

FACTUAL HISTORY

The Office accepted that on or before August 31, 2004 appellant, then a 56-year-old building equipment mechanic, sustained right carpal tunnel syndrome in the performance of duty. Appellant underwent right median nerve release on November 1, 2004, authorized by the Office.

On December 9, 2004 appellant claimed a schedule award. The Office obtained an impairment evaluation from appellant's attending physician on January 9, 2006, finding that he attained maximum medical improvement. An Office medical adviser reviewed the report and opined that appellant had a 10 percent impairment of the right upper extremity due to median nerve deficits according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed.).

By decision dated September 14, 2006, the Office granted appellant a schedule award for a 10 percent permanent impairment of the right upper extremity. The period of the award ran for 218.4 days or 31.2 weeks, from January 9 to September 2, 2006. The payments were made by check. The Office erroneously continued to issue schedule award payments from September 3, 2006 to January 19, 2008.

By notice dated March 25, 2008, the Office advised appellant of its preliminary determination that an overpayment of \$56,586.93 occurred from September 3, 2006 to January 19, 2008 as the Office paid compensation under schedule award compensation after it expired on September 2, 2006.¹ It made the preliminary finding that appellant was at fault in creation of the overpayment as he accepted payments he knew or should have known to be incorrect. The September 14, 2006 decision clearly stated that the award expired on September 2, 2006. The Office afforded appellant 30 days to submit additional evidence and argument and to request a hearing.

By notice dated March 28, 2008, the Office advised appellant of its preliminary determination that a \$1,990.29 overpayment of compensation occurred in his case for the period August 16 to September 2, 2006. It noted that the schedule award properly began on January 9, 2006, the date of maximum improvement. However, the 218.4 day entitlement period ended on August 15, 2006, not September 2, 2006 as set forth in the September 14, 2006 schedule award decision. The Office found that appellant was not at fault in creating the overpayment. It afforded him 30 days to submit additional evidence and to request a hearing.

In an April 24, 2008 letter, appellant requested a prerecoupment hearing regarding both overpayments. He asserted that he was not at fault in their creation and that repaying the debt would cause severe financial hardship.

At the prerecoupment hearing, held September 23, 2008, appellant contended that the employing establishment and the Office conspired to ruin him financially by creating the overpayment. He noted that most of the compensation paid went to support an adult daughter

¹ The Office noted that, from September 3, 2006 to January 19, 2008, appellant received 1 payment of \$3,214.93, 7 payments of \$3,096.00 totaling \$21,672.00 and 10 payments of \$3,170.00 totaling \$31,700.00. It added these amounts to equal \$56,586.93.

and her minor child, who resided with him. Appellant indicated that another adult daughter also lived in the household.

Appellant submitted financial information and documentation showing \$2,949.34 in monthly household income and \$2,896.09 in monthly expenses.² He noted assets of \$5,550.00 in cash, savings and bonds and an automobile worth \$10,000.00.

By decision dated January 8, 2009, the Office affirmed the March 25 and 28, 2008 overpayments. It found that appellant was not at fault in creation of the \$1,990.29 overpayment as the Office erred in determining the schedule award period. The Office denied waiver as appellant had \$13,913.00 in qualifying assets, exceeding the \$8,000.00 resource base for a married claimant.³ Also, appellant's household income of \$2,949.34 exceeded his ordinary and necessary living expenses of \$2,896.09 by more than \$50.00 a month. The Office also denied waiver as he did not demonstrate that detrimental reliance on the overpaid compensation caused a financial loss. The Office further found that appellant was at fault in creation of the \$56,586.93 overpayment as the September 14, 2006 decision stated that the schedule award expired on September 2, 2006 but appellant continued to deposit compensation checks through January 2008. As appellant was at fault, the \$56,586.93 overpayment was not subject to waiver. The Office directed recovery of the overpaid amount by paying \$50.00 a month at a three percent interest rate. It compromised the debt principal to \$19,559.18.⁴ The Office noted that there was no evidence to establish that anyone conspired against appellant regarding his compensation benefits.

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, that 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 The

² Appellant listed the following monthly expenses: \$470.00 mortgage payment; \$670.00 food; \$150.00 clothing; \$455.00 utilities; \$450.00 in miscellaneous expenses; and \$243.09 car loan payment.

³ It is unclear from the record if the Office considered appellant's minor grandchild, who resided with him, as a dependent, which would allocate an additional \$960.00 in assets under the Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (May 2004). However, this is not dispositive, as appellant's allowable assets of \$13,913.00 would still exceed the \$8,000.00 resource base with the additional \$960.00 allowance.

⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Compromise to Limit the Repayment Period*, Chapter 6.300.5 (May 2004) provides that the Office must compromise the debt principal where it is necessary to limit the repayment period. Compromise must be considered if the application of charges will increase the period of indebtedness by more than 35 percent. As applied to this case, the repayment period must be reduced to 1,527.85 months, thereby reducing the principal debt to \$19,559.18. Appellant does not contest the accuracy of this calculation.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Id.* at § 8102(a).

⁷ *Id.* at § 8129(a).

Office's procedure manual identifies various situations when overpayments of compensation may occur, including when a claimant receives schedule award compensation after the expiration of the award.⁸

ANALYSIS -- ISSUE 1

Appellant claimed a schedule award for permanent impairment of the right upper extremity due to accepted carpal tunnel syndrome. On September 14, 2006 the Office granted a schedule award for a 10 percent permanent impairment of the right upper extremity. The decision specified that the period of the award ran from January 9 to September 2, 2006. However, the Office continued payment from September 3, 2006 to January 19, 2008, after the schedule award expired.

The evidence reflects and appellant does not dispute that he received \$56,586.93 in compensation from September 3, 2006 to January 19, 2008. The Board therefore finds that the Office correctly determined that appellant received an overpayment of compensation in the amount of \$56,586.93 for the period in question.⁹

While developing the \$56,586.93 overpayment issue, the Office discovered that the schedule award should have expired on August 15, 2006. However, the evidence establishes and appellant does not dispute that the Office issued \$1,990.29 in compensation for the period August 16 to September 2, 2006. The Board therefore finds that the Office correctly determined that appellant received an overpayment of \$1,990.29 for that period.

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.¹⁰ 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.¹¹ 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 regulations¹² 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

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2 (May 2004).

⁹ *Alberto Pineiro*, 51 ECAB 310 (2000).

¹⁰ *Robert Atchison*, 41 ECAB 83 (1989).

¹¹ See 5 U.S.C. § 8129(b).

¹² 20 C.F.R. §10.436.

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.¹³ 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 \$50.00.¹⁴

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.¹⁵

ANALYSIS -- ISSUE 2

The Office found that appellant was not at fault in the matter of the \$1,990.29 overpayment, so he was eligible for consideration of waiver. Appellant's overpayment recovery questionnaire showed that he had assets of \$13,913.00, exceeding the specified resource base of \$8,000.00 for a claimant with a spouse. By regulation, then, recovery of the overpayment would not cause hardship and would not defeat the purpose of the Act.

On appeal, appellant contends that the Office should grant waiver because he needs all his monthly income to meet monthly expenses. That alone, however, is not enough to establish that recovery would defeat the purpose of the Act. "Defeat the purpose of the Act" has two components, both of which must be met. Appellant would have to establish that he needs substantially all of his current income to meet current ordinary and necessary living expenses. He would also have to establish that his assets do not exceed \$8,000.00. So even if appellant's expenses did exceed his income, he would not be entitled to waiver on the grounds of hardship.

Appellant asserts that the Office did not properly review his financial information. However, the Board finds that the Office hearing representative thoroughly reviewed appellant's supporting documentation and gave due regard to all appropriate factors in determining that the overpayment was not eligible for waiver.

Appellant does not argue, and the record does not establish, that recovery of the debt would be against equity and good conscience. He did not show that he gave up a valuable right or changed his position for the worse in reliance on the overpayment.

Because recovery of the overpayment would not defeat the purpose of the Act and would not be against equity and good conscience, the Office properly denied waiver. Appellant must

¹³ 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 (May 2004).

¹⁴ *Sherry A. Hunt*, 49 ECAB 467 (1998).

¹⁵ 20 C.F.R. § 10.437 (1999).

repay the debt. The Board will affirm the Office's January 8, 2009 decision on the denial of waiver.¹⁶

LEGAL PRECEDENT -- ISSUE 3

Section 10.433 of the implementing regulations provide that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.¹⁷ Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment 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.¹⁸

Section 10.433(b) of the Office's regulations provides, in relevant part, that the determination of fault "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."¹⁹

ANALYSIS -- ISSUE 3

The Office found that appellant was at fault in the creation of the \$56,586.93 overpayment because he accepted compensation payments that he knew or should have known to be incorrect.

The September 14, 2006 decision stated that the schedule award expired on September 2, 2006. The Office continued to issue compensation checks from September 3, 2006 through January 19, 2008. Despite being informed that the schedule award had expired on September 2, 2006, appellant deposited these checks, totaling \$56,596.93, into his bank account. Appellant accepted payments which he knew or should have known to be incorrectly issued after expiration of the schedule award. Therefore, the Office properly found appellant at fault in creation of the overpayment. The fact that the Office may have been negligent in issuing the payments does not mitigate this finding.²⁰

The Board notes that it does not have jurisdiction to review the Office's determination that the overpayment would be recovered by repayment of \$50.00 per month on a principal compromised to \$19,559.18. The Board's jurisdiction is limited to reviewing those cases where

¹⁶ The Board notes that it does not have jurisdiction to review the Office's finding regarding how the overpayment should be recovered. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

¹⁷ *Id.*

¹⁸ 20 C.F.R. § 10.433(a)(3).

¹⁹ *Id.* at § 10.433(b).

²⁰ *Id.* at § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

the Office seeks recovery from continuing compensation under the Act.²¹ Appellant is not in receipt of continuing compensation.

The Office properly determined that appellant was at fault in the creation of the \$56,586.93 overpayment and therefore not entitled to waiver.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$1,990.29 for the period August 15 to September 2, 2006 and a \$56,586.93 overpayment, compromised to \$19,559.18, for the period September 3, 2006 to January 19, 2008. The Board further finds that the Office properly denied waiver of both overpayments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 8, 2009 is affirmed.

Issued: May 13, 2010
Washington, DC

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

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

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

²¹ *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).