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<b>FRANK DiDONATO, Appellant (deceased)</b>	)	
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<b>and</b>	)	<b>Docket No. 03-2111</b>
	)	<b>Issued: March 25, 2004</b>
<b>DEPARTMENT OF THE AIR FORCE,</b>	)	
<b>McGUIRE AIR FORCE BASE, NJ, Employer</b>	)	
	)	

### Case Submitted on the Record

*Office of Solicitor, for the Director*

Before:  
ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member

On August 26, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated June 18, 2003 in which the Office found that an overpayment had been made to appellant in the amount of \$11,603.36, that appellant was not entitled to waiver of recovery of the overpayment and that \$246.00 should be withheld from appellant's continuing compensation to recover the overpayment. Since he filed his appeal within a year of the Office's last merit decision on June 18, 2003, the Board has jurisdiction to review the case on the merits pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).<sup>1</sup>

The issues are: (1) whether the Office determined that an overpayment of compensation in the amount of \$11,603.36 occurred; (2) whether the Office properly determined that appellant

<sup>1</sup> Appellant died on November 16, 2003. On September 14, 2003 he authorized his son to represent him before the Board and gave his son durable power of attorney authorizing him to make medical and business decisions on his behalf. In a formal document signed by appellant on January 23, 2003, notarized on the same date, appellant gave his son durable power of attorney.

was not entitled to waiver of recovery of the overpayment; and (3) whether \$246.00 should be withheld from his continuing compensation to recover the overpayment.

### **FACTUAL HISTORY**

The Office accepted appellant's claim for a herniated intervertebral disc at L-4 for which appellant received total disability compensation benefits. He retired in 1971. On his Form CA-1032 dated December 3, 1999, appellant stated that he had been divorced since November 6, 1997 and that the reason his wife stopped being a dependent was "separation of marriage." By letter to appellant dated November 1, 2001, the Office informed him that he might have incurred an overpayment in compensation benefits as a result of the dependency change. The Office stated that it wanted to give appellant the opportunity as to what change occurred and when it occurred. The Office told him that he must respond in writing within 15 days of the letter, to advise if there had been a death, divorce or end of cohabitation between him and his wife. The Office instructed appellant, that if his marriage was terminated, he should submit the appropriate proof, either a certified copy of the death certificate or divorce decree and if his wife was no longer living with him, to state the date they last lived together and her current resident address. The Office also informed him that if he failed to submit the requested evidence within the stipulated time frame, the Office would assume that the last date on which appellant had a qualifying dependent was November 6, 1997 and that he had been overpaid compensation for the inclusive period from November 7, 1997 to November 3, 2001.

In a preliminary overpayment determination dated November 7, 2001, the Office found that appellant received an overpayment in the amount of \$11,603.36 because after his divorce on November 6, 1997 his wife no longer qualified as a dependent and appellant was erroneously paid the three-quarters percentage pay rate instead of the two-thirds percentage pay rate from November 7, 1997 to November 3, 2001. The Office found that he was without fault in the creation of his overpayment because he timely reported his divorce to the Office. The Office found that the overpayment occurred because the Office did not change the compensation rate until November 1, 2001. The Office informed appellant that he had 30 days to submit information regarding his income and expenses to determine whether it would be against equity and good conscience or defeat the purposes of the Federal Employees' Compensation Act to recover the overpayment.

Appellant submitted an overpayment recovery questionnaire, Form OWCP-20, dated November 15, 2001 in which he indicated that his total monthly income was \$2,566.00, representing \$308.00 for Social Security benefits, \$2,150.00 for Civil Service benefits and \$108.00 for Veterans Administration benefits. He indicated that his total monthly expenses were \$1,767.00, representing \$191.00 for rent, \$250.00 for food, \$50.00 for clothing, \$460.00 for utilities and \$816.00 for expenses and he had a checking account balance of \$6,500.00. By letter dated December 10, 2001, the Office acknowledged receipt of the Form OWCP-20 but informed appellant that he did not request a telephone conference, furnish a detailed explanation for his reasons for seeking waiver of the overpayment and did not support his entries on the Form OWCP-20. The Office gave him 30 days to submit additional evidence.

By letter dated January 5, 2001, appellant submitted copies of some of his bills and bank statements, requested a telephone conference and explained his reasons for requesting a waiver.

He explained that the update of his monthly expenses was \$181.00 for rent, \$400.00 for food, \$100.00 for clothing and \$152.00 for utilities or a total of \$1,175.00. Appellant's bills representing \$46.09 for AT&T, \$37.64 for Verizon, \$75.41 for medical expenses, \$80.37 for insurance, and \$181.00 for rent totaled \$420.51. The bank statement that he submitted from Ocean First for the period ending December 10, 2001, showed a balance of \$8,084.59. Appellant stated that he had no way of knowing that an error had been made by way of his receiving more money than he was owed and over the last four years he had become accustomed to living on his monthly allotment. He stated that, if he received approximately \$250.00 less each month, he would suffer a financial hardship in addition to trying to repay the debt and the problem had already caused his family and him great stress and distress. Appellant further stated that, in preparing the financial documentation, he learned that the GPU Energy had made a billing error in not billing him for 18 months so he would also have to pay that company back for 18 months of charges.

A telephone conference was held on August 8, 2002 between the senior claims examiner and appellant's son, Louis DiDonato. The Office noted the financial information that appellant submitted on January 5 and November 15, 2001. Mr. DiDonato argued that recovery of the overpayment should be waived in full because his father was without fault and recovery of the overpayment would be a financial hardship. He stated that the statement of expenses was erroneous because it omitted some of his father's expenses such as charges for weekly physical therapy appellant underwent for a nonoccupational medical condition. The Office stated that, in deference to appellant's age and condition, it would provide appellant with another 30 days to submit updated, fully documented financial data including his federal and state income tax returns.

Appellant subsequently submitted a Form OWCP-20 dated September 27, 2002 which showed monthly income of \$2,337.00 representing \$313.00 in Social Security benefits, \$1,921.00 in a government pension and \$103.00 in Veterans Administration benefits. The form showed \$2,406.29 in monthly expenses representing \$180.00 in rent, \$390.00 in food, \$50.00 in clothing, \$304.94 in utilities, \$1,362.35 in other expenses (*i.e.*, newspapers, car insurance and gas, home health care, medical insurance and "D.O.P.") and \$119.00 for a creditor. Appellant also indicated that he had funds of \$6,871.54 representing \$200.00 for cash on hand and a checking account balance of \$6,671.54.

By decision dated June 18, 2003, the Office finalized the overpayment determination to reflect that appellant received an overpayment in the amount of \$11,603.36 from November 7, 1997 to November 3, 2001 and found that appellant was not entitled to waiver of recovery of the overpayment. The Office noted the information on the Form OWCP-20 dated September 27, 2002 which showed a monthly income of \$2,337.00, monthly expenses of \$2,406.29 and his assets were \$6,871.54. The Office also found that appellant's documented monthly expenses totaled \$1,493.55. The Office found that his actual monthly income was \$2,548.00 representing \$2,132.00 in FECA benefits, \$313.00 in Social Security benefits, and \$103.00 in Veterans Administration benefits. The Office found that appellant's monthly expenses were \$2,406.29 and his assets were \$6,871.54. The Office determined that appellant's monthly income of \$2,548.00 exceeded appellant's monthly expenses of \$2,406.29 by more than \$50.00 (actual difference is \$141.71) and his assets exceed the individual resource base of \$3,000.00.

The Office determined that recovery would not be against equity and good conscience because appellant, who had been completing CA-1032 forms since 1985, had been informed on the forms that a person with no eligible dependents should be paid at the two-third percentage rate. The Office determined that he was therefore aware or reasonably should have been aware that he was receiving excess compensation when he no longer had a dependent. The Office also found that appellant could not be excused from a finding that he derived no personal gain from the payments. The Office found that he did not detrimentally rely on receipt of the excess payment because, although he stated in his November 5, 2002 statement that he had become “accustomed” to the excess amount, that is not the same as showing detrimental reliance on the receipt of that amount. The Office also found that an assessment of interest should not be waived because the monthly payment was large enough to more than adequately cover the monthly interest charge. The Office concluded that waiver should not be granted because recovery would not defeat the purpose of the Act or be against equity and good conscience. The Office required appellant to pay \$246.00 each month with interest until the overpayment was recovered.

### **LEGAL PRECEDENT -- ISSUE 1**

The basic rate of compensation under the Act is 66 2/3 percent of the injured employee’s monthly pay. Where the employee has one or more dependents as defined in the Act, he is entitled to have his basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.<sup>2</sup>

Under the Act, a spouse may be a dependent if:

“(A) she is a member of the same household as the employee; (B) she is receiving regular contributions from the employee for her support; or (C) the employee has been ordered by a court to contribute to her support.”<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

In his Form CA-1032 dated December 3, 1999, appellant indicated that he was divorced on November 6, 1997 and his wife stopped being a dependent due to “separation of marriage.” In its November 1, 2001 letter to appellant, the Office informed him that he might have incurred an overpayment due to the change in his exwife’s former dependency status and requested that appellant submit documentation of the change in his wife’s status such as a copy of the divorce decree and the current address where she lived. The Office informed appellant that if he did not submit the requested information within 15 days of the date of the letter, it would assume that the last date appellant had a qualifying dependent was November 6, 1997. He did not submit the requested documentation. The Office therefore properly determined that appellant’s wife no longer qualified as a dependent on November 6, 1997. The Office records show that from November 7, 1997 to November 2, 2001 appellant was paid at the augmented 75 percent rate of

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<sup>2</sup> 5 U.S.C. § 8110(b); *see also* William G. Dimick, 38 ECAB 751 (1987).

<sup>3</sup> 5 U.S.C. § 8110(a)(2); *Nancy J. Masterson*, 52 ECAB \_\_\_\_ (No. 00-1434, issued September 11, 2001).

pay in the amount of \$105,618.07 when he should have been paid the standard 66 2/3 rate of pay in the amount of \$94,014.71. The difference between \$105,618.07 and \$94,014.71 equals \$11,603.36. The Office therefore properly found that an overpayment of \$11,603.36 had been created.

### **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.<sup>4</sup> These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustments or recovery by the United States may not be made when incorrect payments 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."<sup>5</sup> Since the Office found that appellant was without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it is determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436<sup>6</sup> provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship to a currently or formerly entitled beneficiary because "(a) [t]he beneficiary from whom OWCP [the Office] seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) [t]he beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics." 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.<sup>7</sup> Further, 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.<sup>8</sup> Section 10.437<sup>9</sup> states that recovery of an overpayment is also considered to be against good conscience if the 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.

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<sup>4</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>5</sup> 5 U.S.C. § 8129(b).

<sup>6</sup> 20 C.F.R. § 10.436

<sup>7</sup> *Frederick Arters*, 53 ECAB \_\_\_\_ (Docket No. 01-1237, issued February 27, 2002); see *Howard R. Nahikian*, 53 ECAB \_\_\_\_ (Docket No. 01-138, issued March 4, 2002).

<sup>8</sup> *Id.*

<sup>9</sup> 20 C.F.R. § 10.437.

## **ANALYSIS -- ISSUE 2**

In this case, per appellant's most recent financial data on the September 27, 2002 Form CA-1032, appellant had monthly income of \$2,337.00, monthly expenses of \$2,406.29 and assets of \$6,871.54. The Office determined that his monthly income was actually \$2,548.00 which represented a total of \$2,132.00 FECA benefits, \$313.00 Social Security benefits and \$103.00 Veterans Administration benefits. Appellant's monthly income of \$2,548.00 exceeded his monthly expenses of \$2,406.29 by \$141.71 and, therefore, the difference was greater than the minimum of \$50.00. Further, his assets of \$6,871.54 exceeded the \$3,000.00 resource base. Although appellant stated that he had grown "accustomed" to the higher rate of payment, he did not show that in reliance on the higher payments, he gave up a valuable right or changed his position for the worse. The Office therefore properly denied appellant waiver of recovery of the overpayment.

## **LEGAL PRECENT -- ISSUE 3**

Section 10.441(a) provides that if an overpayment has been made to an individual who is 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 any hardship."<sup>10</sup>

## **ANALYSIS -- ISSUE 3**

In this case, the Office stated that appellant should pay \$246.00 a month for the Office to recover the overpayment. The Office, however, did not appear to consider any of the factors in section 10.441(a) in making this determination. Such consideration is particularly necessary where, as here, appellant's monthly income exceeded his monthly expenses by only \$141.71 and, thus, it is not clear why a monthly recovery rate of \$246.00 is justified. The case will therefore be remanded for the Office to address the factors in section 10.441(a) and provide reasons regarding those factors in determining the monthly recovery payment.<sup>11</sup>

## **CONCLUSION**

The Board finds that the Office properly determined that an overpayment of \$11,603.36 was created from November 7, 1997 and November 3, 2001 and that the Office properly determined that recovery of the overpayment should not be waived. The Board finds that the Office erred in failing to consider the factors in section 10.441(a) in determining the monthly recovery payment.

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<sup>10</sup> 20 C.F.R. § 10.441(a).

<sup>11</sup> See *Darlene A. Luck*, 54 ECAB\_\_\_ (Docket No. 03-1215, issued August 5, 2003); *Katherine Newton*, 54 ECAB \_\_\_ (Docket No. 03-926, issued June 12, 2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 18, 2003 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further action on the issue of the amount of the monthly recovery payment. In all other respects, the Office's June 18, 2003 decision is affirmed.

Issued: March 25, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member