

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

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**NANCY E. TUCKER, Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Baltimore, MD, Employer**

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**Docket No. 06-74  
Issued: February 7, 2006**

*Appearances:*

*Nancy E. Tucker, 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

**JURISDICTION**

On October 12, 2005 appellant filed a timely appeal of a September 2, 2005 decision of the Office of Workers' Compensation Programs, which found that she received an overpayment of compensation in the amount of \$591.97. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

**ISSUES**

The issues are: (1) whether appellant received an overpayment in compensation in the amount of \$591.97 for the period May 16, 2004 to February 19, 2005, because her compensation had been based on an incorrect pay rate; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$100.00 every four weeks from appellant's continuing compensation. On appeal appellant generally contends that repayment would create hardship.

### **FACTUAL HISTORY**

On September 29, 1994 appellant, then a 30-year-old secretary, sustained an employment-related lumbosacral strain and left knee sprain when her car was involved in an accident at the employing establishment garage. She worked intermittently until December 8, 1994, when she underwent left knee arthroscopic surgery and returned to full duty on April 5, 1995. On June 5, 2002 she was granted a schedule award for a 12 percent permanent loss of use of the left lower extremity and on May 13, 2004 underwent a second arthroscopic procedure on her left knee. She has not worked since that time and claimed disability beginning on May 16, 2004.

On June 15, 2005 the Office issued a preliminary finding that an overpayment in compensation in the amount of \$591.97 had been created. The Office explained that the overpayment resulted because appellant was paid at the incorrect pay rate of \$729.69 per week for the period May 16, 2004 to February 19, 2005, when she should have been paid at the rate of \$709.96 per week. The Office found appellant not at fault in the creation of the overpayment and provided an overpayment questionnaire for her to submit.

On July 5, 2005 appellant returned the questionnaire and requested a decision on the record. She stated that she supported her husband and mother and that she received zero income. She itemized monthly expenses, which totaled \$2,147.22.<sup>1</sup> By letter dated August 5, 2005, the Office requested household income information from appellant. A telephone memorandum dated August 23, 2005, indicated that appellant's husband's annual income was \$34,643.00 and her mother received a \$277.00 monthly pension. On September 2, 2005 the Office finalized the overpayment decision. The Office reiterated that appellant was not at fault but denied waiver noting that the monthly household income exceeded household expenses by greater than \$2,000.00 per month and ordered repayment by deducting \$100.00 every four weeks from appellant's continuing compensation.

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

For all claims under the Federal Employees' Compensation Act,<sup>2</sup> compensation is to be based on the pay rate as determined under section 8101(4), which defines "monthly pay" as the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.<sup>3</sup>

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<sup>1</sup> The monthly expenses were itemized as follows: taxes -- \$125.00, mortgage -- \$587.03, food -- \$300.00, utilities -- \$409.48, GMC -- \$414.71, life insurance -- \$237.00 and truck insurance -- \$74.00.

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8101(4); *John M. Richmond*, 53 ECAB 702 (2002).

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

In this case, appellant's pay rate for compensation purposes would be the rate of pay she was receiving on the date of her recurrence of disability, May 16, 2004. The record indicates that for the period May 16, 2004 to February 19, 2005 she received compensation based on a weekly pay rate of \$729.69. Pay rate information provided by the employing establishment indicated that, at the time of appellant's May 16, 2004 recurrence of disability, her annual rate of pay was \$36,918.00 or \$709.96 per week. The Board therefore finds that an overpayment in compensation had been created. The record demonstrates that, for the period May 16, 2004 to February 19, 2005, appellant received total compensation of \$21,890.77 based on the incorrect pay rate of \$769.69, when she should have received compensation totaling \$21,298.80 based on the correct pay rate, yielding an overpayment in compensation in the amount of \$591.97, as properly determined by the Office.

### **LEGAL PRECEDENT -- ISSUE 2**

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>4</sup> If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of the Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.<sup>5</sup>

Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom 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) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.<sup>6</sup> Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.<sup>7</sup> Recovery of an overpayment is also considered to be against equity and good conscience when any 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.<sup>8</sup>

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be

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<sup>4</sup> 20 C.F.R. § 10.433(a).

<sup>5</sup> 20 C.F.R. § 10.434.

<sup>6</sup> 20 C.F.R. § 10.436.

<sup>7</sup> 20 C.F.R. § 10.437(a).

<sup>8</sup> 20 C.F.R. § 10.437(b).

against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.<sup>9</sup>

### **ANALYSIS -- ISSUE 2**

As the Office found appellant without fault in the creation of the overpayment in compensation, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.<sup>10</sup>

Appellant furnished the Office with an overpayment questionnaire, which indicated that she had monthly expenses totaling \$2,147.22. The record indicates that her periodic compensation is \$2,129.88 for each four-week period or \$2,307.37 per month.<sup>11</sup> Office procedures provide that 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, *i.e.*, the amount of monthly funds available for debt repayment is the difference between current income and adjusted-living expenses plus \$50.00,<sup>12</sup> which in this case would be \$110.15. The record also indicates that appellant's husband has an annual income of \$34,643.090 or \$2,886.92 per month. The Board therefore finds that the Office properly concluded that recovery of the overpayment would not cause financial hardship to appellant and thus defeat the purpose of the Act. Furthermore, as appellant made no argument that she gave up a valuable right or changed her position for the worse in reliance on the overpaid compensation, the Office properly determined that recovery would not be against equity and good conscience. The Board therefore finds that the Office properly denied waiver of the overpayment and is required by law to recovery the debt by decreasing later payments to which appellant is entitled.<sup>13</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

The Office's implementing regulation 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 any hardship.<sup>14</sup>

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<sup>9</sup> 20 C.F.R. § 10.438(a).

<sup>10</sup> 20 C.F.R. §§ 10.436, 10.437.

<sup>11</sup> The Office projected appellant's husband's monthly net income as approximately \$1,924.61, based on an annual salary of \$34,643.00 and also considered her mother's pension of \$277.00 per month in determining that appellant was not entitled to waiver.

<sup>12</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1), (a)(4) (April 2003).

<sup>13</sup> 5 U.S.C. § 8129(a).

<sup>14</sup> 20 C.F.R. § 10.441(a).

### **ANALYSIS -- ISSUE 3**

The Board finds that the Office gave due regard to the relevant factors noted above in setting a rate of recovery of \$100.00 per compensation period. The record indicates that appellant had adjusted discretionary income of \$110.15 per month, based solely on her compensation payments and not considering her husband's income. The Office therefore did not abuse its discretion in finding that appellant should repay her overpayment at the rate of \$100.00 per compensation period.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$591.97 and that the Office properly denied waiver and required recovery of the overpayment by deducting \$100.00 every 28 days from her continuing compensation payments.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 2, 2005 be affirmed.

Issued: February 7, 2006  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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