

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

O.R., Appellant)

and)

DEPARTMENT OF AGRICULTURE,)
Rio Grande City, TX, Employer)

**Docket No. 07-2399
Issued: April 10, 2008**

Appearances:
Michael C. Paul, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 24, 2007 appellant, through his attorney, filed a timely appeal from a June 22, 2007 merit decision of a hearing representative of the Office of Workers' Compensation Programs finding that he received an overpayment of compensation and denying waiver of the recovery of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$21,314.36 because he was paid at an inaccurate pay rate for the periods September 15 to 25, 1999 and March 1, 2000 to September 3, 2005; (2) whether the Office properly denied waiver of the recovery of the overpayment; and (3) whether the Office properly found that the overpayment should be repaid in monthly installments of \$250.00. On appeal, appellant's attorney contends that the Office failed to consider whether he detrimentally relied upon the overpayment of compensation.

FACTUAL HISTORY

On October 4, 1998 appellant, then a 49-year-old mounted patrol inspector, filed a traumatic injury claim for injuries sustained in an October 3, 1998 motor vehicle accident. The Office accepted the claim for a sprain of the neck and lumbar region.

Appellant filed a claim for compensation on account of disability (Form CA-7) beginning June 14, 1999. On the claim form, the employing establishment provided his base pay at the time of his injury as \$36,578.00 per year. The employing establishment further indicated that appellant received a horse allowance of \$161.33 per pay period effective October 4, 1998 and \$170.16 per pay period effective June 14, 1999. The employing establishment specified that he stopped work on October 4, 1998 and returned to work on January 5, 1999. Appellant stopped work again on January 19, 1999 and used sick leave and annual leave until June 14, 1999.

The Office paid appellant compensation on the periodic rolls effective June 14, 1999 based on his date-of-injury pay rate of \$703.42 per week. On June 15, 1999 the Office requested information from the employing establishment regarding appellant's horse allowance. The employing establishment submitted provisions of a union contract relevant to the horse allowance. The contract specified that the employing establishment would reimburse employees who were required to furnish a horse and other necessary equipment on a biweekly rate. The contract provided:

“If an employee is on leave due to illness or injury beyond 90 consecutive days or is receiving injury compensation beyond 90 consecutive days or on limited duty for a period of more than 90 consecutive days, horse allowance will be suspended until such time as the employee is returned to full duty. If circumstances warrant, extension of horse allowance may be continued beyond the 90 days, based on determination of the [d]octor's prognosis and agreement of management and union representative(s).”

The Office adjusted appellant's compensation to \$788.50 per week beginning June 14, 1999 to include the horse allowance. The Office added \$85.08 per week, or half of \$170.16, to his base salary of \$703.42 per week to find a total weekly pay rate including the horse allowance of \$788.50 per week. Appellant returned to his regular employment on September 26, 1999 but stopped work on November 30, 1999. He filed a claim for compensation beginning December 20, 1999. The Office placed appellant on the periodic rolls effective December 20, 1999. The Office utilized his earnings on the date of injury in calculating his pay rate for compensation purposes. The Office explained that as he did not resume his regular full-time employment for six months he was not entitled to a pay rate based on the date he sustained a recurrence of disability. The Office determined that appellant's pay rate was \$788.50 weekly including his horse allowance.¹

In a letter dated July 6, 2005, the employing establishment informed the Office that appellant's horse allowance was erroneously included in his compensation as the union contract provided that the horse allowance continued only 90 days after receipt of injury compensation or

¹ On January 13, 2001 the employing establishment removed appellant from service.

limited duty. The employing establishment specified that his date-of-injury pay rate was \$36,258.00 per year and that his horse allowance was \$161.33 per pay period. The employing establishment indicated that appellant stopped work on June 14, 1999.

On September 19, 2005 the Office notified appellant of its preliminary determination that he received an overpayment of \$21,314.46 because he received compensation at an inaccurate pay rate. The Office determined that it had erroneously included a horse allowance in calculating his pay rate for the periods September 15 to 25, 1999 and March 1, 2000 to September 3, 2005. The Office noted that, pursuant to the employing establishment's union contract, appellant was not entitled to receive a horse allowance after 90 consecutive days of receiving leave or compensation for an illness or injury. He stopped work after his employment injury on June 14, 1999. Appellant was entitled to a horse allowance through September 14, 1999. The Office determined that he was not entitled to a horse allowance from September 15, 1999 until his return to work on September 26, 1999. Appellant stopped work again on November 30, 1999 and was entitled to a horse allowance from December 1, 1999 through February 29, 2000. He received a horse allowance, however, from March 1, 2000 to September 3, 2005. The Office indicated that appellant's pay rate without the horse allowance was \$697.27 per pay period. The Office calculated that he received \$185,408.31 in compensation but should have been paid only \$164,093.95, resulting in an overpayment of \$21,314.36. The Office found that appellant was without fault in the creation of the overpayment and requested that he complete an overpayment recovery questionnaire. The Office additionally advised him that, within 30 days of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On October 16, 2005 appellant requested a prerecoupment hearing. He challenged fact and amount of overpayment and requested waiver. Appellant submitted an overpayment recovery questionnaire dated October 16, 2005. At the hearing, held on April 12, 2007, appellant related that he relied upon information provided by the Office that he was entitled to a horse allowance. He advised that he would have sold the horse if not for receiving the allowance as part of his salary as he was unable to ride the horse. Appellant related, "In fact, I had two horses when I got injured because I was a responsible character in my job but when I found out that they were only paying for one horse, I sold the other one. If you would have said, you do [not] get horse hire, I could have sold the horse right away." Appellant described the amount that he spent feeding the horse and paying veterinary expenses. He asserted that he would be unable to repay the overpayment.

Appellant submitted another overpayment questionnaire dated April 14, 2007 with supporting financial documents. He listed monthly income as \$2,324.70 and expenses as \$2,260.00. Appellant specified that he had \$54.00 in a checking account.

By decision dated June 22, 2007, a hearing representative found that there was an overpayment of \$21,314.46. She found that appellant was not entitled to a horse allowance from September 15 through 25, 1999 or from March 1, 2000 through September 3, 2005 and, thus, received an overpayment of \$21,314.36. The hearing representative further determined that

appellant was not entitled to waiver of the recovery of the overpayment as his income exceeded his expenses. She found that appellant could repay \$250.00 in monthly installments.²

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act³ provides that the United States shall pay compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁴ If the disability is total, the United States shall pay the employee during the disability monetary compensation equal to 66 2/3 percent of his monthly pay, the basic compensation rate for total disability.⁵ Under section 8110 of the Act, an employee is entitled to compensation at the augmented rate of 75 percent of his weekly pay if he has one or more dependents.⁶

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.⁷

A final decision of the Office shall contain findings of fact and a statement of reasons.⁸ With respect to overpayment decisions, the Office must provide clear reasoning showing how the overpayment was calculated.⁹

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained sprains of the cervical and lumbar spine due to a motor vehicle accident on October 3, 1998. Appellant stopped work on October 4, 1998. He returned to work on January 5, 1999. He claimed compensation for disability due to his employment injury beginning June 14, 1999.¹⁰ The employing establishment submitted a union contract which specified that employees who provided horses and other equipment for use at work would receive a biweekly allowance. The allowance ceased if the employee was on leave

² It appears that the hearing representative meant that the \$250.00 should be repaid monthly from continuing compensation.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8105(a).

⁶ *Id.* at § 8110.

⁷ *Id.* at § 8129; *see Ricky Greenwood*, 57 ECAB ____ (Docket No. 05-1739, issued March 10, 2006).

⁸ 20 C.F.R. § 10.126.

⁹ *James Tackett*, 54 ECAB 611 (2003).

¹⁰ There is conflicting information from the employing establishment regarding when appellant stopped work. On May 24, 1999 the employing establishment indicated that he stopped work on January 19, 1999 and used sick and annual leave until June 14, 1999, when he requested compensation. On July 6, 2005 the employing establishment provided that appellant stopped work following his injury on June 14, 1999.

or receiving compensation due to an injury or illness that lasted more than 90 days, unless alternate arrangements were made between the union and management of the employing establishment.

The Office paid appellant compensation with a horse allowance beginning June 14, 1999. He returned to his regular employment on September 26, 1999 but stopped work on November 30, 1999 and claimed compensation beginning December 20, 1999. The Office paid appellant compensation, including a horse allowance, beginning that date. According to the union contract, however, he was not entitled to receive a horse allowance after 90 consecutive days of being either on leave or in receipt of compensation for an illness or injury. Following appellant's June 14, 1999 work stoppage, he was entitled to a horse allowance through September 14, 1999. He was not entitled to a horse allowance from September 15, 1999 until his return to work on September 26, 1999. Appellant stopped work again on November 30, 1999 and was entitled to a horse allowance from December 1, 1999 through February 29, 2000. He received a horse allowance, however, from March 1, 2000 to September 3, 2005. The Office erred in including a horse allowance in paying him compensation from September 15 to 25, 1999 and March 1, 2000 to September 3, 2005; consequently, he received an overpayment of compensation.

The Board finds, however, that the Office has not adequately explained how it calculated the amount of overpayment. The Office initially determined that appellant's base pay on the date of injury as \$703.42 per week excluding the horse allowance, or \$788.50 per week with the horse allowance. The Office paid him compensation beginning June 14, 1999 based on this calculation. In determining that he received an overpayment of compensation, however, the Office found that his pay rate on the date of injury, excluding the horse allowance, was only \$697.27 per week. The Office determined that appellant was owed \$164,093.95 in compensation for the periods September 15 to 25, 1999 and March 1, 2000 to September 3, 2005 utilizing the weekly pay rate of \$697.27 per week. The Office found that he received \$185,408.31 for the periods September 15 to 25, 1999 and March 1, 2000 to September 3, 2005. The compensation received for these periods, however, was based on a pay rate excluding the horse allowance of \$703.42 per week. The Office is required to provide clear reasoning showing how the overpayment was calculated.¹¹ The Board is not able to determine the correct amount of the overpayment from the information submitted by the Office. The case, therefore, will be remanded to the Office for further development regarding the amount of overpayment. The Office should fully explain its rationale and provide adequate documentation to support its explanation. After such further development, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that appellant received an overpayment of compensation from September 15 to 25, 1999 and March 1, 2000 to September 2, 2005 because the Office erroneously included a horse allowance in his pay rate for compensation purposes. The Board further finds, however, that the case is not in posture for decision regarding the amount of

¹¹ *Id.*

overpayment. It is, therefore, premature to address appellant's eligibility for waiver and recovery of the overpayment.¹²

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 22, 2007 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 10, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹² The Board notes, however, that the Office failed to consider whether appellant, in reliance on the overpayment compensation, relinquished a valuable right or changed his position for the worse.