

S1 disc herniation. Appellant received compensation for temporary total disability on the periodic rolls.

Appellant returned to work full time effective October 31, 2008. The Office continued to pay compensation for temporary total disability through November 22, 2008.

On December 31, 2008 the Office issued a preliminary determination that appellant received a \$2,130.05 overpayment from October 31 through November 22, 2008 and that he was at fault in creating it because he accepted a payment that he knew or reasonably should have known was incorrect. Appellant completed an overpayment recovery questionnaire showing \$3,900.00 in monthly income, \$3,542.00 in monthly expenses¹ and \$58.00 in funds and assets.

Following a telephonic hearing on May 7, 2009, appellant submitted documentation of his household expenses for the prior three months, including medical bills, a mortgage statement and account statements. He submitted evidence that in February 2009 his total income was \$3,759.47 compared to total expenses of \$4,126.02. Appellant submitted evidence that in March 2009 his total income was \$4,275.14 compared to total expenses of \$4,292.47. He submitted evidence that in April 2009 his total income was \$3,573.29 compared to total expenses of \$3,903.79.

In a decision dated July 14, 2009, the Office finalized its preliminary determination that appellant received a \$2,130.05 overpayment from October 31 through November 22, 2008. It found, however, that he was not at fault in the matter. The Office acknowledged receiving a statement from appellant regarding his son's medical expenses and his wife's reduced hours, but noted that his overpayment recovery questionnaire showed \$358.00 in discretionary monthly income. It denied waiver on the grounds that recovery would not defeat the purpose of the Act or be against equity and good conscience.

On appeal, appellant argues that he tried every means possible to notify the correct people that he had returned to work on October 31, 2008 and contended that he did everything within his control to prevent the overpayment. He argued that he was unaware of the overpayment until he received a letter on the subject. Appellant asked that the debt be excused, as repayment would place an undue burden upon his family and would not be in the best interest of all concerned.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.² While an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, with certain exceptions.³ It is therefore well established that an

¹ The expenses actually totaled \$3,592.00.

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8116(a).

employee is not entitled to compensation for temporary total disability after returning to work.⁴ “Temporary total disability” is defined as the inability to return to the position held at the time of injury or earn equivalent wages or perform other gainful employment.⁵

ANALYSIS -- ISSUE 1

The fact and amount of the overpayment are not in dispute. Appellant returned to work full time and with no wage loss effective October 31, 2008, but the Office continued to pay compensation for total disability through November 22, 2008. He was not entitled to this compensation, so an overpayment arose. The Office calculated the amount by subtracting from appellant’s November 22, 2008 payment the several days of compensation to which he was entitled prior to October 31, 2008. The Board will affirm the Office’s July 14, 2009 decision on the issues of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that when an overpayment of compensation has been made 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.⁶ The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁷ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of the Federal Employees’ Compensation Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁸

Recovery of an overpayment will defeat the purpose of the Act if such 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 current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary’s assets do not exceed a specified resource base.⁹

An individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by

⁴ *E.g., Tammi L. Wright*, 51 ECAB 463, 465 (2000) (where the record established that the employee returned to work at the employing establishment for four hours per day from August 7, 1996 to January 8, 1997 but received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

⁵ 20 C.F.R. § 10.400(b).

⁶ 5 U.S.C. § 8129(a).

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.* at § 10.434.

⁹ *Id.* at § 10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).¹⁰

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.¹¹ Conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit, is not to be considered a loss.¹²

Whether to waive an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹³

ANALYSIS -- ISSUE 2

Upon further consideration, the Office found that appellant was not at fault in creating the overpayment. This finding made him eligible for consideration of waiver of the recovery of the overpayment. The Office denied waiver on the grounds that his overpayment recovery questionnaire showed \$358.00 in discretionary monthly income. As appellant would not need substantially all of his current income to meet current ordinary and necessary living expenses, the Office found that recovery would not create hardship and defeat the purpose of the Act. The Office also found that recovery would not be against equity and good conscience.

Appellant's overpayment recovery questionnaire did show over \$300.00 in discretionary monthly income. After his telephonic hearing, he submitted relevant financial information for the months of February, March and April 2009. In each case, monthly expenses exceeded monthly income. The Office did not address this evidence or explain why recovery of the overpayment would not cause hardship in light of the newly submitted financial evidence. Because it denied waiver without giving due consideration to the evidence submitted, the Board finds that the Office did not properly exercise its discretion in the matter. The Board will set aside the July 14, 2009 decision on the issue of waiver and remand the case for a proper exercise of discretion. After such further development as may be necessary, the Office shall issue an appropriate final decision on whether appellant is entitled to waiver.

Appellant contended on appeal that he did everything within his control to prevent an overpayment. The Office ultimately decided he was not at fault in the matter, so the issue is moot. An overpayment nonetheless arose when the Office made the November 22, 2008

¹⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

¹¹ 20 C.F.R. § 10.437(b).

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.b(3) (October 2004).

¹³ *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984) and cases cited therein.

payment for total disability and because appellant was not at fault in the matter, he is eligible for consideration of waiver of the recovery of the overpayment.

CONCLUSION

The Board finds that appellant received a \$2,130.05 overpayment from October 31 to November 22, 2008. The Board also finds that this case is not in posture for decision on the issue of waiver of the recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2009 decision of the Office of Workers' Compensation Programs is affirmed on the issues of fact and amount of overpayment. The Office's decision is set aside on the issue of waiver of the recovery of the overpayment and the case is remanded for further action consistent with this opinion.

Issued: May 24, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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