

FACTUAL HISTORY

In late 1996, the Office accepted that appellant, then a 36-year-old special agent, sustained post-traumatic stress disorder due to the duties of his job. He stopped work at that time and received wage-loss compensation for periods of disability. In a February 2, 2001 decision, the Office adjusted appellant's compensation based on its determination that he was capable of earning wages in the constructed position of elementary school teacher. The decision advised him that his wage-loss benefits every four weeks would decrease to \$2,528.00 beginning February 25, 2001.¹ In a January 3, 2002 decision, an Office hearing representative affirmed the February 2, 2001 decision.

In a May 2, 2008 letter, the Office advised appellant of its preliminary determination that he received a \$15,990.22 overpayment of compensation and that he was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment. It advised that he received a \$15,990.22 overpayment for the period February 26, 2001 to March 15, 2008 because it reduced his entitlement to compensation in the February 2, 2001 wage-earning capacity decision but failed to adjust his compensation payments for this period. Rather, appellant received benefits for total disability. Regarding the matter of fault in creation of the overpayment, the Office stated:

“As you received your compensation benefits by direct deposit, you were also notified by a benefits statement mailed directly to you, of the amount your compensation check. You had plenty of time to be cognizant of the incorrectly paid money, the fact it differed from the amount provided in the February 02, 2001 decision, the same amount you appealed to the Branch of Hearings and Review. You did not inform this Office or inquire when or why your compensation benefits were not reduced.”²

On the overpayment questionnaire completed on October 10, 2008 appellant listed \$7,781.24 in monthly income and \$7,767.30 in monthly expenses.³ After a September 24, 2008 prerecoupment hearing before an Office hearing representative, he submitted additional financial information. Appellant listed \$7,781.24 in monthly income as follows: \$2,758.52 in wage-loss compensation; \$2,731.32 for his wife's income; \$200.00 for payments from Chenairco; and \$2,091.40 for his teacher salary. He again listed \$7,767.30 in monthly expenses.

¹ The Office found that appellant could earn \$488.94 per week as a teacher.

² The Office requested that appellant complete an enclosed financial information questionnaire even if he was not requesting waiver of the overpayment. The record contains documents showing that he received \$273,054.59 in compensation for the period February 26, 2001 to March 15, 2008, but that he would have received \$257,064.37 for this period if his compensation had been properly reduced in accordance with the Office's February 2, 2001 decision.

³ The record contains a Form EN1032 completed on March 14, 2009 in which appellant listed a yearly salary of \$39,727.00 as a teacher.

In a May 7, 2009 decision, the Office hearing representative determined that appellant received a \$15,990.22 overpayment of compensation. She found that he was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment. The Office hearing representative indicated that the overpayment would be recovered by deducting \$408.79 from appellant's compensation payments every 28 days. She determined that he could pay this amount because he had \$7,693.63 in monthly expenses⁴ and \$9,002.42 in monthly income. The Office hearing representative noted that appellant listed \$2,091.40 for his teacher salary on the questionnaire, but indicated that she was using the \$39,727.00 per year salary listed on the EN1032 form. Dividing the \$39,727.00 per year salary by 12 yielded a higher monthly salary for his teaching job of \$3,310.58.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁵ 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.⁶ 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.”⁷

Section 8116(a) of the Act provides that, while an employee is receiving compensation or if he 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.⁸ Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, the Office may, under certain circumstances, base a wage-earning capacity determination reducing compensation on a constructed position.⁹

⁴ The Office hearing representative disallowed \$73.67 for guitar lessons because this did not represent a necessary expense.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 8116(a).

⁹ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

ANALYSIS -- ISSUE 1

In a February 2, 2001 decision, the Office adjusted appellant's compensation based on its determination that he was capable of earning wages in the constructed position of elementary school teacher.¹⁰ The decision reduced his entitlement to wage-loss compensation to \$2,528.00 every four weeks beginning February 25, 2001. The record contains documents establishing that appellant received \$273,054.59 in compensation for the period February 26, 2001 to March 15, 2008; but he was only entitled to receive \$257,064.37 under the Office's February 2, 2001 decision. Appellant was not entitled to receive wage loss for total disability. The difference between these two figures is \$15,990.22. Therefore, the Board finds that he received an overpayment of compensation in the amount of \$15,990.22.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.¹¹ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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 this subchapter or would be against equity and good conscience."¹² No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.¹³

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

"An individual is with fault in the creation of an overpayment who--

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

- (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 to be incorrect...."¹⁴

¹⁰ In a January 3, 2002 decision, an Office hearing representative affirmed the Office's February 2, 2001 decision.

¹¹ 5 U.S.C. § 8129(a).

¹² *Id.* at § 8129(b).

¹³ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁴ 20 C.F.R. § 10.433(a).

Section 10.433(c) of the Office's regulations provides:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”¹⁵

ANALYSIS -- ISSUE 2

The Office's February 2, 2001 decision notified appellant that his wage-loss compensation every four weeks would decrease to \$2,528.00 beginning February 25, 2001 based on his capacity to earn wages as a school teacher. The Board finds that he accepted amounts that he knew or should have known to be incorrect. The length of time that appellant received improper checks, a period of more than seven years, shows that he knew or should have known that he received improper payments. During this extended period, he did not contact the Office to inquire why his compensation checks had not been reduced in accordance with the Office's February 2, 2001 wage-earning capacity determination.

Even though the Office may have been negligent in continuing to issue appellant checks at the rate of compensation for total disability after the issuance of its February 2, 2001 decision reducing his benefits, this does not excuse his acceptance of such payments which he knew or should have known to be incorrect and returned to the Office.¹⁶ For these reasons, it properly determined that appellant was at fault in creating the \$15,990.22 overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

“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 the 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.”¹⁷

¹⁵ *Id.* at § 10.433(c).

¹⁶ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁷ 20 C.F.R. § 10.441(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

ANALYSIS -- ISSUE 3

The Office hearing representative determined that the \$15,990.22 overpayment would be recovered by deducting \$408.79 from appellant's compensation payments every 28 days. She determined that he could pay this amount because he had \$7,693.63 in monthly expenses and \$9,002.42 in monthly income. The Office hearing representative stated that appellant listed \$2,091.40 for his teacher salary on a financial information questionnaire, but indicated that she was using the \$39,727.00 per year salary listed on an EN1032 form. She divided the \$39,727.00 per year salary by 12 to yield a higher monthly salary for appellant's teaching job of \$3,310.58. The Board finds, however, that the Office hearing representative did not adequately explain why she chose to list appellant's monthly income for teaching as \$3,310.58 rather than \$2,091.40 or some other figure. It remains unclear whether the \$39,727.00 per year salary is a gross or net figure for appellant's teaching salary. Until this matter is clarified, it remains unclear whether deducting \$408.79 from his compensation payments every 28 days would be proper under the Act. The case will be remanded to the Office for further development of the method of recovery of the \$15,990.22 overpayment.

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$15,990.22 overpayment of compensation. The Board finds that the Office properly determined that he was at fault in creating the overpayment of compensation and that; therefore, the overpayment was not subject to waiver. The Board further finds that the case is not in posture for decision regarding whether the Office properly required repayment of the overpayment by deducting \$408.79 from appellant's compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT May 7, 2009 decision of the Office of Workers' Compensation Programs is affirmed with respect to the issues of fact, amount, fault and waiver of overpayment. The decision is set aside with respect to the method of recovery of the overpayment. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: February 17, 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