

Appellant stopped working on May 20, 2008 following foot surgery. Appellant began receiving compensation payments commencing May 20, 2008 with a pay rate for compensation purposes of \$1,149.88 per week.

An employing establishment based on appellant's pay rate of \$59,794.00 annually as of the date of recurrence reported that as of January 2008 appellant's pay rate was \$50,794.00 per year, and as of May 20, 2008 his pay rate was \$51,252.00 per year, or \$985.62 weekly. The employing establishment confirmed that, while the May 28, 2008 CA-7 appeared to report a pay rate of \$59,794.00 for January 2008, the correct figure was \$50,794.00.¹

By letter dated November 20, 2008, the Office advised appellant of a preliminary determination that an overpayment of \$2,627.61 was created from May 20 to October 19, 2008. It explained that an incorrect pay rate was used in paying wage-loss compensation. According to the Office appellant received \$17,896.70 in compensation for the period, but should have received \$15,269.09.

Appellant submitted an overpayment recovery questionnaire dated December 2, 2008 providing information regarding income and expenses. On March 10, 2009 a telephone hearing was held regarding the overpayment. Appellant reported \$9,550.00 in monthly income but was provided additional time to provide information on expenses.

On April 2, 2009 the record indicates the Office received additional financial information. Appellant submitted copies of bills, bank statements and an OWCP-20 data sheet with additional expenses listed.

By decision dated April 7, 2009, the Office finalized its determination that an overpayment of \$2,627.61 was created. It denied waiver of the overpayment, finding that appellant did not need substantially all of his monthly income to meet ordinary and necessary living expenses. In notes receipt of an OWCP-20 on December 8, 2008 and that a March 10, 2009 telephone hearing was held.

LEGAL PRECEDENT -- ISSUE 1

When an employee has worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which there was a fixed annual rate of pay, the average annual earnings are the annual rate of pay.² Under 5 U.S.C. § 8101(2), "monthly pay" means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."³

¹ The employing establishment explained the placement of the comma made the 50 appear to be 59.

² 5 U.S.C. § 8114(d).

³ See also 20 C.F.R. § 10.5(s), which defines "pay rate for compensation purposes" as the employees pay as determined under 5 U.S.C. § 8114 at the time established under the requirements of 5 U.S.C. § 8101(2).

ANALYSIS -- ISSUE 1

The Office paid appellant compensation from May 20 to October 19, 2008 using a weekly pay rate for compensation purposes of \$1,149.88. This was based on information in a May 28, 2008 CA-7 that appeared to establish appellant's annual rate of pay as of January 2008 was \$59,794.00, or \$1,149.88 per week. The employing establishment indicated that the actual salary as of May 20, 2008, the date of a recurrence of disability, was \$51,252.00, or \$985.62 per week.

Pursuant to 5 U.S.C. § 8101(2) and 20 C.F.R. § 10.5(s), the pay rate for compensation purposes is determined at the time of the recurrence of disability on May 20, 2008. Since appellant was paid compensation based on a weekly pay rate for compensation purposes of \$1,149.88, rather than \$985.62, an overpayment of compensation was created. The Office determined that appellant's net compensation for the period May 20 to October 19, 2008 was \$17,896.70, but he should have received \$15,269.09 in net compensation based on a correct pay rate of \$985.62. There is no contrary evidence of record. Therefore the Board finds an overpayment of \$2,627.61 was created.

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.⁴ 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."⁵ 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 regulations⁶ 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 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.⁷ An individual is deemed to need substantially all of his or her income to meet current ordinary and

⁴ *Robert Atchison*, 41 ECAB 83 (1989).

⁵ *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361 (1994).

⁶ 20 C.F.R. § 10.436 (1999).

⁷ 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 (October 2004).

necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁸

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.⁹

ANALYSIS -- ISSUE 2

The Office made a finding that appellant did not need substantially all of his income to meet ordinary and necessary living expenses. There are no specific findings in the April 7, 2009 decision regarding appellant's income and expenses, and it does not appear that the Office considered all the evidence of record. In any case, appellant did submit additional relevant evidence on April 2, 2009, prior to the April 7, 2009 final decision. There is no indication that the Office reviewed this evidence, as the April 7, 2009 decision refers only to the prior OWCP-20 and the March 10, 2009 hearing. The Office did not discuss the evidence submitted on April 2, 2009 nor make a finding as to the specific income and expenses attributable to appellant in this case. The Act provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim.¹⁰ Since the Board's jurisdiction of a case is limited to reviewing the evidence which was before the Office at the time of its final decision, it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision.¹¹

The case will be remanded to the Office for proper consideration of the waiver issue based on all the relevant evidence of record. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the evidence supports a finding that an overpayment of 2,627.61 was created. The case is remanded on the issue of waiver for consideration of all the relevant evidence of record.

⁸ *Sherry A. Hunt*, 49 ECAB 467 (1998).

⁹ 20 C.F.R. § 10.437 (1999).

¹⁰ *William A. Couch*, 41 ECAB 548 (1990).

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 7, 2009 is affirmed with respect to fact and amount of the overpayment, and set aside and remanded for further action on the issue of waiver.

Issued: January 22, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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