



September 20, 2005. The Office accepted the claim for a fracture of the right upper humerus. Appellant returned to work.<sup>1</sup>

On November 20, 2006 appellant filed a claim for compensation (Form CA-7), checking the box for a schedule award. In a December 18, 2006 report, an Office medical adviser found that appellant had a 15 percent right arm permanent impairment. The date of maximum medical improvement was August 15, 2006.

On April 6, 2007 the Office issued a schedule award payment for \$8,629.38 covering the period August 15, 2006 to March 17, 2007. A July 6, 2007 payment of \$4,612.00 was issued for the period March 18 to July 6, 2007. Commencing August 4, 2007, the Office issued compensation payments every 28 days through March 14, 2009.

On March 6, 2009 the Office issued a schedule award decision for a 15 percent right arm permanent impairment. The period of the award was 46.80 weeks, from August 15, 2006 to July 8, 2007.

By letter dated March 6, 2009, the Office notified appellant of a preliminary determination that an overpayment of \$26,001.61 was created. It explained that she had continued to receive compensation payments under the schedule awards after July 8, 2007 after the period covered by the awards had expired. Appellant was advised she was found not to be at fault in creating the overpayment.

Appellant requested a telephonic hearing with an Office hearing representative, which was held on September 23, 2009. On October 9, 2009 she submitted an overpayment recovery questionnaire (Form OWCP-20) and copies of financial statements. Appellant listed monthly income of \$4,347.00, which included \$2,523.00 in social security benefits and \$1,824.00 for her husband's unemployment insurance. As to expenses, she reported on the form \$4,607.00 and referred to a separate list of expenses. The record contains two lists of expenses, one for \$3,218.00 and another totaling \$4,607.00. The latter included higher amounts for some expenses and additional expenses.<sup>2</sup>

By decision dated November 2, 2009, the hearing representative found the amount of the overpayment was \$24,798.01. He reduced the preliminary amount by \$1,203.00 as appellant was returned the March 14, 2009 compensation payment. With respect to waiver, the hearing representative noted that appellant had claimed \$3,709.00 in expenses. He found that \$807.00 in claimed expenses were not ordinary and necessary, including expenses for cable television, cellular phone, expenses for a sister and brother and expenses for a rental property. The hearing representative found that appellant had sufficient income over expenses and denied waiver of the overpayment.

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<sup>1</sup> At a September 23, 2009 telephonic hearing, appellant indicated that she was not currently working.

<sup>2</sup> For example, food is \$400.00 as opposed to \$300.00, and automobile repairs are \$200.00 instead of \$100.00 in the former list.

### **LEGAL PRECEDENT -- ISSUE 1**

The number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the arm, the maximum number of weeks of compensation is 312 weeks. As appellant's impairment was 15 percent, she is entitled to 15 percent of 312 weeks, or 46.80 weeks of compensation. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

On November 20, 2006 appellant filed a schedule award claim. Based on an Office medical adviser's opinion, the Office found that appellant had 15 percent right arm impairment. It granted a schedule award for 46.80 weeks of compensation from August 15, 2006 to July 8, 2007. The record reflects, however, that payments continued to March 14, 2009. Appellant has not claimed compensation for wage loss for disability and there is no evidence of record to establish that she was entitled to monetary compensation after July 8, 2007. Since he continued to receive compensation payments after the period of the schedule award, an overpayment of compensation was created.

With respect to the amount of the overpayment, the Board notes the following. Although the Office did not clearly explain all of its calculations, the original preliminary determination of \$26,011.61 appeared to be based on receipt of \$39,284.17 in compensation from August 15, 2006 to March 14, 2009. It calculated that appellant was entitled to \$13,282.56, based on the payments of \$8,629.38, \$4,612.00 and one day of compensation for July 8, 2007 at \$41.18. However, the Office failed to account for July 7, 2007. The period of the award was August 15, 2006 to July 8, 2007. The initial payments of \$8,629.38 and \$4,612.00 covered the period August 15, 2006 to July 6, 2007. Appellant therefore was entitled to an additional two days of compensation for July 7 and 8, 2007, or \$82.36. Accordingly, her entitlement under the schedule award was \$13,323.74, resulting in an overpayment of \$25,960.43. The hearing representative deducted a payment of \$1,203.00 as appellant returned one check. Therefore the amount of the overpayment is \$24,757.43.<sup>4</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Federal Employees' Compensation Act<sup>5</sup> 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."<sup>6</sup> Since the Office found appellant to be

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<sup>3</sup> *Albert Valverde*, 36 ECAB 233, 237 (1984).

<sup>4</sup> The fact that the Office was negligent in continuing to issue checks for permanent impairment does not preclude recovery.

<sup>5</sup> 5 U.S.C. § 8101 *et seq.*

<sup>6</sup> *Id.* at § 8129(b).

without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

Section 10.436 of the Code of Federal Regulations provide that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary “needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses,” and, also, if the beneficiary’s assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.<sup>7</sup> For waiver under the “defeat the purpose of the Act” standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the resource base.<sup>8</sup>

Section 10.437 of the Code of Federal Regulations provide that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) the 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.

The Office must exercise its discretion in determining whether waiver is warranted under either 20 C.F.R. § 10.436 or 10.437. The waiver of or refusal to waive an overpayment of compensation by the Office rests within its discretion pursuant to statutory guidelines.<sup>9</sup>

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

The hearing representative found that appellant did not need substantially all her current income to meet ordinary and necessary living expenses. She reported \$4,347.00 in monthly income. The reported income did include unemployment compensation from her husband, and Office procedures specifically indicate that unemployment compensation is included in determining total income available.<sup>10</sup>

With respect to monthly expenses, appellant provided the Office with two lists of expenses with significant differences in amounts, and no explanation offered for the differences. The hearing representative provided a detailed review of appellant’s expenses, and included amounts that were stated in the \$3,218.00 list and other expenses reported on the \$4,607.00 list.

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<sup>7</sup> Office procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (October 2004).

<sup>8</sup> See *Robert E. Wenzholz*, 38 ECAB 311 (1986).

<sup>9</sup> *George A. Rodriguez*, 57 ECAB 224 (2005).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(2) (October 2004).

He specifically excluded some claimed expenses, and provided reasons for the exclusion. Office procedures limit expenses to “fixed living expenses” including such items as food, clothing and mortgage payments.<sup>11</sup> The hearing representative found that cable television and a cellular phone, when appellant had a land-based telephone, were not ordinary and necessary expenses. As to payments to appellant’s sister for a sitter and medical insurance payments for her brother, allowable expenses are limited to support for others for whom the individual is responsible, such as dependent child day care.<sup>12</sup> The hearing representative also excluded expenses for a rental property that was not appellant’s residence. Based on the hearing representative’s calculations, appellant had \$2,900.00 in monthly expenses or approximately \$1,700.00 in excess income over expenses.

The Board notes that even if the reported monthly expenses of \$4,607.00 were used, deducting the \$800.00 in excluded expenses would result in expenses of approximately \$3,800.00, leaving over \$500.00 in excess monthly income. Office procedures indicate that, if income exceeds expenses by more than \$50.00, then a claimant does not need substantially all of his or her income to meet current necessary expenses.<sup>13</sup> The Board finds that the Office hearing representative properly determined that appellant did not need substantially all her income to meet ordinary and necessary living expenses. Recovery of the overpayment would therefore not defeat the purpose of the Act. With respect to the equity and good conscience standard, appellant did not allege that she gave up a valuable right in reliance on the overpayment. Moreover, as the above discussion of income and expenses indicates, the record does not establish a severe financial hardship in repaying the debt. The Board finds the Office properly exercised its discretion in denying waiver of the overpayment.

On appeal, appellant notes that her income included unemployment compensation, which is not a permanent source of income. As discussed, Office procedures do include unemployment compensation in calculating total monthly income. Appellant contends that she cannot repay the overpayment at the rate of \$800.00 per month, as directed by the hearing representative. With respect to recovery of the overpayment, the Board’s jurisdiction is limited to those instances where recovery is made from continuing compensation benefits.<sup>14</sup> Since the recovery is not from continuing compensation, the Board does not have jurisdiction over this issue.

### **CONCLUSION**

The Board finds an overpayment of \$24,757.43 was created. The Board further finds the Office properly denied waiver of the overpayment.

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<sup>11</sup> *Id.* at Chapter 6.200.6 (a)(3) (October 2004).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at Chapter 6.200.6(a)(1) (October 2004).

<sup>14</sup> *See Levon H. Knight*, 40 ECAB 658, 665 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 2, 2009 is affirmed, as modified to reflect an overpayment of \$24,757.43.

Issued: June 16, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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