

**United States Department of Labor
Employees' Compensation Appeals Board**

G.B., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
CUSTOMS & BORDER PROTECTION,)
Miami, FL, Employer)

**Docket No. 09-1697
Issued: May 10, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 15, 2009 appellant filed a timely appeal from an April 14, 2009 decision of the Office of Workers' Compensation Programs finding that appellant received an overpayment in the amount of \$215,261.91, for which he was with fault. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether the Office properly found that appellant received an overpayment in the amount of \$215,261.91 due to his receipt compensation for total disability following a loss of wage-earning capacity determination for the period February 24, 2001 through April 15, 2006; and (2) whether the Office properly found appellant at fault in the creation of the overpayment.

On appeal, appellant contends that he did not cause the overpayment and should not be held responsible for the Office's mistake. He also contends that repayment of the overpayment would cause him financial problems and that he not be made to pay more than \$1,000.00 a month.

FACTUAL HISTORY

On September 14, 1993 appellant, then a 44-year-old senior customs inspector, filed a claim for an injury to his back and severe strain. The Office accepted this claim and paid compensation and medical benefits. Appellant had multiple other claims, including a claim for a traumatic injury on November 2, 1982 that was accepted for lumbar subluxation, L4, and herniated nucleus pulposus.

By decision dated September 26, 1997, the Office found that appellant was reemployed as a customs inspector at the employing establishment and that his actual earnings fairly and reasonably represented his wage-earning capacity. It set appellant's compensation rate as \$1,288.36 every four weeks. Appellant retired from the Federal Government on November 25, 2006.

On July 21, 2008 the Office made a preliminary determination that appellant was overpaid in the amount of \$227,805.91. It noted that this overpayment occurred because appellant returned to work as a customs inspector in June 1997, that the Office found that this position fairly and reasonably represented his wage-earning capacity; that appellant continued to receive compensation at the reduced rate for approximately four years until his benefits were temporarily suspended for nonreceipt of the Form CA-132; and that when benefits were reinstated on March 25, 2001 the total disability rate was utilized until April 15, 2006 thus causing an overpayment of compensation in this case.¹ The Office further found that appellant was at fault in the creation of the overpayment, as he accepted a payment which he knew or should have known to be incorrect. It forwarded to appellant an overpayment recovery questionnaire.

In a letter dated August 21, 2008, appellant responded to the Office's preliminary overpayment determination. He indicated that he was under the assumption that he was receiving a schedule award that was to be paid over four to five years. Appellant further noted that he lost his home in 2007 to foreclosure due to higher taxes and insurance payments, that his on-the-job injuries have become worse and that he has only been able to obtain a part-time work position paying \$8.00 per hour for approximately 30 hours a week with no benefits; that his on-the-job injuries are causing the loss of feeling in his lower extremities; and that he now has two parents in nursing homes which causes him to miss work on a regular basis to provide support, transportation and care for them. He also contends that he should not be held accountable for the Office's mistake as he followed all the required filings of salary information each year.

¹ The Office found that for the period March 25, 2001 through April 15, 2006 appellant was paid benefits for total disability in the amount of \$323,360.51. It noted that for that time period appellant was entitled to receive compensation in the amount of \$95,554.60. The difference in these amounts, \$227,805.91, represented the amount of the overpayment.

Appellant also completed an overpayment recovery questionnaire.² He requested a prerecoupment hearing.

At the hearing held on February 10, 2009, appellant testified that he retired from the Federal Government on November 25, 2006. He disagreed that an overpayment occurred. Appellant stated that he filed a claim for a schedule award and was told by the Office that he would receive a schedule award over a period of four or five years. He testified that three hurricanes hit his house in 1975 and that this destroyed his paperwork. With regard to his financial situation, appellant noted that his current job just cut 40 percent of his wages this year, so he is projecting making \$8,000.00 in 2009. He noted that his wife was expecting to be laid off from her job because the state of Florida is going to lay off another 4,000 people this year, and that when this occurs, they will be living on \$326.00 every two weeks. The hearing representative reviewed appellant's overpayment questionnaire.

By decision dated April 14, 2009, the hearing representative modified the Office's decision in that he reduced the amount of the overpayment to \$215,261.91.³ The hearing representative made the overpayment determination final, found appellant not without fault in creating the overpayment, and ordered that repayment be repaid at the rate of \$1,200.00 per month from his government retirement.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act 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.⁴ 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.⁵

² In the overpayment recovery questionnaire, appellant listed his income, from his job and his wife's, as \$2,800.00 per month. He listed income from Civil Service Retirement Annuity (CSRA) as \$3,600.00, for a total income of \$6,400.00. Appellant listed his expenses as \$2,200.00 for rent, \$800.00 for food, \$100.00 for clothing and \$900.00 for utilities. He also noted other expenses as \$1,700.00. Appellant noted that he made monthly payments of \$500.00 to his credit union and \$450.00 per month on his credit cards. He listed his total monthly expenses as \$4,950.00.

³ The hearing representative reduced the overpayment from \$227,805.91 to \$215,261.91. The hearing representative found that the Office failed to consider appellant's entitlement to compensation for his loss of wage-earning capacity for the period April 16 through November 25, 2006 (the date of his retirement). The hearing representative noted that appellant was entitled to \$12,488.00 during this period for his loss in wage-earning capacity, thus reducing the overpayment. (The record contains a supplemental roll payment worksheet indicating that appellant should have been paid \$12,544.00 for the period April 16 through November 25, 2006. The record also contains a revised worksheet for the period April 16 through November 24, 2006 indicating compensation due of \$12,488.00. The amount was modified for the reason that appellant was entitled to loss of wage-earning capacity from the date he was taken off rolls due to overpayment, April 16, 2006, to the date before he retired, November 24, 2006.)

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$215,261.91 for the period March 10, 2001 to April 15, 2006.

By decision dated September 26, 1997, the Office determined that appellant had returned to work as a customs inspector with the employing establishment; that this position represented his wage-earning capacity; and that appellant was to be paid compensation at the new rate of \$1,288.36 every 28 days. It suspended this compensation effective March 9, 2001 as appellant failed to submit a Form CA-1032. This form was submitted and appellant's compensation was restored, however, the Office improperly restored appellant's compensation to the full total disability rate, and not to his loss of wage-earning capacity. The Office provided calculations evincing that appellant was paid total disability compensation in the amount of \$323,360.51 for the period March 25, 2001 through April 15, 2006. However, appellant was only entitled to compensation, based on his wage-earning capacity for this period, of \$95,554.60. Accordingly, this resulted in an overpayment of \$227,805.91 for this time period. When the overpayment was evaluated by the hearing representative, she determined that the Office failed to consider appellant's entitlement to compensation based on his loss of wage-earning capacity for the period April 16 through November 25, 2006, the date appellant elected to begin receiving retirement benefits. The hearing representative found that when the amount appellant should have received for this time period, \$12,488.00 was subtracted from the prior overpayment amount of \$227,805.91, the new amount of the overpayment was \$215,261.91. The Board notes that although the hearing representative stated that she subtracted \$12,488.00 (the amount of compensation for the period April 16 through November 24, 2006, the date before appellant began retirement benefits), actually the hearing representative erroneously subtracted \$12,544.00 (the amount of compensation for the period April 16 through November 25, 2006). When the proper amount, \$12,488.00 is subtracted from \$227,805.91, the correct total for the overpayment is \$215,317.91. Accordingly, the Board will modify the overpayment decision to find an overpayment in the amount of \$215,317.91.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless 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.⁶

Section 10.433(a) of the Office's regulations provide that the Office:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. 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. The recipient must show in good faith and exercise a high degree of care in reporting events which

⁶ 5 U.S.C. § 8129. See *Linda E. Padilla*, 45 ECAB 768 (1994).

may affect entitlement to the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment:

- (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. (This provision applies only to the overpaid individual.)⁷

To determine if an individual was at fault with respect to the creation of an overpayment, the Office examines 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.⁸

ANALYSIS -- ISSUE 2

The Board finds that appellant accepted payments from the Office that he should have known to be incorrect. For the period February 25 through March 24, 2001, appellant received compensation totaling \$1,368.64. For the period March 25 through April 21, 2001, appellant received \$4,633.00, an increase of \$3,264.36 every 28 days. These increased payments continued through April 15, 2006. Appellant should have noticed the increase in his compensation benefits and been aware that he was not entitled to the greater amount. The Board is not persuaded by appellant's argument that he thought that these payments were for a schedule award, as there is no evidence in the record that appellant received a schedule award nor is there any evidence that appellant filed a claim for a schedule award.

Therefore, the Board finds that the Office properly determined that he was at fault in creating the overpayment. The fact that the Office may have erred in issuing the payments does not mitigate this finding. Overpayments resulting from the negligence of the Office, does not excuse the employee from accepting payment which the employee knew or should have been expected to know that he was not entitled to receive.⁹

With respect to recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act.¹⁰ As appellant was not in receipt of compensation benefits at the time of the Office's final decision, the Board lacks jurisdiction to review recovery of the overpayment.

⁷ 20 C.F.R. § 10.433. See *Sinclair L. Taylor*, 52 ECAB 227 (2001). See also 20 C.F.R. § 10.430.

⁸ 20 C.F.R. § 10.433(b). See also *Duane C. Rawlings*, 55 ECAB 366 (2004).

⁹ See *J.K.*, 60 ECAB ____ (Docket No. 08-1761, issued January 8, 2008).

¹⁰ See *Terry A. Keister*, 56 ECAB 559 (2005).

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$215,317.91. The Board finds that the Office properly denied waiver of the recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 14, 2009 is affirmed, as modified.

Issued: May 10, 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