



By letter dated December 20, 2007, the Office advised appellant of his eligibility for benefits. In an attached Form CA-1008, it advised appellant of certain information concerning the circumstances under which he could receive compensation.

The employing establishment offered appellant a position as a full-time modified office helper at his date-of-injury wage rate, effective January 24, 2008. On January 24, 2008 appellant accepted the position and returned to work.

On April 17, 2008 appellant stopped work and underwent authorized arthroscopic surgery on the left shoulder. He was placed on the periodic rolls for temporary total disability after his surgery.

In a letter dated May 14, 2008, the Office outlined appellant's entitlement to compensation benefits and his responsibility to return to work in connection with the injury accepted by the Office. It advised that he could not keep any compensation payment for a period in which he also worked.

On June 24, 2008 appellant returned to work in his full-time limited-duty job.

In a periodic rolls payment worksheet dated July 1, 2008, the Office noted that appellant returned to work full-time limited duty on June 24, 2008 and was paid compensation through July 5, 2008.

On July 1, 2008 the employing establishment offered appellant a position as a full-time modified office helper position. The position was effective July 1, 2008. Appellant accepted the position.

On July 2, 2008 the Office notified appellant that since he returned to work on June 24, 2008 he was required to file CA-7 claim forms for any lost time from work due to his work injury as he would no longer be compensated automatically every 28 days.

In a July 2, 2008 payment report, the Office noted that from June 8 to July 5, 2008 appellant was paid net compensation of \$2,777.82. In an Office worksheet dated July 2, 2008, it noted that, from the period June 24 to July 5, 2008, he was paid \$1,190.49 in net compensation. In another fiscal payment worksheet, the Office noted that, from June 24 to July 5, 2008, a total of 12 days, appellant was overpaid compensation benefits in the amount of \$1,190.49.

In a September 2, 2008 letter, the Office informed appellant that it had made a preliminary determination that he had received a \$1,190.49 overpayment of compensation from June 24 to July 5, 2008 because he continued to receive compensation benefits for temporary total disability from June 24 to July 5, 2008 after he had returned to work full time. It noted that the net amount of compensation paid to him for the period June 8 to July 5, 2008 was \$2,777.82. The Office further noted that, for the period June 24 to July 5, 2008, appellant was paid \$1,190.49. As noted above, appellant was paid \$2,777.82 for the period June 8, to July 5, 2008 but was only entitled to \$1,587.33 and therefore an overpayment of \$1,190.49 was created. The Office found that he was at fault in creating the overpayment because he accepted payment that he knew or reasonably should have known to be incorrect. It informed appellant that he had the

right to submit evidence or argument if he disagreed with the Office's finding and of his right to a prerecoupment hearing.

On September 29, 2008 appellant requested a telephonic prerecoupment hearing which was held on January 13, 2009. He submitted an overpayment questionnaire in which he noted that he did not have any incorrectly paid checks in his possession and did not transfer any property or cash since the notice of overpayment was issued. The rest of the questionnaire was left blank. During the hearing, the hearing representative advised appellant that the overpayment recovery questionnaire was incomplete and advised him that, if he were not at fault and desired waiver of the overpayment, he must submit the requested financial information as that information was needed to determine if he would experience financial hardship if he had to repay the overpayment. The hearing representative explained to appellant the type of financial information that was needed to document eligibility for waiver.

On January 23, 2009 the hearing representative sent appellant another copy of an overpayment recovery questionnaire for completion.

In an undated statement, appellant disagreed that he was overpaid benefits. He noted that he filed two grievances because he had not received compensation on April 7, 2008 and received only a partial payment on September 2, 2008 for continuation of pay and for physical therapy. Appellant acknowledged receiving a check in May 2008. He asserted that the agency was required by law to advise him of his right to file for compensation benefits for an injury sustained at work and they failed to do so. Appellant also acknowledged receiving funds a few days after returning to work and believed he was without fault and that the overpayment should be waived.

In an April 7, 2009 decision, an Office hearing representative found that appellant received a \$1,190.49 overpayment of compensation from June 24 to July 5, 2008. The hearing representative noted appellant's hearing testimony and found that he was not at fault in creating the overpayment. However, the hearing representative noted that appellant was not eligible for waiver of the overpayment as he did not allege that the repayment would create a financial hardship and he did not submit the requested financial information. The hearing representative found that the overpayment was due and payable in full.<sup>1</sup>

### **LEGAL PRECEDENT**

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.<sup>2</sup> 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.<sup>3</sup> A claimant, however, is not entitled to

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<sup>1</sup> The Board notes that the Office issued a loss of wage-earning capacity determination on August 10, 2009. Appellant did not appeal this decision and therefore this issue is not before the Board at this time.

<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> *Id.* at § 8129(a).

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.<sup>4</sup>

### **ANALYSIS**

The record indicates that appellant returned to full-time work, without wage loss, at the employing establishment on June 24, 2008. He continued to receive wage-loss compensation for total disability through July 5, 2008. As noted above, appellant is not entitled to receive compensation for total disability after he has returned to work. Thus, an overpayment occurred in the amount of \$1,190.49. Appellant did not dispute the calculation of the overpayment.

Since the evidence indicated that appellant returned to full-time work for eight hours daily on June 24, 2008, he would not be entitled to any compensation for wage loss after that date for hours that he worked. The record shows that the Office calculated that, from June 8 to July 5, 2008, appellant received \$2,777.82 in total disability compensation but should have received only \$1,587.33. The Office further noted that, for the period June 24 to July 5, 2008, appellant was paid \$1,190.49. As noted above, appellant was paid \$2,777.82 for the period June 8 to July 5, 2008 but was only entitled to \$1,587.33 and therefore an overpayment of \$1,190.49 was created.

The Office subtracted \$1,587.33 from \$2,777.82 and found that the difference between the amount of compensation appellant received and the amount she should have received was \$1,190.49, the amount of the overpayment. It explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,190.49 for the period June 24 to July 5, 2008.

### **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.<sup>5</sup> These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when [an] 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."<sup>6</sup> 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.

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<sup>4</sup> 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).

<sup>5</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>6</sup> See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

Section 10.436 of the implementing regulations<sup>7</sup> provides that recovery of an overpayment will defeat the purpose of the Act if such 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 or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

Section 10.438 of the regulations provides that “[t]he 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.” Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

On September 2, 2008 the Office requested that appellant provide the necessary financial information by completing an overpayment recovery questionnaire, OWCP-20, if he desired waiver of the overpayment in question. Appellant did not submit a completed OWCP-20 form or otherwise submit financial information supporting his income and expenses. At the January 13, 2009 hearing, the hearing representative also explained the type of financial evidence that was needed to support a request for waiver of the overpayment. On January 23, 2009 the hearing representative sent appellant another copy of an overpayment recovery questionnaire for completion. Appellant did not submit a completed questionnaire or otherwise submit responsive financial evidence. As a result, the Office did not have the necessary financial information to

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<sup>7</sup> 20 C.F.R. § 10.436.

<sup>8</sup> An individual's assets must exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment. *See Robert F. Kenney*, 42 ECAB 297 (1991).

<sup>9</sup> *See Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

<sup>10</sup> 20 C.F.R. § 10.437.

<sup>11</sup> *Id.* at § 10.438.

determine whether recovery of the overpayment would defeat the purpose of the Act or if recovery would be against equity and good conscience.<sup>12</sup>

Consequently, as appellant did not submit the financial information required by section 10.438 of the Office's regulations, which was necessary to determine eligibility for waiver, the Office properly denied waiver of recovery of the overpayment.<sup>13</sup> Inasmuch as he has not shown that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience, the Board finds that the Office properly denied waiver of recovery of the overpayment of compensation in the amount of \$1,190.49.

On appeal appellant asserts that, pursuant to section 8129(b) of the Act, adjustment or recovery by the United States cannot be made when incorrect payment has been made to an individual who was without fault or if recovery would defeat the purpose of the act or be against equity and good conscience. However, as noted, he did not submit the required financial information that is necessary for 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.<sup>14</sup>

### **CONCLUSION**

The Board finds that the Office properly found that appellant received an overpayment of compensation and that he was not entitled to waiver of the overpayment.<sup>15</sup>

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<sup>12</sup> See 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

<sup>13</sup> *Id.* at § 10.438. See *T.S.*, 60 ECAB \_\_\_ (Docket No. 08-1604, issued March 13, 2009).

<sup>14</sup> See *id.* at § 501.2(c).

<sup>15</sup> The Board has no jurisdiction over recovery of the overpayment as the Office did not seek recovery from compensation benefits. Where no recovery from continuing compensation benefits was sought, the Board has no jurisdiction over the Office's determination regarding the manner in which the overpayment should be recovered. See *F.A.*, 60 ECAB \_\_\_ (Docket No. 08-1519, issued December 18, 2008).

**ORDER**

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

Issued: August 18, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board