

such that it was not eligible for waiver; and (3) whether the Office properly directed recovery of the overpayment at \$75.00 every 28 days from his continuing compensation.

FACTUAL HISTORY

The Office accepted that appellant, then a 31-year-old biological technician, sustained a crush injury to his left leg on July 14, 1992 in a boating accident for which he underwent surgery for a three-compartment fasciotomy. Appellant returned to modified duty in October 1992 and was released to regular-duty work as of January 25, 1993. He sustained another accepted injury to his left leg and low back on August 27, 1994 in a boating accident from which he was found totally disabled. Appellant received medical treatment for post-traumatic left leg sympathetic dystrophy and saphenous vein insufficiency requiring surgical correction in 1995. The Office subsequently accepted a consequential post-traumatic stress disorder. Appellant was referred to vocational rehabilitation for job placement services in November 1996.

On March 11, 1998 the Office granted appellant a schedule award for 38 percent permanent impairment of the left leg; however, he was notified that payment could not be made under the award while he was in receipt of compensation for total disability during vocational rehabilitation. Appellant was advised that, upon completion of vocational rehabilitation, the schedule award could be paid.

The record reflects that the Office approved training as an electronic technician or electronic mechanic at the College of the Redwoods for two years commencing with the fall semester of 1997. On May 22, 1999 appellant earned an associate in science degree in electronic technology. After graduation, vocational placement services were provided for 90 days but appellant did not secure employment in the private sector. Rather, in August 1999 appellant reenrolled at the college and took computer courses for an additional associate degree.²

On December 7, 1999 the Office notified appellant that his compensation benefits would be reduced based on his ability to earn wages in the constructed position of an electronic technician.

In a February 18, 2000 decision, the Office reduced appellant's wage-loss compensation, finding that he had a 53 percent wage-earning capacity as an electronic technician.

In a February 23, 2000 letter, the Office advised appellant that payment under the wage-earning capacity determination would be interrupted in order that he could receive payment of the schedule award. Appellant was advised that compensation paid from February 27, 2000 through April 4, 2002 would be for his 38 percent left leg impairment and, upon the expiration of the schedule award, his monetary compensation would be reduced to reflect the February 18, 2000 wage-earning capacity determination. The Office reissued the schedule award decision on February 23, 2000.

On June 26 and August 15, 2000 appellant sought review of the wage-earning capacity determination, contending that he remained totally disabled due to his post-traumatic stress

² By the spring of 2003, appellant had earned a third degree from the college.

disorder.³ In an October 4, 2000 decision, the Office denied modification of the February 18, 2000 wage-earning capacity decision.

Appellant received compensation under the schedule award through April 4, 2002. The record reflects, however, that as of April 5, 2002 continuing wage-loss compensation was paid based on the rate for total disability and not the 53 percent rate under the February 18, 2000 wage-earning capacity determination.

On November 1, 2007 Office payment records noted that appellant's schedule award ended as of April 4, 2002 but compensation paid after that date was not reduced to reflect his 53 percent wage-earning capacity. From April 5, 2002 to October 27, 2007, appellant received wage-loss compensation in the amount of \$95,230.67 but was only entitled to monetary compensation of \$44,749.60, the difference representing an overpayment in the amount of \$50,481.07. It reduced appellant's continuing compensation as of October 28, 2007 to reflect his wage-earning capacity.

On August 7, 2009 the Office issued a preliminary overpayment determination in the amount of \$50,481.07 for the period April 5, 2002 to October 27, 2007. It found that appellant received monetary compensation for wage loss after the expiration of the schedule award at the rate of total disability rather than at the 53 percent wage-earning capacity determination. The Office found appellant was at fault in the creation of the overpayment. It noted that, after successful vocational rehabilitation, he was rated as having the wage-earning capacity of an electronic technician. Appellant's monetary compensation was not immediately reduced; however, as of February 23, 2000, he was advised that continuing payment would be made under the schedule award. He was notified that compensation paid after the expiration of the schedule award would be based on the February 18, 2000 wage-earning capacity. Appellant was found to have accepted payments after April 4, 2002 he knew or should have known to be incorrect. The Office advised appellant as to his right to a precoupment hearing if he contested the overpayment and to submit any evidence or argument concerning the preliminary determination.

On August 28, 2009 appellant requested a telephone conference that was held on October 1, 2009. The record reflects that the claims examiner discussed the issue of the creation of the overpayment and the finding of fault. He explained that the February 23, 2000 schedule award cover letter advised that entitlement under the award would continue until April 4, 2002 when appellant's compensation would be reduced beginning April 5, 2002 to reflect the wage-earning capacity determination. Appellant was found at fault because the record did not reflect any effort on his part to contact the Office after April 5, 2002 to determine why compensation payments were not reduced as was stated. With regard to the financial information submitted prior to the conference call, appellant stated that he rented his current home for \$675.00 a month, that his utility bill ran from \$40.00 to \$50.00 a month and that his home was heated primarily with fire wood gathered from the surrounding forest. Appellant estimated that he spent \$100.00 a month on food and clothing, an amount the claims examiner noted to be a low figure. He stated that he received a supplemental food service because of his low income and had approximately \$3,000.00 in credit card debt. Appellant reported receiving monthly social

³ Appellant initially sought a written review of the wage-earning capacity determination on April 19, 2000. This request was found untimely in a June 7, 2000 decision of the Branch of Hearings and Review.

security benefits of \$192.00 and compensation benefits from the Office of \$692.00 every 28 days. He reported no other assets, such as stocks or bonds. He estimated that he had about \$2.00 in a savings account and owned three motor vehicles worth collectively about \$1,100.00.

In a December 8, 2009 decision, the Office finalized the preliminary overpayment of compensation determination in the amount of \$50,481.07 for which appellant was at fault in the creation. In considering recovery of the overpayment, the Office determined that appellant had a monthly income of \$884.00 and that his monthly expenses were at or exceeded his income with no other substantial assets. Given appellant's financial circumstances, the amount of the overpayment was compromised by \$20,548.57, leaving an outstanding debt of \$29,932.50. The claims examiner considered appellant's life expectancy at 30.7 years and entitlement to compensation of \$692.00 every 28 days. The Office determined that repayment of \$75.00 from each continuing compensation payment represented 11 percent of gross compensation, at the lower end of the normal range of repayment of 10 to 15 percent. At \$975.00 a year, the outstanding overpayment balance would be recovered within appellant's anticipated lifetime if no interest or penalties were included. The Office affirmed the overpayment as compromised without interest or penalty and directed recovery at \$75.00 from continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled.⁴

In administering benefits under the Act, the Board has noted that the Office needs to fairly administer payments to injured employees who sustain both periods of wage loss or of loss of wage-earning capacity and permanent impairment qualifying them for schedule awards. This has led to establishing certain norms for coordinating receipt of wage-loss and schedule award compensation.⁵ These administrative practices call for interruption and then subsequent resumption of compensation for wage-loss benefits for the payment of a schedule award. Where an injured employee is receiving disability compensation up to the date of a schedule award, wage-loss compensation must be reinstated at the appropriate level following expiration of the schedule award.⁶

ANALYSIS -- ISSUE 1

Appellant was in receipt of compensation for wage loss prior to the commencement of his schedule award. In 1998, the Office determined that he had a 38 percent impairment of his left leg due to his accepted injuries; however, it postponed payment under the schedule award while appellant was participating in vocational rehabilitation. Upon his graduation from the degree program at College of the Redwoods in May 1999, appellant received placement services which

⁴ *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004); *Marlon G. Massey*, 49 ECAB 650 (1998).

⁵ *See Arthur E. Billigmeier*, 42 ECAB 506 (1991).

⁶ *See Sherry A. Hunt*, 49 ECAB 467 (1998); *Anthony Luczczyński*, 43 ECAB 1129 (1992).

were unsuccessful. On December 7, 1999 he was notified that his wage-loss benefits would be reduced to represent his capacity to earn wages as an electronic technician. The Office adjusted appellant's wage-loss compensation in a February 18, 2000 decision, finding that he had a 53 percent wage-earning capacity following his successful vocational rehabilitation and training as an electronic technician. On February 23, 2000 appellant was advised by letter that payment under the schedule award would be made effective February 27, 2000 through April 4, 2002. The Office notified appellant that, upon expiration of his schedule award, on April 5, 2002 wage-loss compensation would be reinstated at the reduced level reflecting the February 18, 2000 wage-earning capacity determination.

After the expiration of the schedule award on April 4, 2002, appellant was reinstated on wage-loss compensation at the rate of total disability from April 5, 2002 through October 27, 2007. The Office was negligent in failing to reinstate compensation at the reduced level of the wage-earning capacity determination. For this period, compensation was paid in the amount of \$95,230.67, to which appellant was entitled to \$44,749.60. The difference resulted in an overpayment of wage-loss compensation in the amount of \$50,481.07. Because appellant was not entitled to reinstatement of wage loss at the rate of total disability, an overpayment was created in this amount. The Board will affirm the fact and amount of compensation.

In contesting the fact of overpayment on appeal, appellant's contentions pertain primarily to being totally disabled due to his accepted post-traumatic stress disorder. That issue, however, is not currently before the Board. The Office issued an August 7, 2009 decision concerning various aspects of appellant's medical treatment and claims of disability. It denied modification of the 2000 wage-earning capacity determination. Appellant did not timely seek review of this decision and the Board does not have jurisdiction over that aspect of his claim in this appeal.⁷

LEGAL PRECEDENT -- ISSUE 2

Section 10.433 of the Office's implementing federal regulations provide that, in determining whether a claimant is at fault in the creation of an overpayment, it will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who: (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.⁸

In determining whether a claimant is at fault in creating an overpayment, the Office will consider the circumstances surrounding the overpayment.⁹ The fact that the Office was negligent

⁷ See *supra* note 1. This decision does not preclude appellant from submitting evidence or argument to the Office should he seek modification of the wage-earning capacity determination.

⁸ *J.S.*, 58 ECAB 515 (2007); *Harold F. Franklin*, 57 ECAB 387 (2006).

⁹ See *Ricky Greenwood*, 57 ECAB 462 (2006); *William F. Salmonson*, 54 ECAB 152 (2002).

in making payment to a claimant does not relieve the claimant of fault in accepting incorrect payments.¹⁰

ANALYSIS -- ISSUE 2

On February 23, 2000 the Office issued appellant's schedule award for 38 percent loss of use of his left leg. The schedule award noted that it was in payment of compensation for the period February 27, 2000 through April 4, 2002. In a separate cover letter, the Office notified appellant that payments he received starting February 27, 2000 were for compensation under the schedule award. Such payments would continue through April 4, 2002 at which time he would be reinstated on wage loss at the reduced level determined by the February 18, 2000 wage-earning capacity determination. Although the Office was negligent by failing to reduce appellant's wage-loss compensation as of April 5, 2002, this does not excuse his acceptance of compensation after that date at the rate of total disability.

Appellant was properly informed in the February 18, 2000 wage-earning capacity determination that his new basic rate of compensation was reduced to \$539.00 each four weeks. Under the schedule award issued five days later, he was advised that payment would be made every four weeks commencing February 27, 2000 in the amount of \$1,148.00. The Office's February 23, 2000 cover letter notified appellant that he was found no longer totally disabled and that payment under the wage-earning capacity would be interrupted in order to pay his schedule award entitlement for permanent impairment of his left leg. When the schedule award expired on April 4, 2002, "[b]eginning April 5, 2002 your compensation payments will be reduced to reflect your wage-earning ability." The record establishes that appellant was appropriately notified of the nature of the benefits he was receiving from February 27, 2000 through April 4, 2002. When the Office failed to reduce his compensation as of April 5, 2002, he made no inquiry as to the continuing payment of benefits at the rate of total disability. Appellant contended before the Office that it was his understanding that he had been found totally disabled and that he believed the compensation paid was based on that rate, but as noted, he was clearly notified of the reduction in wage-loss benefits based on his capacity to earn wages in the constructed position of an electronic technician.

The record establishes that appellant accepted payments that he knew or should have known to be incorrect from April 5, 2002 to October 27, 2007. Appellant should have known he was accepting payments that were incorrect after April 4, 2002 based on the information provided by the Office. The Board finds that he was at fault in the creation of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 provides that when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made by decreasing later payments to which the individual is entitled.¹¹

¹⁰ *Neill D. DeWald*, 57 ECAB 451 (2006); *Dale Mackelprang*, 55 ECAB 174 (2003).

¹¹ The Board's jurisdiction over recovery of an overpayment is limited to a review of those cases where the Office seeks recovery from continuing compensation payments. See *Terry A. Keister*, 56 ECAB 559 (2005).

Section 10.441 of the Office's federal regulations provide that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, the Office shall decrease later payments of compensation, taking into account 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 hardship.¹²

Under the Office's procedure manual, the compromise of all or part of the overpayment and any charges may be made depending upon the individual claimant's financial circumstances in order to set a repayment schedule. Compromise of the principal of the overpayment can be considered if application of the interest charges would extend the period of repayment by more than 35 percent. Such a determination is made at the time the repayment schedule is established.¹³ Compromise is a matter which rests in the discretion of the Office.¹⁴

ANALYSIS -- ISSUE 3

In setting the rate of recovery from appellant's continuing compensation, the Office claims examiner considered the fact that recovery of the principal balance of \$50,481.07 with interest would take appellant 908.66 months to repay, or over 75 years. As appellant had a life expectancy of some 30.7 years, the period in which repayment could be made was 368.4 months. By compromising the balance to \$29,932.50 without interest or penalty, it was determined that appellant could repay the reduced balance at a rate of \$75.00 per payment cycle, or \$975.00 a year, from his continuing compensation over the period of his remaining life expectancy.

The record reflects that the Office exercised its discretion to compromise the outstanding balance of the overpayment in setting the rate of recovery from appellant's continuing compensation. In doing so, it considered those factors under section 10.441, such as appellant's age, life expectancy, the rate of compensation paid and the period in which recovery could be obtained with reference to his financial circumstances. There is no evidence of record to establish that the Office abused its discretion in setting the rate of recovery of \$75.00 a payment cycle from appellant's continuing compensation so as to minimize financial hardship.

CONCLUSION

The Board finds that appellant received an overpayment of \$50,481.07 from April 5, 2002 to October 27, 2007 for which he was at fault in creating. The Board further finds that the Office did not abuse its discretion in compromising the principal amount of the outstanding debt to \$29,932.50 or in setting the rate of recovery from continuing compensation at \$75.00 every 28 days.

¹² 20 C.F.R. § 10.441(a).

¹³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.5 (May 2004). See *Jorge E. Diaz*, 53 ECAB 403 (2002).

¹⁴ *Jorge E. Diaz*, *supra* note 13 and *Linda D. Lane*, 46 ECAB 727 (1995). See also *Larry Towns*, Docket No. 02-1059 (issued July 29, 2003) and *Fred C. Smith*, Docket No. 02-219 (issued April 11, 2003).

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: January 19, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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