

FACTUAL HISTORY

On February 15, 1994 appellant, then a 44-year-old quality assurance specialist, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right knee injury while squatting in the performance of duty on February 11, 1994. The Office accepted the claim for a right knee strain. Appellant filed an occupational disease claim (Form CA-2) on October 8, 1996 which was accepted for aggravation of degenerative arthritis of the right knee.

Appellant retired from federal employment in 1997 and began working intermittently in private industry. In a decision dated April 19, 2001, the Office issued a schedule award for a 19 percent permanent impairment to the right leg.

By decision dated June 29, 2001, the Office determined that appellant's actual earnings in a private sector job as a quality control inspector fairly and reasonably represented his wage-earning capacity. His compensation was reduced to reflect a wage-earning capacity of \$494.80 per week as of January 29, 2001. On December 10, 2002 appellant filed a notice of recurrence of disability (Form CA-2a) commencing December 6, 2002. Appellant indicated that he had been laid off from his position. The Office began paying appellant compensation for temporary total disability. He received net compensation of \$2,778.00 every four weeks.

By letter dated October 23, 2003, the Office indicated that appellant had returned to private employment as of October 20, 2003. He was advised that he would receive a compensation payment for October 5 to 19, 2003 and any claim for additional compensation should be made pursuant to a Form CA-7 claim for compensation. Appellant was referred for vocational rehabilitation services.

In a decision dated January 23, 2004, the Office modified its 2001 wage-earning capacity determination. The Office found that appellant had actual earnings that fairly and reasonably represented his wage-earning capacity. Appellant was advised that his net compensation every four weeks would be \$857.24; the decision reported that the first period covered would be "October 20, 2003 to January 24, 2003," and the initial payment would be \$857.24. The Office issued a direct deposit payment on January 30, 2004 of \$3,270.29 for the period October 20, 2003 to January 24, 2004. On February 21, 2004 appellant received a direct deposit payment of \$2,778.00 for the period January 25 to February 21, 2004. He continued to receive compensation payments for temporary total disability every four weeks through November 27, 2004.

By decision dated January 11, 2005, the Office issued a schedule award for an additional 17 percent permanent impairment to the right leg. The period of the award was December 26, 2004 to December 3, 2005.¹

In a letter dated January 13, 2005, the Office advised appellant of a preliminary determination that an overpayment of \$20,455.72 was created for the period January 25 to November 27, 2004. The Office indicated that appellant had received \$30,985.43 during that period, but was entitled to only \$10,529.71 of that amount based on his loss of wage-earning

¹ Appellant did not request that the Board review this decision on appeal.

capacity. With regard to fault, the Office found that appellant was at fault in creating the overpayment because he accepted payments he knew or should have known to be incorrect.

In a letter dated January 24, 2005, appellant argued that he had been confused by the typographical error with respect to the period covered by the first payment and that he was not at fault in creating the overpayment. Appellant also submitted an overpayment recovery questionnaire (Form OWCP-20) regarding his monthly income and expenses. He listed monthly household income of \$2,800.00, not including compensation benefits, with monthly expenses of approximately \$4,870.00.

By decision dated February 15, 2005, the Office finalized its preliminary with respect to the \$20,455.72 overpayment. The Office found that appellant was not without fault in creating the overpayment. It reviewed the financial evidence with respect to monthly expenses and income, finding that appellant had \$5,622.00 in monthly income and \$3,923.51 in monthly expenses.² The monthly income included \$2,822.00 in compensation payments pursuant to the schedule award. The Office concluded that appellant had the resources to repay the overpayment and therefore was “not entitled to a waiver.” With respect to recovery of the overpayment, the decision stated that \$2,050.00 would be withheld from appellant’s continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant’s ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains in place until properly modified.³

ANALYSIS -- ISSUE 1

In the present case, appellant returned to work on October 20, 2003 in private employment. The Office modified appellant’s compensation on the grounds that his actual earnings fairly and reasonably represented his wage-earning capacity under 5 U.S.C. § 8115(a). Appellant’s continuing compensation was therefore based on his loss of wage-earning capacity. The Office determined that appellant was entitled to \$857.24 every 28 days, based on a 33 percent loss of wage-earning capacity.

From January 25 to November 27, 2004, appellant received compensation based on temporary total disability, rather than a loss of wage-earning capacity. The Office paid appellant \$30,985.43 in compensation during this period; however, his compensation should have been \$10,529.71 based on entitlement to \$857.24 every 28 days. Accordingly, an overpayment of \$20,455.22 was created.

² The Office indicated that appellant claimed \$997.60 in miscellaneous monthly expenses, but no supporting documentation was submitted and \$50.00 was allowed for miscellaneous expenses.

³ *Ronald E. Bennett*, 56 ECAB ____ (Docket No. 05-671, issued July 12, 2005).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled.⁴ The only exception to this requirement is a situation that meets the tests set forth as follows in section 8129(b): "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 payment is possible if the claimant is not without fault in helping to create the overpayment.⁶

In determining whether an individual is without fault, section 10.433(a) of the Office's regulations provide, in relevant part:

"A recipient who has done any of the following will be found at fault with respect to creating an overpayment--

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect, or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect."⁷

ANALYSIS -- ISSUE 2

The Board notes that the Office found that appellant was at fault in creating the overpayment. Although the Office appeared to consider appellant's financial circumstances with respect to waiver, no waiver of the overpayment is possible if a beneficiary is properly found to be at fault in creating the overpayment.

In the present case, the Office found that appellant had accepted payments, commencing with the February 21, 2004 payment for the period January 25 to February 21, 2004, that he knew or should have known to be incorrect. Appellant argued that he was confused by the typographical error in a January 23, 2004 wage-earning capacity decision that the period of the first payment was "October 20, 2003 to January 24, 2003." The Board notes that the initial payment deposited on January 30, 2004 is not part of the overpayment in this case. That payment did not represent a 28-day compensation payment. The payments constituting the

⁴ 5 U.S.C. § 8129(a).

⁵ 5 U.S.C. § 8129(b).

⁶ *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁷ 20 C.F.R. § 10.433(a).

overpayment were the deposited payments commencing February 21, 2004 in the amount of \$2,778.00. Appellant had been clearly notified by the January 23, 2004 decision that his compensation was being reduced and he would be entitled to continuing benefits at a payment of \$857.24. He should have known that the continuing payments of temporary total disability every 28 days were incorrect because he had returned to work and was notified that his compensation was being reduced. The Board finds that appellant did accept payments that he knew or should have known to be incorrect, commencing with the February 21, 2004 payment and continuing through the November 27, 2004 payment. Under 10.433(a) appellant is not without fault in creating the overpayment and therefore he is not entitled to waiver.

LEGAL PRECEDENT -- ISSUE 3

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. 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 hardship.⁸

ANALYSIS -- ISSUE 3

The Office reviewed the financial evidence of record and concluded that appellant had \$1,698.49 in excess monthly income over expenses. With respect to recovery of the overpayment, however, the Office found that \$2,050.00 would be deducted from appellant's continuing compensation. There is no evidence that the Office considered the financial circumstances so as to minimize hardship in this case. The amount deducted from continuing compensation exceeds the monthly amount that the Office found was available to appellant after monthly expenses and no explanation was provided as to how the \$2,050.00 amount was determined. The Board finds that the Office did not follow its regulations in determining the amount to be deducted from continuing compensation by taking into account the relevant factors to minimize hardship. The case will be remanded to the Office for appropriate consideration of the factors under section 10.441(a).

CONCLUSION

The Board finds that an overpayment of compensation of \$20,455.72 was created for the period January 25 to November 27, 2004 and appellant was not entitled to waiver as he was at fault in creating the overpayment. The case will be remanded for proper consideration of relevant factors as to the amount to be deducted from appellant's continuing compensation.

⁸ 20 C.F.R. § 10.441(a) (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 15, 2004 is affirmed with respect to fact, amount and waiver of the overpayment. The decision is set aside with respect to recovery of the overpayment and is remanded to the Office for an appropriate determination on the issue.

Issued: September 9, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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