

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

STEVEN R. COFRANCESCO, Appellant)	
)	
and)	Docket No. 06-408
)	Issued: June 27, 2006
PEACE CORPS, Dashauz, Turkmenistan, Employer)	
)	

Appearances:
Steven R. Cofrancesco, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 8, 2005 appellant filed an appeal of a September 19, 2005 decision of the Office of Workers' Compensation Programs' hearing representative, finalizing an overpayment decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of \$4,147.82 was created; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly determined that the overpayment should be repaid by deducting \$100.00 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

The Office accepted that appellant sustained a right elbow strain, right ulnar neuropathy with consequential left ulnar neuropathy and left elbow medial epicondylitis in the performance of duty on March 6, 1999. He began receiving compensation for temporary total disability.

Appellant's compensation rate was 75 percent of his pay rate for compensation purposes, as he indicated he had a dependent spouse. In a letter dated January 10, 2001, the Office advised appellant to notify it of any changes in the status of any dependent.

On April 24, 2002 appellant submitted a response to a request for information (Form EN1032) indicating that he was married but his spouse did not live with him. The form explains that compensation is paid at 66 2/3 percent of the applicable pay rate if no dependents, and 75 percent for a claimant with one or more dependents and provides the definition of an eligible dependent. In response to a question as to whether he made direct payments for support, appellant reported "yes + no" and indicated his last support payment was made on January 30, 2002. In an EN1032 dated April 13, 2003, appellant reported that he was not married but would make support payments until December 2004.

Appellant continued to receive compensation at the augmented rate of 75 percent of the pay rate for compensation purposes through December 27, 2003. By letter dated January 31, 2004, he advised the Office that he and his wife had decided to separate and divorce in March 2001. Appellant indicated that he agreed to make support payments totaling \$4,400.00 through December 2004; however, he made advance payments in April 2001 and his last support payment of \$100.00 was made on January 30, 2002. The record contains a divorce judgment from the Massachusetts Probate and Family Court dated November 27, 2001. The judgment stated that it was conditional and would become effective after February 25, 2002.

By letter dated July 6, 2004, the Office advised appellant of a preliminary determination that an overpayment of \$6,200.00 occurred from March 25, 2001 to December 27, 2003. The Office found that he had separated from his wife in March 2001 and was not entitled to augmented compensation. Appellant requested a hearing before an Office hearing representative. A hearing was held on July 12, 2005.

The hearing representative requested that the Office provide information regarding compensation paid from February 26, 2002 until December 27, 2003. The record contains a compensation payment history indicating that for the period February 26, 2002 to December 27, 2003 appellant received \$37,260.04 in net compensation.¹ The Office also included a worksheet stating that the gross compensation for the period February 26, 2002 to December 27, 2003, at a compensation rate of 66 2/3 percent, was \$33,112.22.

Appellant did not complete a current overpayment questionnaire. The hearing representative noted that appellant had previously indicated that he had over \$12,000.00 in a bank checking account and over \$13,000.00 in stocks, bonds and mutual funds. Appellant stated that he currently had less in the bank checking account, but he did not provide additional evidence. An April 30, 2005 account statement indicated that he had approximately \$15,000.00 in stock and mutual fund accounts. Appellant indicated that his monthly expenses exceeded his income.

¹ In this case, net compensation equaled gross compensation as no deductions had been made from gross compensation.

By decision dated September 19, 2005, the hearing representative modified the preliminary determination to reflect that the amount of the overpayment was \$4,147.82, the difference between the \$37,260.04 paid to appellant and the \$33,112.22 the Office reported as the amount he should have been paid. The hearing representative finalized the finding of fault, on the grounds that appellant had provided an incorrect statement on the April 24, 2002 EN1032, failed to furnish information that his divorce was final and accepted payments he knew or should have known were incorrect. With respect to repayment, the hearing representative noted the available financial information and found that appellant could repay the overpayment by deducting \$100.00 from appellant's continuing compensation every 28 days.

LEGAL PRECEDENT -- ISSUE 1

The basic rate of compensation under the Federal Employees' Compensation 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.² A wife is 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.³

ANALYSIS

With respect to fact of overpayment, appellant does not contest that an overpayment of compensation was created. He was divorced from his wife by judgment dated November 27, 2001, with an effective date of February 26, 2002. Although appellant indicated that he had separated from his wife in March 2001, he continued to make support payments through January 30, 2002. The hearing representative properly concluded that he could not claim his former spouse as a dependent as of February 26, 2002, the effective date of the divorce. Appellant did not have any dependents as of February 26, 2002 and was not entitled to compensation at the augmented rate. Since he received compensation at the augmented rate through December 27, 2003, an overpayment of compensation was created.

As to the amount of the overpayment, appellant argues that it should be 8 1/3 percent of the amount he was paid from February 26, 2002 until December 27, 2003. Since he received \$37,260.04 in compensation, he argues the overpayment should be 8 1/3 percent of that amount; or approximately \$3,107.00. The overpayment, however, is not 8 1/3 percent of the amount of compensation received, but 8 1/3 percent of his monthly pay. The Act, at 5 U.S.C. § 8110, provides augmented compensation "at the rate of 8 1/3 percent of his monthly pay...." The overpayment amount, therefore, is based on appellant's pay rate for compensation purposes, not a percentage of the amount of compensation received for the period in question. The Office determined that appellant should have been paid \$33,112.22 in compensation from February 26, 2002 until December 27, 2003 and thus, the overpayment amount was \$4,147.82. There is no probative evidence of error in the Office's calculations.

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

³ 5 U.S.C. § 8110(a)(1).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁴ 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.”⁵ Waiver of an overpayment is not permitted unless the claimant is “without fault” in creating the overpayment.⁶

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: “(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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 was incorrect.”

LEGAL ANALYSIS -- ISSUE 2

Although the hearing representative identified all three of the fault standards, only one is necessary to find that appellant was at fault. The EN1032 forms provided information to appellant regarding dependents and augmented compensation. He was advised as to the requirements for claiming a spouse as a dependent and that a claimant with no dependents is paid at 66 2/3 percent of the applicable pay rate, not 75 percent. Appellant indicated that he initially agreed to provide support through December 2004, but that he made advance payments and his last support payment was on January 30, 2002. When his divorce became final after February 25, 2002, he should have known that his continuing compensation payments at \$1,521.00 were incorrect. Although appellant stated on appeal the judge had told him he would receive a document in six months making the divorce official, the divorce judgment clearly stated it would become final after February 25, 2002. Appellant received a payment on March 23, 2002 for the period February 24 to March 23, 2002 with no reduction in compensation and he continued to receive compensation payments every 28 days showing no reduction.⁷ The Board finds that appellant accepted payments he knew or should have known were incorrect and, therefore, he was at fault under section 10.433(a)(3).

On appeal, appellant acknowledged that he should have read the EN1032's more carefully, but that he did not knowingly make any misstatements regarding dependents. The fault standard, however, is accepting payments that the claimant knew or should have known were incorrect and appellant should have known he could not continue to receive compensation at the augmented rate.

⁴ 5 U.S.C. §§ 8101 *et seq.*

⁵ 5 U.S.C. § 8129(b).

⁶ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁷ The compensation payments increased on April 20, 2002 to \$1541.00 to reflect a cost of living increase.(r 1036)

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of the Office's regulations provides:

“Whenever 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 or his or her attention is called to the same. 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

Appellant did not provide detailed information regarding his current financial circumstances. It is his responsibility to provide information about income, expenses and assets.⁹ The hearing representative noted the available evidence did indicate that appellant had significant assets in stock and mutual fund accounts and that he had previously reported over \$12,000.00 in a bank account. He indicated that appellant received \$1,472.00 every 28 days and he set the recovery of the overpayment at \$100.00 from continuing compensation payments. Based on the evidence, the hearing representative did take relevant evidence into account so as to minimize hardship in recovering the overpayment. The Board finds that Office properly followed its regulations in this case.

CONCLUSION

The Office properly determined that an overpayment of \$4,147.82 was created from February 26, 2002 to December 27, 2003. Appellant was not entitled to waiver of the overpayment as he was not without fault in creating the overpayment. The Office properly followed its regulations in recovering the overpayment by deducting \$100.00 every 28 days from continuing compensation.

⁸ 20 C.F.R. § 10.441.

⁹ 20 C.F.R. § 10.438.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 19, 2005 is affirmed.

Issued: June 27, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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