

stairwell with a load on his shoulder. He twisted his back. The Office accepted appellant's claim for lumbar strain and aggravation of herniated discs at L3-4 and L4-5. Appellant received compensation for temporary total disability on the periodic rolls at a net rate of over \$1,700.00 every four weeks.

Effective November 3, 2002, the Office reduced appellant's wage-loss compensation to reflect his capacity to earn wages in the constructed position of computer technical support specialist. It found that he had the capacity to earn 64 percent of the current wages paid by his date-of-injury position. Appellant thereafter received compensation at the net rate of nearly \$500.00 each four weeks for the partial disability resulting from the accepted injury.

On May 22, 2003 the Office issued a schedule award for a five percent impairment of appellant's left lower extremity. During the period of the award, which expired on August 26, 2003, appellant received compensation at the net rate of over \$1,700.00 each four weeks. The schedule award notified him: "After the ending date of this award noted in item 3, your entitlement to compensation will be based solely on disability for work resulting from the accepted injury."

When payments under the schedule award expired, appellant received a payment of \$285.61 for the period August 27 to September 6, 2003, after which he continued to receive compensation at the net rate of over \$1,700.00 each four weeks. These payments continued through August 30, 2008.

On March 16, 2009 the Office made a preliminary determination that appellant received an \$89,809.60 overpayment of compensation from September 7, 2003 through August 30, 2008, as it paid him at the rate for total disability even though he was entitled to compensation for only partial disability under the 2002 determination of wage-earning capacity. It found that he was at fault in the matter because he accepted payments that he knew or should have known were incorrect. During an August 11, 2009 telephonic hearing before an Office hearing representative, appellant testified that his monthly expenses exceeded his monthly income.

In a decision dated December 14, 2009, the Office hearing representative found that appellant was at fault in creating an \$89,809.60 overpayment of compensation from September 7, 2003 to August 30, 2008. The hearing representative affirmed the Office's finding that he received payment that he knew or should have known was incorrect. As appellant was at fault, the Office could not grant waiver, and as it appeared that appellant's monthly expenses exceeded his monthly income, the hearing representative determined that the debt could not be recovered in a reasonable time frame. The hearing representative therefore compromised \$60,339.44 of the overpayment to minimize the debt, leaving a balance of \$29,470.16, and determined that a monthly payment plan of \$75.00 would allow a reasonable recovery.

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.¹

¹ 5 U.S.C. § 8102(a).

“Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.²

Section 8115(a) of the Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings, if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.³ If a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss.⁴

With respect to any period after payments under a schedule award have ended, an employee is entitled to compensation for partial disability if his disability is partial.⁵ Thus, where the employee is receiving partial disability benefits prior to the payment of a schedule award, the Office is obligated to resume benefits at that same level upon expiration of the schedule award unless a proper determination has been made warranting modification of the loss of wage-earning capacity.⁶

ANALYSIS -- ISSUE 1

When appellant’s schedule award expired on August 26, 2003, the Office should have resumed his benefits at the same level that was established before the schedule award began, which was a net rate of nearly \$500.00 each four weeks for the partial disability resulting from the accepted injury. Instead, the Office continued to pay him as though he were totally disabled, at a net rate of over \$1,700.00 each four weeks. As the compensation payment history and worksheet calculations in the record show, this oversight caused an \$89,809.60 overpayment of compensation from September 7, 2003 to August 30, 2008. The Board will therefore affirm the Office’s December 14, 2009 decision on the issue of fact and amount of overpayment.

² 20 C.F.R. § 10.5(f).

³ 5 U.S.C. § 8115(a)

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9.a (December 1995).

⁵ 5 U.S.C. § 8107(b)(2).

⁶ *Arthur E. Billigmeier*, 42 ECAB 506 (1991).

LEGAL PRECEDENT -- ISSUE 2

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. Section 8129(b) describes the only exception:

“Adjustment or recovery by the United States may not be made when incorrect payment had 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.”⁷

Thus, 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. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he knew or should have known to be incorrect; or (2) Failed to provide information which he knew or should have known to be material; or (3) Accepted a payment which he knew or should have known to be incorrect.⁸

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment 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 is being overpaid.⁹

ANALYSIS -- ISSUE 2

In 2002 the Office reduced appellant’s compensation for disability because he was no longer totally disabled for work. Appellant was only partially disabled; he had the capacity to earn some wages in the open market as a computer technical support specialist. So his compensation for disability decreased from a net rate of over \$1,700.00 every four weeks to a net rate of nearly \$500.00 every four weeks.

When appellant received his schedule award the following year, the Office informed him: “After the ending date of this award ... your entitlement to compensation will be based solely on disability for work resulting from the accepted injury.” He should have expected his compensation to return to what he was receiving before, nearly \$500.00 every four weeks. When it did not return to that level, when appellant continued to receive over \$1,700.00 every

⁷ 5 U.S.C. § 8129(b).

⁸ 20 C.F.R. § 10.433(a) (1999).

⁹ *Id.* § 10.433(b).

four weeks, just as he had when he was totally disabled for all work, he should have known that the payments were incorrect. The difference in compensation was significant.

Because appellant accepted payments that he should have known were incorrect, the Board finds that he was at fault with respect to creating the overpayment, thereby precluding any consideration of waiver. The Board will affirm the Office's December 14, 2009 decision on the issue of fault.

LEGAL PRECEDENT -- ISSUE 3

Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual.¹⁰

ANALYSIS -- ISSUE 3

The Office hearing representative took several factors into consideration in setting the rate of recovery from appellant's continuing compensation, including appellant's financial circumstances, the extent of the overpayment and the amount of time it would take to recover the debt. The hearing representative knew from appellant's testimony that his monthly expenses exceeded his monthly income, so the entire debt could not be recovered within a reasonable time. The hearing representative therefore compromised or wrote off two-thirds of appellant's debt -- allowing him to keep about \$60,000.00 that he was not entitled to receive from the federal government -- in order to make some reasonable repayment possible. The hearing representative also knew that appellant was entitled to receive a certain amount of continuing compensation for partial disability. With that information, the hearing representative determined that a monthly repayment plan of \$75.00 -- only about \$2.50 a day -- would allow a reasonable recovery of the uncompromised portion of the debt. The Board therefore finds that the Office gave due regard to relevant factors in order to minimize any resulting hardship. The Board will affirm the Office's December 14, 2009 decision on the issue of rate of recovery.

CONCLUSION

The Board finds that appellant was at fault in creating an \$89,809.60 overpayment of compensation from September 7, 2003 to August 30, 2008, thereby precluding consideration of waiver. The Board also finds that the Office gave due regard to relevant factors in setting the rate of recovery from continuing compensation.

¹⁰ *Id.* at § 10.321(a).

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 30, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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