

Appellant returned to modified duty on September 28, 2009 working four hours a day. On October 24, 2009 he received *via* direct deposit a check for \$1,756.88, representing periodic compensation for 28 days of temporary total disability from September 27 to October 24, 2009.

On November 25, 2009 the Office made a preliminary determination that appellant received an overpayment of \$865.02 and that he was not at fault in the matter. It asked him to complete an overpayment recovery questionnaire:

“In order for [the Office] to consider the question of waiver or to determine a reasonable method for collection, you must complete and submit the enclosed Form OWCP-20. Attach supporting documents to Form OWCP-20, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records which support the income and expenses listed. Under 20 C.F.R. § 10.438, failure to submit the requested information within 30 days will result in the denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.”

Appellant failed to respond with the information requested and on December 30, 2009 the Office finalized its decision and denied waiver. It asked him to send a check in the amount of \$865.02.

On appeal, appellant disagrees that he owes this overpayment because it was determined not to be his fault. He argues that the Office should waive the overpayment because recovery would create a financial hardship.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act places limitations on the right to receive compensation: While an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, with certain exceptions.¹ It is therefore well established that an employee is not entitled to compensation for temporary total disability after returning to work.² “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.³

ANALYSIS -- ISSUE 1

When appellant returned to part-time modified duty on September 28, 2009, he was no longer entitled to compensation for total disability. He was now working four hours a day and was entitled to receive less compensation than he was previously receiving on the periodic rolls.

¹ 5 U.S.C. § 8116(a).

² *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).

³ 20 C.F.R. § 10.400(b).

The Board will therefore affirm the Office's December 30, 2009 decision on the issue of fact of overpayment.

In reviewing appellant's periodic rolls payment on October 24, 2009, the Board notes that the Office took \$444.00 off the top of his \$2,650.00 gross compensation and applied that amount toward court-ordered child support. The Office then subtracted \$426.56 for health benefits insurance, \$13.20 for basic life insurance, \$9.36 for option life insurance, and paid appellant net compensation of \$1,756.88 for total disability from September 27 to October 24, 2009.

When the Office calculated compensation paid for purposes of the overpayment, it neglected to deduct the child support payment and when it calculated compensation due for the period, it neglected to deduct both the child support payment and the insurance premiums. Moreover, it stated that appellant claimed 75.91 hours of leave without pay for the period. The Board's review of the time analysis forms shows 79.91 hours claimed.⁴

Because it is not clear that the Office calculated the overpayment correctly, the Board will set aside the Office's December 30, 2009 decision on the issue of amount of overpayment. Upon return of the case record, the Office should clearly explain its methodology for calculating the overpayment especially regarding child support and insurance premiums.⁵

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.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

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether an overpayment should be waived. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.⁸

ANALYSIS -- ISSUE 2

When the Office issued its preliminary determination on November 25, 2009, it asked appellant to complete an overpayment recovery questionnaire and attach supporting financial

⁴ The Office appears not to have included four hours of leave without pay on October 12, 2009, a holiday.

⁵ Appellant claimed compensation for 79.91 out of a possible 160 work hours, or 49.94375 percent of the \$1,756.88 he received for total disability during the period.

⁶ 5 U.S.C. § 8129(a).

⁷ 20 C.F.R. § 10.433(a) (1999).

⁸ *Id.* at § 10.438.

documentation. It explained the consequences of failing to do so. Because appellant failed to submit the requested information within 30 days, the Office had no discretion in the matter; the law required a denial of waiver. The Board will therefore affirm the Office's December 30, 2009 decision on the issue of waiver.

Appellant argues that he was not at fault in the matter, and he is correct. However, that does not mean he gets to keep money that does not belong to him. The Office could waive the overpayment if appellant's financial circumstances qualify. It cannot make that determination without the information requested by the overpayment recovery questionnaire.⁹

CONCLUSION

The Board finds that appellant received an overpayment from September 27 to October 24, 2009 but that further development is warranted on the amount. The Board also finds that the Office properly denied waiver.

ORDER

IT IS HEREBY ORDERED THAT the December 30, 2009 decision of the Office of Workers' Compensation Programs be set aside on the issue of amount of overpayment and is otherwise affirmed. The case is remanded for further action consistent with this opinion.

Issued: January 4, 2011
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

⁹ The Board notes that the Office asked appellant to submit a check in the amount of the overpayment. But as he was entitled to further payments of compensation for partial disability, the Act requires that "adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."