

**United States Department of Labor
Employees' Compensation Appeals Board**

TERRY LAPPIN, Appellant

and

**U.S. DEPARTMENT OF AGRICULTURE,
PAYETTE NATIONAL FOREST, McCall, ID,
Employer**

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**Docket No. 04-1765
Issued: March 4, 2005**

Appearances:
Terry Lappin, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 6, 2004 appellant filed a timely appeal from a May 27, 2004 merit decision of the Office of Workers' Compensation Programs, finding a \$3,140.02 overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issue.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of compensation was created in the amount of \$3,140.02; (2) whether the Office properly refused to waive an overpayment of compensation; and (3) whether the Office properly required repayment of the overpayment by withholding \$200.00 from appellant's continuing compensation payments.

FACTUAL HISTORY

The Office accepted that on July 20, 2000 appellant, then a 40-year-old firefighter, sustained a cervical fracture with a spinal cord injury, a vertebral fracture with a spinal cord injury and post-traumatic pulmonary failure when he was struck by a falling tree while in the performance of duty. He stopped work on July 20, 2000 and received compensation for total disability beginning on September 5, 2000 and was placed on the periodic rolls on September 10, 2000.

On August 31, 2000 appellant filed a Form CA-7, claim for compensation and noted that he was not married and had no dependents. The record reveals in a daily computation log, dated September 26, 2000, that he received compensation at the three-fourths augmented rate beginning September 5, 2000. By letter dated August 1, 2001, the Office requested that appellant prepare a Form EN1032. On August 13, 2001 he noted on the EN1032 that he was not married and had no dependents. By letter dated January 2, 2004, the Office requested that appellant prepare an updated EN1032. In an EN1032 dated January 12, 2004, he again informed the Office that he was unmarried and had no dependents.

On March 22, 2004 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$3,140.02. The Office advised that, while receiving compensation, he was placed on the daily rolls on September 5, 2000 and the periodic rolls effective September 10, 2000 and was erroneously paid compensation at the three-fourths rate of compensation, 75 percent of salary, with dependents, during the period September 5, 2000 through January 24, 2004. Appellant should have been paid at the 2/3 rate, with no dependents from September 5, 2000 to January 24, 2004. As he had not claimed any dependents, the Office determined that appellant was without fault in the matter of the overpayment. The Office allotted him 30 days to request a telephone conference, review of the written evidence or hearing and to submit financial information by completing an overpayment recovery questionnaire (Form OWCP-20) to allow the Office to determine if it should waive recovery of the overpayment.

By decision dated May 27, 2004, the Office finalized its preliminary determination as to the amount of the overpayment and appellant's lack of fault in the creation of the overpayment. The Office denied waiver of recovery of the overpayment on the basis that he did not respond to the preliminary overpayment notice and failed to provide any additional documents or financial information in support of waiver. The Office stated that the overpayment of compensation would be recovered by withholding \$200.00 from each of appellant's continuing compensation payments beginning June 13, 2004.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act 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.¹ 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

¹ 5 U.S.C. § 8102(a).

monthly pay, which is known as his basic compensation for total disability.² Under section 8110³ of the Act, an employee is entitled to compensation at the augmented rate of three-fourths of his weekly pay if he has one or more dependents. A child is considered a dependent if he or she is under 18 years of age, is over 18 but is unmarried and incapable of self-support because of a physical or mental disability or is an unmarried student under 23 years of age, who has not completed four years of education beyond the high school level and is currently pursuing a full-time course of study at a qualifying college, university or training program.⁴ If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation he was entitled to receive at the two thirds compensation rate and the augmented compensation received at the three-fourths rate constitutes an overpayment of compensation.⁵

ANALYSIS -- ISSUE 1

In this case, the Office properly determined that for the period September 5, 2000 through January 24, 2004, appellant received an overpayment of \$3,140.02. He does not dispute that he received the overpayment in question, nor does he dispute the amount of the overpayment. The Office explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. The record supports that the overpayment occurred because appellant was incorrectly paid at the augmented three-fourths rate for the period September 5, 2000 to January 24, 2004 and, therefore, received an overpayment of \$3,140.02. The Board finds that the Office properly determined the amount of the overpayment that covered the period of September 5, 2000 through January 24, 2004.

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.⁶ 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 [an] incorrect payment has 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 Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b),

² *Id.* at § 8105(a). See also *Duane C. Rawlings*, 55 ECAB ____ (Docket No. 02-2172, issued March 8, 2004).

³ 5 U.S.C. § 8110.

⁴ 5 U.S.C. §§ 8110(a)(1) and 8101(17); 20 C.F.R. § 10.405 (2003). See *Leon J. Mormann*, 51 ECAB 680 (2000).

⁵ *Diana L. Booth*, 52 ECAB 370 (2001) (the Board held that as the claimant received compensation at the augmented rate for certain periods, even though she had no dependents, she received an overpayment of compensation).

⁶ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁷ See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

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.

Section 10.436 of the implementing regulation⁸ provides that 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 or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined (by the Office) from data furnished by the Bureau of Labor Statistics.⁹ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁰

Section 10.437 provides that 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 or her position for the worse.¹¹

Section 10.438 of the regulation provides that "[t]he 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 or not recovery on an overpayment would defeat the purpose of the Act or be against equity and good conscience." Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹²

ANALYSIS -- ISSUE 2

On March 22, 2004 the Office requested that appellant provide necessary financial information by completing an overpayment recovery questionnaire, OWCP-20, if he desired waiver of the overpayment in question. Appellant did not submit a completed OWCP-20 form or otherwise submit financial information supporting his income and expenses. As a result, the Office did not have the necessary financial information to determine whether recovery of the

⁸ 20 C.F.R. § 10.436.

⁹ An individual's assets must exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment. *See Robert F. Kenney*, 42 ECAB 297 (1991).

¹⁰ *See Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹¹ 20 C.F.R. § 10.437.

¹² 20 C.F.R. § 10.438.

overpayment would defeat the purpose of the Act or if recovery would be against equity and good conscience.¹³

Consequently, as appellant did not submit the financial information required by section 10.438 of the Office's regulation,¹⁴ which was necessary to determine eligibility for waiver, the Office properly denied waiver of recovery of the overpayment. Inasmuch as appellant has not shown that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience, the Board finds that the Office properly denied waiver of recovery of the overpayment of compensation in the amount of \$3,140.02.

LEGAL PRECEDEN -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.¹⁵ Section 10.441(a) of the regulation¹⁶ provides:

“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 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.”¹⁷

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive wage-loss compensation under the Act. When, as in this case, an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.¹⁸ Appellant did not provide any information for the Office to consider in determining the amount to be withheld from his continuing compensation and the Board finds that the Office did not abuse its discretion in determining that the overpayment sum of \$3,140.02 would be recovered by deducting \$200.00 from appellant's continuing compensation benefits every 28 days.

¹³ See 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

¹⁴ 20 C.F.R. § 10.438.

¹⁵ *Lorenzo Rodriguez*, 51 ECAB 295 (2000); *Albert Pineiro*, 51 ECAB 310 (2000).

¹⁶ 20 C.F.R. § 10.441(a).

¹⁷ *Id.*

¹⁸ *Gail M. Roe*, 47 ECAB 268 (1995); *Robin D. Calhoun*, (Docket No. 00-1756, issued May 21, 2001).

CONCLUSION

The Board finds that appellant received an overpayment of \$3,140.02 in compensation from September 5, 2000 to January 24, 2004. The Board also finds that the Office did not abuse its discretion in denying waiver of the overpayment. The Board further finds that the Office properly required repayment of the overpayment by withholding \$200.00 from appellant's continuing monthly compensation payments.¹⁹

ORDER

IT IS HEREBY ORDERED THAT the May 27, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 4, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁹ With his appeal appellant submitted financial information. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).