

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

C.W., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
McCLELLAN AIR FORCE BASE, CA,)
Employer)

Docket No. 06-1623
Issued: December 21, 2006

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 11, 2006 appellant filed a timely appeal of the June 2, 2006 decision of the Office of Workers' Compensation Programs, which found that appellant received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether the Office properly determined that appellant received an overpayment of \$2,904.00 from April 17 to October 1, 2005; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On July 23, 1997 appellant, then a 40-year-old electronics mechanic, injured his back while tightening bolts on an antennae. The Office accepted appellant's claim for lumbar radiculopathy and aggravation of LS-S1 disc disease. Appellant stopped work on July 23, 1997

and worked intermittently thereafter. He was approved for disability retirement on September 27, 1999. Thereafter, he elected to receive compensation benefits.

In a letter dated April 16, 2002, the Office issued a proposed reduction of compensation on the grounds that the medical and factual evidence established that appellant was no longer totally disabled. He was found partially disabled with the capacity to earn wages in a constructive position as a computer systems engineer. The Office indicated that appellant had a 42 percent wage-earning capacity amount, \$355.48 and calculated a weekly compensation rate of \$368.19. By decision dated May 20, 2002, the Office adjusted appellant's compensation benefits to reflect his wage-earning capacity as a network engineer.

On November 3, 2003 the Office advised that it had received an order from the county child support services to withhold child support from appellant's compensation benefits. The Office indicated that appellant's gross compensation for the period November 2 to 29, 2003 was \$1,578.00 and would be subject to the following deductions: health benefits of \$162.40, basic life insurance of \$14.58, an overpayment collection¹ of \$46.15 and court ordered child support of \$686.77, for net compensation of \$626.40 every four weeks.

In a periodic wage-earning capacity worksheet dated January 23, 2005, it was noted that appellant's wage-earning percentage was 42 percent with a wage-earning amount of \$355.49 per week. The Office further noted that, from January 23 to February 19, 2005, appellant was paid at a compensation rate of three-quarters percent for a net compensation payment of \$616.42.

In a periodic wage-earning capacity worksheet dated April 29, 2005, it was noted that appellant's wage-earning capacity based on actual wages was \$240.00 with a wage-earning percentage of 25 percent for a weekly wage-earning capacity of \$211.60. The Office further noted that from April 17 to May 14, 2005 appellant was paid net compensation of \$1,157.90.

On October 4, 2005 appellant contacted the Office. He previously sent a letter to the Office informing it that he had been overpaid benefits since April 2005. Appellant requested that the issue be resolved immediately because he had a child support hearing in November 2005 and he needed to provide the court with an accurate statement of his earnings.

In a periodic wage-earning capacity worksheet dated October 7, 2005, it was noted that appellant's wage-earning capacity based on a constructed amount was \$400.00 with a wage-earning percentage of 42 percent and a wage-earning amount of \$355.49 per week. The Office further noted that from October 2 to October 29, 2005 appellant was paid at a compensation rate of three-quarters percent for a net compensation payment of \$673.90.

On October 12, 2005 the Office informed appellant that at the beginning of 2005 it converted to a new computer system. Due to this conversion, some compensation payments were effected and the computer system issued checks for incorrect amounts. The Office advised appellant that he had been overpaid benefits since April 2005. The Office notified appellant that

¹ The Office of Personnel Management (OPM) made a determination that appellant received a \$2,730.00 overpayment as he received dual payments of civil service annuity and Office benefits for the period September 28 to November 30, 1999. The overpayment was collected by withholding \$46.15 from compensation every 28 days.

the correct amount of his compensation check was \$673.90 and that a preliminary overpayment decision would be issued.

On October 13, 2005 the Office made a preliminary finding that appellant had been overpaid benefits in the amount of \$2,904.00. It noted that the overpayment occurred because it implemented a new computer system which issued payments based on an incorrect pay rate for the period April 17 to October 1, 2005. During this period, appellant received \$1,157.90 every 28 days for a total of \$6,947.40, but he was only entitled to \$673.90 every 28 days for a total of \$4,304.40, which created an overpayment of \$2,904.00. The Office also determined that appellant was with fault in the matter of the overpayment because he accepted payment which he knew or should have known that he was not entitled. It notified appellant that he had the right to submit, within 30 days, evidence or arguments regarding the overpayment and the preliminary finding of fault.

In a letter dated October 29, 2005, appellant contended that he received an underpayment of compensation in the amount of \$389.45 as reflected in an April 2005 benefits statement. In addition to the computer error, the Office sent an incorrect child support amount to the county child support services. Appellant called the Office to inform it that he received an underpayment of compensation. He received a letter from the Office dated April 27, 2005 which indicated that he would receive the balance of the underpayment of compensation benefits in May 2005 and that the child support payment would be corrected. Appellant's June, July and August 2005 benefit statements reflected an overpayment of compensation and he notified the Office several times by telephone to inform it of the mistake. He deposited the overpayments in his checking account but did not spend the funds. On October 29, 2005 appellant requested a telephone conference.

A conference memorandum dated April 14, 2006 noted that the overpayment was caused by an error on the part of the Office and that appellant attempted to correct the situation by contacting the Office. The claims examiner requested that appellant submit an overpayment questionnaire for consideration of waiver of the overpayment.

On April 24, 2006 appellant submitted an overpayment questionnaire. He indicated a total monthly income of \$6,559.61 and monthly expenses of \$6,483.49. Monthly expenses included rent or mortgage of \$955.46, food of \$675.00, clothing of \$75.00, utilities of \$511.16, other expenses of \$1,344.87, Chase Bank automotive finance of \$411.00, WFS Financial of \$150.00, Brazo Higher Education of \$51.00, Bank One credit card of \$150.00, Home Depot of \$150.00, Capitol One credit card of \$100.00, Sony credit card of \$150.00, Bank of America credit card of \$200.00, Discover credit card of \$100.00, Macy's credit card of \$50.00 and child support of \$1,410.00. Appellant noted that he had the incorrectly paid checks in his possession in the amount of \$2,904.00.

By decision dated June 2, 2006, the Office finalized the overpayment determination, finding that appellant was overpaid compensation benefits in the amount of \$2,904.00, modified to find he was without fault. It noted that the overpayment occurred because it implemented a new computer system which issued payments based on an incorrect pay rate for the period April 17 to October 1, 2005. The Office indicated that during the period April 17 to October 1, 2005 appellant received \$1,157.90 every 28 days for a total of \$6,947.40, but he was only

entitled to \$673.90 every 28 days for a total of \$4,304.40, which created an overpayment of \$2,904.00. It also noted appellant's argument in support of waiver and found that recovery of the overpayment would not defeat the purpose of the Federal Employees' Compensation Act² nor would it be against equity and good conscience and specifically noted that appellant's income of \$6,559.61 exceeded his expenses of \$6,483.49 by \$76.20. The Office further noted that appellant indicated on the overpayment questionnaire that he had the full amount of the overpayment in his bank account. Therefore, waiver of overpayment was not granted. It requested that appellant repay the overpayment in full or contact the Office to arrange for a repayment schedule.

LEGAL PRECEDENT -- ISSUE 1

The 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 duty.³ When an overpayment has been made to an individual because of an error of fact or law, adjustments shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁴

ANALYSIS -- ISSUE 1

A loss of wage-earning capacity determination was made on May 20, 2002. The Office found that appellant was no longer totally disabled and had the capacity to earn wages in a constructed position as a computer systems engineer. At that time, the Office calculated a 42 percent wage-earning capacity or \$355.48 a week.

In October 2005 the Office determined that appellant's compensation payments were incorrectly processed after it implemented a new computer system. The record reflects that from April 17 to October 1, 2005 appellant's wage-earning capacity was incorrectly based on weekly wages of \$240.00 or a 25 percent wage-earning capacity. Because of this, appellant received a net compensation payment of \$1,157.90 every 28 days during this period. However, as noted above, appellant's compensation should have been based on weekly wages of \$355.49 (a 42 percent wage-earning capacity). The difference paid to appellant created an overpayment of compensation. The Office calculated that during the period April 17 to October 1, 2005 appellant received \$1,157.90 every 28 days for a total of \$6,947.40, but was only entitled to \$673.90 every 28 days for a total of \$4,304.40. This created an overpayment of \$2,904.00.

The Board finds that for the period April 17 to October 1, 2005 appellant received an overpayment of \$2,904.00 due to his receipt of benefits calculated using an incorrect pay rate. Appellant 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

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

this to appellant with the preliminary notice of overpayment. The Office properly determined the amount of the overpayment that covered the period April 17 to October 1, 2005.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides as follows:

“Adjustment or recovery 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.”⁵ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁶

Sections 10.441(a) of Title 20 of the Federal Code of Regulations provides that where an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same. However, section 8129(b) provides “[a]djustment 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

Section 10.436 of Title 20 of the Code of Federal Regulations⁸ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary and necessary living expenses. The Office’s procedure manual states that recovery would defeat the purpose of the Act if both of the following apply:

“(a) The individual from whom recovery is sought needs substantially all of his or her current income (including [Federal] FECA monthly benefits) to meet current ordinary and necessary living expenses and

“(b) The individual’s assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent.⁹ This base includes all of the claimants assets not exempted from recoupment.... The first \$4,800 or more, depending on

⁵ 5 U.S.C. § 8129(b).

⁶ *Gregg B. Manston*, 45 ECAB 344 (1994).

⁷ *Id.* at § 8129(b).

⁸ 20 C.F.R. § 10.436.

⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(a)(1) (October 2004).

the number of the individual's dependents, is also exempted from recoupment as a necessary emergency resource.

An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).

“Both conditions in (a) and (b) above must be met to defeat the purpose of the [Act]. When an individual exceeds the limits for either disposable current income or assets, on the face of it this provides a basis for establishing a reasonable repayment schedule over a reasonable, specified period of time. It is the individual's burden to show otherwise by submitting evidence that recovery of the overpayment would cause financial hardship of a nature sufficient to justify waiver.”¹⁰

Under the first criterion, an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.¹¹

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by the same criteria set forth in section 10.436 above or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.¹² To establish a change in position for the worse, the individual must show that he made a decision she otherwise would not have made in reliance on the overpaid amounts and that this decision resulted in a loss; conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose. In making such a decision, the individual's present ability to repay the overpayment is not considered.¹³

ANALYSIS -- ISSUE 2

The Office determined that appellant was without fault in the creation of the overpayment. Because he is without fault in the matter of the overpayment, the Office may adjust later payments only if adjustment would not defeat the purpose of the Act or be against equity and good conscience.

¹⁰ *Id.*

¹¹ *Id.*

¹² *See* 20 C.F.R. § 10.437.

¹³ *See Jorge O. Diaz*, 51 ECAB 124, 129 (1999).

Appellant was advised by the Office to provide the necessary financial information if he desired waiver. The Office sought financial information and documentation to help determine whether recovery would defeat the purpose of the Act or would be against equity and good conscience. The information provided by appellant in the overpayment recovery questionnaire and the telephone conversation on April 14, 2006 revealed that he had monthly expenses which included, rent or mortgage of \$955.46, food of \$675.00, clothing of \$75.00, utilities of \$511.16, other expenses of \$1,344.87, Chase Bank automotive finance of \$411.00, WFS Financial of \$150.00, Brazo Higher Education of \$51.00, Bank One credit card of \$150.00, Home Depot of \$150.00, Capitol One credit card of \$100.00, Sony credit card of \$150.00, Bank of America credit card of \$200.00, Discover credit card of \$100.00, Macy's credit card of \$50.00 and child support of \$1,410.00 for a total of \$6,483.49 per month. The questionnaire further noted that appellant earned \$1,382.16 in compensation benefits and \$5,177.45 in income from both he and his wife's salary for a total of \$6,559.61.¹⁴ Appellant further noted a checking account balance of \$206.52, a savings account balance of \$20.55, and \$2,904.00 in incorrectly paid benefits in a savings account for a total of \$3,131.07. The record establishes that his current income exceeds his monthly expenses by more than \$50.00; therefore, he is deemed not to need substantially all of his income to meet his ordinary and necessary living expenses. Because appellant has income which exceeds his monthly expenses by more than \$50.00, as set forth by Office procedures, the Board concludes that appellant has failed to demonstrate that recovery of the overpayment would defeat the purposes of the Act.¹⁵ With total income of \$6,559.61 and expenses of \$6,483.49, appellant has not shown that he would experience severe financial hardship in repaying the overpayment debt of \$2,904.00.

Appellant further asserts that the Office improperly relied on an Office data spreadsheet instead of his handwritten OWCP-20 overpayment recovery questionnaire form dated April 24, 2006 when determining whether waiver of the overpayment was appropriate. He indicated that the Office data spreadsheet improperly excluded expenses for utilities, child support and miscellaneous household expenses for total expenses of \$6,483.49. However, the Board finds this argument without merit. The Office noted in its June 2, 2006 decision that appellant's income was \$6,559.61 per month and his expenses were \$6,483.49 per month, for a surplus of \$76.12 per month. The Office properly determined that appellant's current income exceeds his monthly expenses by more than \$50.00; therefore, he is deemed not to need substantially all of his income to meet his ordinary and necessary living expenses. Because appellant has income which exceeds his monthly expenses by more than \$50.00, as set forth by the Office in its procedure manual, appellant has failed to demonstrate that recovery of the overpayment would defeat the purpose of the Act.

With respect to whether recovery would be against equity and good conscience, section 10.437(a)(b) of the federal regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse.

¹⁴ The Board notes that analyzing the limited financial information provided by appellant, his income exceeds his expenses by \$76.12.

¹⁵ *Supra* note 8.

Appellant asserts that he notified the Office on several occasions after reviewing his compensation benefits statement that he was being overpaid compensation benefits. The Board finds that recovery of the overpayment would not be against equity and good conscience since there is no evidence of record from which to conclude that appellant relied on his incorrectly calculated compensation payments to relinquish a valuable right or change his position for the worse. Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹⁶ As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion by denying waiver of recovery.

As appellant has not shown that recovery 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. Thus, appellant does not qualify for waiver by reason of financial hardship. Further, appellant did not argue or submit evidence to establish that recovery of the overpayment would be against equity or good conscience, or that in reliance on the overpaid compensation, he relinquished a valuable right or changed his position for the worse.¹⁷

CONCLUSION

The Board finds that appellant received an overpayment of \$2,904.00 in compensation from April 17 to October 1, 2005. The Board also finds that the Office did not abuse its discretion in denying waiver of the overpayment.

¹⁶ *Carroll R. Davis*, 46 ECAB 361 (1994).

¹⁷ In its decision dated June 2, 2006, the Office requested that appellant repay the overpayment either by a lump-sum payment or by contacting the Office to arrange for a repayment schedule. The Board notes that, since the Office did not issue a final decision with regard to recovery of the overpayment, the Board does not have jurisdiction over the matter. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the June 2, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 21, 2006
Washington, DC

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

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

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