

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

B.M., Appellant)

and)

**DEPARTMENT OF AGRICULTURE, FOOD
SAFETY & INSPECTION SERVICE,
Philadelphia, PA, Employer**)

**Docket No. 09-65
Issued: July 16, 2009**

Appearances:
Appellant, pro se
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 October 9, 2008 appellant filed a timely appeal from a September 16, 2008 decision of the Office of Workers' Compensation Programs denying waiver of the recovery of an overpayment of compensation and regarding the rate of recovery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether the Office properly denied waiver of recovery of the overpayment created during the period May 31, 2004 through June 7, 2008 based on the use of an incorrect pay rate for compensation purposes; and (2) whether it properly found the overpayment should be recovered by deducting \$150.00 from continuing compensation.

FACTUAL HISTORY

On March 16, 2004 appellant, then a 58-year-old consumer safety inspector, sustained injury claim alleging that he injured his lower back and neck when his car slid off a road and

down an embankment due to icy conditions. The Office accepted the claim for aggravation of cervical and lumbar degenerative joint disease. On the back of the form, the employing establishment noted appellant's yearly salary as \$51,714.00. Appellant did not return to work following his injury.

The Office paid appellant compensation for wage loss based on a weekly pay rate of \$1,109.88 for the period May 31, 2004 to November 26, 2005.

By letter dated November 8, 2005, the Office placed appellant on the periodic rolls for temporary total disability. It noted that appellant's compensation was based on a weekly pay rate of \$1,098.88.

On May 22, 2008 the Office requested clarification on the issue of appellant's pay rate from the employing establishment. In a May 27, 2008 response, the employing establishment stated that appellant was a Grade 9, step 9 at the time of his injury with a yearly salary of \$51,714.00. A 2004 salary table for the Pittsburgh, PA area listed a yearly salary of \$51,714.00 for a Grade 9, step 9.

In a letter dated July 10, 2008, the Office issued a preliminary determination that an overpayment of \$18,651.25 was created. It explained that appellant had received \$179,074.86 in compensation from May 31, 2004 through June 7, 2008, but he should have received \$160,423.41 using the correct pay rate. Appellant was found not at fault in creating the overpayment and advised of the actions he could take to request a preresoupment hearing within 30 days. The Office enclosed an overpayment recovery questionnaire (OWCP-20) and indicated that a completed form should be submitted with any request for action.

On July 17, 2008 appellant requested a telephone conference with the Office and submitted a completed overpayment recovery questionnaire. He reported income of approximately \$4,723.00 per month¹ and expenses of \$4,571.00, a cabin worth approximately \$35,000.00 and other funds totaling \$1,620.00.² The list of expenses included \$4,150.00 for rent or mortgage, \$400.00 for food, \$75.00 for clothing, \$550.00 for utilities, credit card payments totaling \$396.00³ and \$1,200.00 for other expenses.

¹ This included \$2,816.00 in monthly income, \$367.00 in monthly social security benefits and \$1,540.00 monthly income from his spouse's salary.

² The other funds included \$120.00 in cash on hand and a \$1,500.00 checking account balance.

³ Appellant noted a monthly payment of \$96.00 to PNC Bank and \$300.00 to American Express. The amount owed to PNC back was \$3,168.14 and \$8,964.00 to American Express.

In a memorandum of telephone prerecouplement conference dated August 12, 2008, the Office noted that appellant's income would be reduced from \$3,724.80 every 28 days to \$2,813.80 every 28 days or \$3,048.28 based on a July 15, 2008 loss of wage-earning capacity decision.⁴ The issues discussed were waiver and appellant's financial resources to repay the overpayment. Appellant did not contest the fact or amount of the overpayment. The Office stated that his income included \$3,048.28 in monthly compensation benefits, \$367.00 in monthly social security income and his wife's monthly salary of \$1,540.00. Appellant reported monthly expenses of \$1,950.00 for first and second mortgages, \$302.00 for car payment; \$550.00 for electricity, gas and phone, \$1,200.00 for car expenses of gas, insurance and maintenance, \$100.00 for cell phone, \$150.00 for cable and internet, \$400.00 for groceries, \$75.00 for clothes, \$96.00 for credit card payment to WaMu and \$300.00 credit card payment to American Express, or total expenses of \$5,123.00. Next assets included a cabin left by appellant's father with an estimated value of \$35,000.00, a car worth a \$1,000.00 and \$1,500.00 in his checking account. Appellant was requested to submit attended supporting financial documentation. Based on the information given in the telephone conference, his monthly expenses exceeded his monthly income by \$167.72.

On August 21, 2005 appellant submitted financial documentation which included a one page copy of a June 2008 PNC Bank checking statement,⁵ a July 2008 Allegheny power bill listing \$110.72 as the amount due, a payment voucher from American Express listing \$153.00 as the minimum payment,⁶ payment voucher for \$365.00 from National City,⁷ a payment voucher from WaMu listing \$93.00 as due by July 8, 2008⁸ and NextTier Bank statement for the period May 20 to June 16, 2008 for appellant's wife.⁹

In a decision dated September 16, 2008, the Office finalized its determination that appellant received an overpayment in the amount of \$18,651.25 as a result of being paid at an incorrect pay rate from May 31, 2004 through June 7, 2008 for which he was without fault. It noted appellant did not disagree with the fact or amount of the overpayment during the August 12, 2008 telephone conference. The Office denied waiver of the recovery and determined that the overpayment would be recovered by deducting \$150.00 every four weeks from his continuing compensation payments. In denying waiver, it found that appellant's total monthly income was \$4,955.28. As to expenses, the Office found that appellant did not submit

⁴The Board notes that appellant did not request review of this decision by the Board, but did request an oral hearing before an Office hearing representative. At the time of his appeal to the Board, no final decision had been issued by an Office hearing representative.

⁵ Appellant's loan payments for this first and second mortgage were listed as totaling \$1,654.32.

⁶ The closing date was listed July 28, 2008 with an outstanding balance of \$7,673.50. Handwriting indicates appellant paid \$500.00.

⁷ The form noted a balance of \$14,743.52 with the due date crossed out.

⁸ The form noted \$3,076.19 as the balance due as of June 11, 2008.

⁹ Appellant identified two payments of \$50.00 each as payments for gas, \$39.86 for electricity, \$300.47 for car payment, \$169.53 for insurance, payments of \$47.46 and \$50.50 for gas and a \$283.66 as payment for phone, internet and cable.

sufficient financial information to support the total of claimed monthly expenses. Appellant alleged monthly car expenses of \$1,200.00, but failed to submit sufficient financial information to support this amount. The Office found that it was reasonable to assume that he had monthly car expenses of \$800.00. It determined that appellant's monthly expenses equaled \$4,723.00, which was less than his monthly income by \$232.28. The Office directed recovery of the overpayment by withholding the sum of \$150.00 from his continuing compensation payments.¹⁰

LEGAL PRECEDENT -- ISSUE 1

Section 8129(b) of the Federal Employees' Compensation Act provides: "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 [the Act] or would be against equity and good conscience."¹¹ If a claimant is without fault in the creation of an overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 through 10.437 of the Office's regulations.

According to section 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 or her current 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.¹² For waiver under the defeat the purpose of the Act standard, an appellant must meet the two-pronged test and show that she both needs substantially all of her current income to meet current ordinary and necessary living expenses,¹³ and that her assets do not exceed the resource base.¹⁴

The burden is on the claimant to show that the expenses are reasonable and needed for a legitimate purpose. If the Office determines that the amounts of certain expenses are not ordinary and necessary, particularly regarding the significant expenses of food, clothing and

¹⁰ The Board notes that that appellant has submitted new evidence with his appeal. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c); *J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB ___ (Docket No. 06-1564, issued February 27, 2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

¹¹ 5 U.S.C. § 8129(b).

¹² Office procedures provide that the 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)

¹³ 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. *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

¹⁴ *W.F.*, 57 ECAB 705 (2006).

vehicles, it must state in writing the reasons for this finding. The finding must be supported by rationale, which may include reference to recognized research data that would show that the claimant's expenses exceed the average or range of expenses for the general population relevant to the claimant's circumstances.¹⁵ The Office must be careful to avoid counting an expense twice when totaling the claimant's ordinary and necessary living expenses.¹⁶

In order to establish that recovery of an overpayment would be against equity and good conscience, an overpaid individual must either establish that she would experience a severe financial hardship in attempting to repay the debt¹⁷ or overpaid individual could also establish that in reliance on such payment or on notice that such payments would be made, she gave up a valuable right or changed her position for the worse.¹⁸ If the claimant is not entitled to waiver under the defeat the purpose of the Act clause against the equity and good conscience clause must be considered by the Office in the written decision.¹⁹

An individual's liquid assets include but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds and certificate of deposits.²⁰ Nonliquid assets include but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings/supplies including more than two vehicles in the immediate family.²¹

ANALYSIS -- ISSUE 1

The Office determined that an overpayment was created for which appellant was not at fault based on the use of an incorrect pay rate in issuing his wage-loss compensation. However, the fact that appellant was not at fault in the creation of the overpayment does not, of itself, establish a basis for waiver of recovery of the overpayment.²² Recovery is still required unless it is established that adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.²³ The financial evidence establishes that appellant has a monthly income of \$4,955.28. The financial evidence also indicates that he has total

¹⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(3) (May 2004).

¹⁶ *Id.*

¹⁷ 20 C.F.R. § 10.437(a).

¹⁸ *Id.* at 10.437(b),

¹⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b) (May 2004)

²⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (May 2004)

²¹ *Id.*

²² *L.S.*, 59 ECAB ___ (Docket No. 07-1961, issued February 14, 2008); *Jorge O. Diaz*, 51 ECAB 124 (1999).

²³ *See W.P.*, 59 ECAB ___ (Docket No. 08-202, issued May 8, 2008); *Keith H. Mapes*, 56 ECAB 130 (2004).

monthly expenses of \$4,723.00.²⁴ Therefore, his monthly income of \$4,955.28 exceeds monthly expenses of \$4,723.00 by \$232.28, in excess of the amount specified in the Office's procedures.²⁵ Appellant listed a cabin worth approximately \$35,000.00. Because his monthly income exceeds his expenses by more than \$50.00, he is not deemed to need substantially all of his current income to meet current ordinary and necessary living expenses and has sufficient funds available for debt repayment. Therefore, the Board finds that the Office properly concluded that recovery of the overpayment would not cause severe financial hardship to appellant or defeat the purpose of the Act.

LEGAL PRECEDENT-- ISSUE 2

Section 10.441 provides that, if an overpayment of compensation has been made to an individual entitled to further payments and 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 hardship.²⁶

ANALYSIS -- ISSUE 3

With respect to the \$150.00 withheld from appellant's continuing compensation payments to recover the overpayment, the Office's regulations list these factors to be considered in determining repayment.²⁷ The implementing regulations provide that the Office must take 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.²⁸

The Office found that recovery of the overpayment would be made by an adjustment against continuing compensation at the rate of \$150.00 per payment.²⁹ The financial evidence of record reveals that appellant's monthly income exceeded his expenses by \$232.68 and he has a cabin worth approximately \$35,000.00. Based on the evidence, the Office took into consideration evidence pertaining to appellant's financial assets so as to minimize any hardship in recovering the overpayment. The Board finds that the Office properly followed its regulations

²⁴ This included payments supported by the financial information of \$1,654.32 for first and second mortgage payments, \$39.86 for electricity, \$197.96 for gas, \$283.66 for phone, internet and cable, \$300.47 car payment, \$169.53 for insurance, \$93.00 to WaMu, \$153.00 to American Express, \$110.72 to Allegheny Power and \$365.00 to National City.

²⁵ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (October 2004) (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).

²⁶ 20 C.F.R. § 10.441.

²⁷ *Id.*; see *Fred A. Cooper, Jr.*, 44 ECAB 498 (1994).

²⁸ *Id.*

²⁹ 20 C.F.R. § 10.441(a).

to determine that the \$18,651.25 overpayment could be recovered by deducting \$150.00 from appellant's continuing compensation payments.³⁰

CONCLUSION

The Board finds that the Office properly denied that waiver of the recovery of the overpayment of compensation in the amount of \$18,651.25 for the period May 31, 2004 through June 7, 2008, resulting from the use of an incorrect pay rate for compensation purposes. The Board further finds that the Office also properly directed recovery of the overpayment by deducting \$150.00 every 28 days from continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 16, 2008 is affirmed.

Issued: July 16, 2009
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

³⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) and 6.200.4.d(1)(b) (May 2004).