



## **FACTUAL HISTORY**

The Office accepted that on December 15, 1993 appellant, then a 49-year-old mechanic, sustained a torn left anterior cruciate ligament, osteoarthritis of his left leg and chondromalacia of his left patella due to stepping between two sacks of mailbags on a loading dock and falling down between the loading dock and the platform. Appellant underwent left knee surgery which was authorized by the Office.

After the December 15, 1993 injury, appellant worked in a modified job for several years. He filed a claim for a recurrence of disability on January 1, 2006 that was approved by the Office. Appellant was totally disabled for work from December 11, 2006 to January 9, 2007 and June 25 to October 5, 2007. He received compensation for temporary total disability based on a recurrent pay rate for time missed from work during both of these periods.

In a March 30, 2009 letter, the Office advised appellant of its preliminary determination that he received a \$3,090.41 overpayment of compensation because he was paid at an incorrect pay rate between December 11, 2006 and October 5, 2007. Because appellant had not returned to full-time regular work for six months or more before the recurrence occurred, he should not have been paid compensation based on the date of the recurrence. The Office also made a preliminary determination that he was not at fault in creating the overpayment. In an attached memorandum, the Office explained how the overpayment was calculated:

“Compensation pay rate was \$583.11 a week, which included night differential pay at \$41.36 a week and Sunday premium pay at \$25.75 a week. The total weekly pay rate paid at 75 percent was \$437.33.

“The total due from December 11, 2006 through January 9, 2007, 22 days, was \$2,516.80 gross -- \$264.01 for health benefits -- \$8.08 for basic life and -- \$65.00 for optional life -- a net of \$2,179.71.

“The amount actually paid out was based on an incorrect pay rate of \$1,068.05. 75 percent was \$801.04 a week. The incorrect payment made was from December 11, 2006 through January 9, 2007, 20 days, for a gross of \$3,204.14 -- \$158.02 for health benefits -- \$14.76 for basic life and -- \$118.49 for optional life for a net of \$2,912.87.

“Overpayment from December 11, 2006 through January 9, 2007 was therefore calculated as \$2,912.87 -- \$2,179.71 = \$733.16.

“The overpayment made from June 25 through July 9, 2007 was also made based on an incorrect pay rate. The weekly pay rate that should have been used was 75 percent of \$583.11 as above. The total due from June 25 through October 5, 2007, for 103 days, was a gross of \$6,435.04 -- \$746.24 for health -- \$32.00 for basic life -- \$257.50 for optional life = a net payment due of \$5,399.30.

“The incorrect pay rate used was \$617.49 from June 25 through October 5, 2007 for a total of 103 days. Compensation paid in error from June 25 through October 5, 2007, 103 days, based on a pay rate of \$617.49 was a gross of

\$9,130.22 -- \$1,173.83 for health benefits -- \$34.21 for basic life -- \$275.16 = a net payment of \$7,756.55. The overpayment made from June 25 through October 5, 2007 was therefore \$7,756.55 -- \$5,399.30 = 2,357.25.

“Total overpayment from December 11, 2006 through January 9, 2007, and June 25 through October 5, 2007 was \$733.16 + \$2,357.25 = \$3,090.41.”<sup>2</sup>

Appellant requested a prerecoupment hearing with an Office hearing representative regarding the fact, amount and waiver issues of the overpayment. At the September 30, 2009 hearing, he argued that he was not overpaid because he was entitled to a recurrent pay rate. Appellant alleged that the two compensation periods in question were the result of back-to-back knee surgeries and that his salary had increased since the initial injury and again increased between the two surgeries. He argued that he should have been entitled to a recurrent pay rate because he had returned to his regular job following his injury. Appellant’s only restriction was to not climb ladders, but his supervisor gave him plenty of work to do that did not require climbing. The work that he performed was his regular work, *i.e.*, doing repairs around the employing establishment premises. Appellant indicated that climbing a ladder was something that had caused his recurrence and he could not perform this task. He noted that it had been 15 years since his initial injury and his salary had increased significantly, so a higher pay rate should have been used to pay compensation during the periods in question. Appellant indicated that he would have financial difficulty repaying the overpayment because he was trying to be frugal in that his wife was on social security disability, job layoffs were possible at the employing establishment and he had to make repairs on his house. He testified that, based on the criteria described to him, his assets were too great and exceeded the \$8,000.00 threshold (for appellant and his spouse) necessary for qualification of a waiver on financial hardship grounds.<sup>3</sup>

In a February 18, 2010 decision, the Office determined that appellant received a \$3,090.41 overpayment of compensation. It found that he was not at fault in the creation of the overpayment but that the overpayment was not subject to waiver. The Office required repayment of the overpayment by deducting \$500.00 from appellant’s compensation payments every four weeks.

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<sup>2</sup> The Office advised appellant that he could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It informed him that he could submit additional evidence in writing or at prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. The Office requested that appellant complete and return an enclosed financial information questionnaire within 30 days even if he was not requesting waiver of the overpayment.

<sup>3</sup> Appellant reported household income and expenses on an overpayment questionnaire dated May 22, 2009 which indicated that he is left with \$919.83 per month after paying necessary living expenses.

## LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Act<sup>4</sup> 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 his duty.<sup>5</sup> Section 8129(a) of the Act provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter 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.”<sup>6</sup>

Section 8105(a) of the Act provides: “If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.”<sup>7</sup> Section 8101(4) of the Act defines “monthly pay” for purposes of computing compensation benefits as follows: “[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater....”<sup>8</sup>

The Board has defined “regular” employment, stating that it means “established and not fictitious, odd-lot or sheltered;”<sup>9</sup> and contrasting it with a job “that was created especially for him.”<sup>10</sup> The Board has also indicated that the duties of “regular” employment are covered by a

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Id.* at § 8102(a).

<sup>6</sup> *Id.* at § 8129(a).

<sup>7</sup> *Id.* at § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee’s monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b). The word “disability” is used in several sections of the Act. With the exception of certain sections where the statutory context or the legislative history clearly shows that a different meaning was intended, the word as used in the Act means “Incapacity because of injury in employment to earn wages which the employee was receiving at the time of such injury.” This meaning, for brevity, is expressed as “disability for work. See *Charles P. Mulholland, Jr.*, 48 ECAB 604, 606 (1997).

<sup>8</sup> 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002). The Board has held that, if an employee has one recurrence of disability which meets the requirements of 8101(4), any subsequent recurrence would also meet such requirements and would entitle the employee to a new recurrence pay rate. *Carolyn E. Sellers*, 50 ECAB 393 (1999).

<sup>9</sup> *Johnny A. Muro*, 17 ECAB 537 (1966).

<sup>10</sup> *Ralph W. Moody*, 42 ECAB 364 (1991).

specific job classification,<sup>11</sup> and that another employee would have performed such duties if the claimant did not perform them.<sup>12</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received a \$3,090.41 overpayment of compensation. The evidence of record clearly supports that he was not entitled to a recurrent pay rate for the periods December 11, 2006 to January 9, 2007 and June 25 to October 5, 2007. Before the Office and on appeal to the Board, appellant argued that he was entitled to a recurrent pay rate, as he had returned to regular employment following his injury, prior to again stopping work for intermittent periods between December 11, 2006 and October 5, 2007. The evidence of record is insufficient to support his argument that he returned to full-time regular work following his injury, or that he would be entitled to a recurrent pay rate.

After his December 15, 1993 work injury, appellant first stopped work on March 3, 1994. He received compensation based on his pay rate in effect on that date based on temporary total disability until he returned to full-time modified employment and his compensation payments ceased as a result. Compensation pay rate was calculated based on information supplied by the employing establishment regarding appellant's salary at the time he first stopped work: \$583.11 a week, which included night differential pay at \$41.36 a week and Sunday premium pay at \$25.75 a week. Appellant worked full time in a modified position until he stopped work on December 11, 2006 due to approved surgery. The claim for recurrence was accepted and he received compensation based on temporary total disability for the periods December 11, 2006 to January 9, 2007 and June 25 to October 5, 2007.

The determinative question for purposes of appellant's pay rate for a recurrence is whether he returned to "regular" employment following his initial disability on March 3, 1994. The Board has defined "regular" employment, stating that it means "established and not fictitious, odd-lot or sheltered" and contrasting it with a job "that was created especially for him."<sup>13</sup> In the present case, appellant did not return to "regular" employment following his initial disability on March 3, 1994. The evidence establishes that he worked limited duty in a modified job tailored to be in accordance with his work restrictions. There is no evidence of record to support that appellant ever returned to his regular, full-duty position following his initial disability in 1994.<sup>14</sup> The evidence of record supports that he worked in a modified job following his disability in 1994. Based on wage-loss compensation paid at a recurrent pay rate, appellant received \$3,090.41 more in compensation than he was entitled to receive at the nonrecurrent pay rate. The Office properly determined that he received a \$3,090.41 overpayment.

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<sup>11</sup> *Wilbur L. Hargrove*, 34 ECAB 1143 (1983).

<sup>12</sup> *Eltore Chinchillo*, 18 ECAB 647 (1967).

<sup>13</sup> *See supra* notes 8 and 9.

<sup>14</sup> Appellant did not perform the full scope of duties of his preinjury position.

## LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.<sup>15</sup> These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."<sup>16</sup> If the Office finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.<sup>17</sup> According to 20 C.F.R. § 10.437, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an 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.<sup>18</sup> To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>19</sup>

## ANALYSIS -- ISSUE 2

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base.

At the hearing before the Office hearing representative, appellant testified that he had assets in excess of the \$8,000.00 threshold (for appellant and his spouse), and the evidence

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<sup>15</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>16</sup> 5 U.S.C. § 8129(b).

<sup>17</sup> 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). Office procedure provides that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

<sup>18</sup> 20 C.F.R. § 10.437(a), (b).

<sup>19</sup> *Id.* at § 10.437(b)(1).

supports that he would therefore be disqualified for consideration of a waiver. Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the first prong of the test, *i.e.*, whether he is deemed to need substantially all of his monthly income to meet current and ordinary living expenses.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.<sup>20</sup>

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, he has failed to show that the Office abused its discretion by refusing to waive the overpayment.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441 of Title 20 of the Code of Federal Regulations provide in pertinent part:

“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.”<sup>21</sup>

### **ANALYSIS -- ISSUE 3**

The record supports that, in requiring repayment of the overpayment by deducting \$500.00 from appellant’s compensation payments every four weeks, the Office took into consideration the financial information submitted by him as well as the factors set forth in section 10.441. It found that this method of recovery would minimize any resulting hardship on him. Therefore, the Office properly required repayment of the overpayment by deducting \$500.00 from appellant’s compensation payments every four weeks.<sup>22</sup>

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<sup>20</sup> See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

<sup>21</sup> 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

<sup>22</sup> Appellant was receiving Office compensation at the time of the Office’s overpayment determination. His monthly income left him with \$919.83 per month after paying necessary living expenses. Appellant also had more than \$8,000.00 in assets.

**CONCLUSION**

The Board finds that appellant received a \$3,090.41 overpayment of compensation. The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment and the Office properly required repayment of the overpayment by deducting \$500.00 from his compensation payments every four weeks.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 18, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 18, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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