monthly expenses, including his wife's salary and a negative balance of \$426.15³ without his wife's income. Appellant's contention that he thought the additional compensation was for a schedule award was not found credible. Therefore, he was found at fault in the creation of the overpayment and waiver was not possible.

In an April 6, 2009 decision, the Office found that an overpayment of \$17,316.10 was created as appellant received compensation for total disability from April 13, 2008 through January 17, 2009 when he was only entitled to wage loss at the reduced wage-earning capacity rate. It found that appellant was at fault in the creation of the overpayment and it was not subject to waiver. The Office directed recovery of the overpayment at the rate of \$400.00 every 28 days from his continuing compensation payments.

² The claims examiner reduced appellant's monthly claim for food and utility expenses. Appellant's claim of \$1,000.00 for food exceeded the average monthly food expenditure required for a family of three and was reduced to \$680.00. The Office also reduced appellant's claim of \$525.00 in monthly utilities to \$370.00. It disallowed \$150.00 for cable TV, but allowed \$80.00 for telephone. The Office reduced appellant's monthly expenditure of \$100.00 for internet access to \$50.00 per month.

³ The Office made a mathematical error in its calculation of the available income when it subtracted appellant's monthly income minus his wife's income when it deducted his monthly expenses. $\$3,026.35$ (monthly income including wife's income) less $\$3,352.50$ (monthly expenses) = $-\$326.15$.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act 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.⁴ When an overpayment has been made to an individual because of an error of fact or law, adjustments shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁵

ANALYSIS -- ISSUE 1

On March 26, 2008 the Office issued a loss of wage-earning capacity determination based on appellant's ability to perform the duties of a plant protection superintendent. It found that he was no longer totally disabled based upon the opinion of his attending physician, Dr. Sweasey. A vocational rehabilitation counselor identified the position of plant protection superintendent, finding that it was within the sedentary strength category and appellant's work restrictions. Appellant qualified for the position based on his education and experience and it was reasonably available in his local labor market. The Office determined that he had a 37 percent wage-earning capacity of \$576.87 a week and adjusted his wage loss to reflect his partial disability. Appellant was notified that his wage-loss benefits would be reduced effective April 13, 2008 and the rate at which he would receive further compensation. The record reflects, however, that the Office continued to issue payments for wage loss after that date at the rate of total disability.

On February 5, 2009 the Office made a preliminary determination that appellant received an overpayment of \$17,316.10. The overpayment occurred because he received wage-loss benefits for total disability from April 13, 2008 through January 17, 2009 rather than at the reduced rate under the March 26, 2008 wage-earning capacity determination. Appellant received compensation in the amount of \$46,783.60 but was only entitled to compensation in the amount \$29,467.50, based on his 37 percent wage-earning capacity. This created an overpayment of \$17,316.10. The Board finds that the fact and amount of overpayment are established in this case. Appellant received an overpayment of \$17,316.10 due to his receipt of wage-loss benefits for this period at total disability instead of at the rate reflecting his wage-earning capacity.

On appeal, appellant contends that he never agreed with the amount of salary as found by the vocational counselor under the wage-earning capacity determination. The Board notes that the March 26, 2008 decision is not presently on appeal.⁶ The Office set forth findings on how the overpayment was created and provided this to appellant with the preliminary notice of overpayment. It properly determined the amount of the overpayment from April 13, 2008 through January 17, 2009. Appellant also contends that he did not receive the Office's

⁴ 5 U.S.C. § 8102(a). *See also J.O.*, 60 ECAB ___ (Docket No. 09-264, issued August 10, 2009).

⁵ *Id.* at § 8129(a). *See also J.S.*, 58 ECAB 515 (2007); *Joan Ross*, 57 ECAB 694 (2006).

⁶ Appellant did not file for review of the March 26, 2008 wage-earning capacity determination within one year of issuance. Therefore, it is not before the Board in the present appeal. *See* 20 C.F.R. §§ 501.2(c) and 501.3. The Board's determination in this case does not preclude him from seeking modification of the wage-earning capacity determination before the Office.

March 26, 2008 loss of wage-earning capacity decision. The Office mailed the March 26, 2008 decision to his address of record. Appellant did not establish that his address changed or that the address of record used by the Office was incorrect. In the absence of evidence to the contrary, 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 been received at the mailing address in due course. This is known as the mailbox rule.⁷ As the decision was properly mailed to appellant's address of record, there is no evidence to substantiate his allegation of nonreceipt on appeal.⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁹ 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.¹⁰ Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.¹¹

On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.¹²

ANALYSIS -- ISSUE 2

In finding appellant at fault in the creation of the \$17,316.10 overpayment, the Office relied on the third standard: that he knew or should have known that the payments made from April 13, 2008 through January 17, 2009 were incorrect. Even though the Office may have been negligent by making incorrect payments that did not reflect the March 26, 2008 wage-earning capacity determination, this does not excuse a claimant from accepting payments he knew or should know to be incorrect.¹³

The record clearly establishes that the Office originally notified appellant of its proposal to reduce his wage-loss compensation on February 20, 2008. The reduction was made effective

⁷ *C.T.*, 60 ECAB ____ (Docket No. 08-2160, issued May 7, 2009); *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004).

⁸ *Id.*

⁹ 5 U.S.C. § 8101 *et seq.*

¹⁰ *Id.* at § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

¹¹ *L.J.*, 59 ECAB ____ (Docket No. 07-1844, issued December 11, 2007); *Tammy Craven*, 57 ECAB 689 (2006); *Norman F. Bligh*, 41 ECAB 230 (1989).

¹² 20 C.F.R. § 10.433; *see B.H.*, 60 ECAB ____ (Docket No. 09-292, issued September 1, 2009); *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

¹³ *E.V.*, 59 ECAB ____ (Docket No. 07-1733, issued December 11, 2007); *William E. McCarty*, 54 ECAB 525 (2003).

on April 13, 2008 following issuance of the March 26, 2008 decision. As noted, the record establishes that he continued to receive compensation for wage loss at the rate for total disability for the following nine months. The wage-earning capacity determination clearly stated that appellant's compensation was reduced 37 percent effective April 13, 2008.

As noted, the Board has addressed his contention that he did not receive the March 26, 2008 decision. Appellant also contends that he believed that the benefits paid and received were for a schedule award. The Board finds that his contention is not reasonable in light of the fact that no schedule award was issued in this case until June 26, 2009, some five months after the end of the overpayment. This is not a case of receipt of dual benefits for wage loss and under a schedule award for impairment. There is no factual evidence of record on which appellant would have a reasonable basis to continue to accept payment of an amount equal to total disability, as was paid. The Board finds that he knew or should have known that the benefits he accepted were incorrect as he was not entitled to wage-loss compensation for total disability as of April 13, 2008, after notification that his benefits were being reduced.

LEGAL PRECEDENT -- ISSUE 3

Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to 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 resulting hardship upon such individual.¹⁴

ANALYSIS -- ISSUE 3

The Office determined that the overpayment would be recovered by withholding \$400.00 from appellant's continuing compensation checks until the payment was repaid in full.

The Board finds that the Office gave due regard to the relevant factors in setting the rate of recovery of \$400.00 every 28-day compensation period. Appellant argued that he relied on the salary of his wife which would cease on or about June 1, 2009. The record reflects that the Office considered his monthly income and expenses and found that he had total assets of approximately \$52,700.00. The Board finds that, by directing recovery of \$400.00 every 28 days from appellant's continuing compensation, it set the rate of recovery at an amount so as to minimize any hardship.¹⁵ On appeal, appellant cited the Office's regulations at 10.436 contending that he needed all of his current income to meet current ordinary and necessary living expenses. The Board notes that the section cited by him pertains to the consideration of waiver. As appellant was found at fault in the creation of the overpayment, he is not eligible for waiver

¹⁴ 20 C.F.R. § 10.321(a)

¹⁵ See *Steven R. Cofrancesco*, 57 ECAB 662 (2006). The Board is not unmindful as to appellant's receipt of future compensation payments. Under the June 29, 2009 schedule award, appellant's benefits were adjusted and he was paid \$4,630.56 from June 7 to July 4, 2009 and would receive \$4,677.36 every four weeks until the expiration of the award on November 28, 2009. This was based on his effective pay rate as of April 28, 2007 and not on the loss of wage-earning capacity determination, under which he received approximately \$2,946.07.

and this section of the regulations is not applicable to his appeal. The Office collection of the overpayment was determined under section 10.441.

CONCLUSION

The Board finds that appellant received an overpayment of \$17,316.10 for which he was at fault.

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 13, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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