

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

L.D., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, New Orleans, LA, Employer)

**Docket No. 08-678
Issued: August 7, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 9, 2008 appellant filed a timely appeal from an October 25, 2007 decision of the Office of Workers' Compensation Programs, which found that she received an overpayment of compensation. 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; (2) whether the Office properly determined the amount of the overpayment to be \$6,456.00; and (3) whether the Office properly determined that she was at fault in accepting the overpayment and was therefore not entitled to waiver.

FACTUAL HISTORY

On January 4, 2006 the Office accepted that appellant, then a 31-year-old registered nurse, sustained an acute reaction to stress while working under the extreme conditions caused

by Hurricane Katrina. Appellant received compensation beginning on March 6, 2006 and was placed on the periodic rolls. On October 25, 2006 she notified the Office that she had accepted a buyout from the employing establishment, and again called on October 30, 2006. The employing establishment submitted evidence showing that on March 5, 2006 appellant voluntarily resigned, that on March 20, 2006 a Voluntary Separation Incentive Pay (VSIP) buyout of \$6,456.00 was approved, and that the VSIP was effective June 30, 2006. An employing establishment worksheet provides that the buyout was apparently based on six weeks pay.

On April 17, 2007 the Office issued a preliminary finding that an overpayment in compensation in the amount of \$6,456.00 had been created. It explained that the overpayment resulted because appellant received a lump-sum VSIP payment while receiving Office benefits. The Office also made a preliminary finding that appellant was at fault in creating the overpayment. By letter dated April 25, 2007, appellant acknowledged that on October 9, 2006 she had received a buyout but stated that the amount was \$4,089.88. She attached a copy of the buyout check. On May 10, 2007 appellant requested a hearing.¹

A telephonic hearing was held on August 29, 2007. Appellant testified that she had been receiving wage-loss compensation by check since April 2006 and had contacted the Office on two occasions in October 2006 regarding the buyout and also called the employing establishment. She stated that she was told by the Office that she could keep the buyout and also stated that she assumed wage-loss compensation would stop because of the buyout. Appellant stated that her second call to the Office concerned the wage-loss compensation check she received in late October, and she was told she could keep it. She also testified regarding income and expenses. By decision dated October 25, 2007, an Office hearing representative found that appellant received an overpayment in compensation in the amount of \$6,456.00 because she received a VSIP payment in that amount while receiving compensation for total disability and that, as she accepted a payment that she knew or reasonably should have known was incorrect, she was at fault. The hearing representative concluded that the Office should proceed with recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act² provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³ Section 8116 limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States.⁴ Section 10.421 of the

¹ The Office issued a final overpayment decision on May 17, 2007. However, appellant had timely requested a hearing, and the Branch of Hearings and Review assumed jurisdiction. See discussion *infra*. The Office also issued a decision on June 20, 2007 finding that appellant declined an offer of suitable work. Appellant has not filed an appeal of that decision with the Board.

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8102(a).

⁴ 5 U.S.C. § 8116(a).

implementing regulations provides that an employee may not receive compensation for total disability concurrently with separation pay.⁵ When the Office discovered concurrent receipt of benefits, it must declare an overpayment in compensation and give the usual due process rights.⁶

ANALYSIS -- ISSUE 1

While receiving compensation for total disability resulting from her employment injury, appellant entered into a VSIP agreement with the employing establishment that paid her \$6,456.00 in exchange for her voluntary resignation. Although compensation under the Act is paid for the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury and although she was no less disabled for having accepted the buyout, the law is clear: she may not concurrently receive compensation for total disability and separation pay.⁷

When they entered into the VSIP agreement, neither appellant nor the employing establishment, it appears, understood that Office regulations prohibiting concurrent receipt effectively removes the incentive for voluntary separation, at least where the employee is totally disabled for work as a result of an employment injury. Suspension or recovery by the Office of an amount of compensation equal to the total amount of the incentive or payable for the number of weeks the incentive represents, effectively leaves the employee no consideration in exchange for her resignation. While the Board appreciates appellant's position, it may not rewrite the law. Because her separation pay created an overpayment of compensation, the Board must affirm the Office's October 25, 2007 decision on the issue of fact of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Employing establishments may offer separation pay or buyouts to encourage employees to leave federal employment voluntarily. FECA Bulletin No. 96-02 provides:

“Separation pay is offered in different forms by different agencies. Sometimes it is defined as a number of weeks of pay and other times as a specific amount of money. How separation pay is defined is determined by the law governing the operations of the establishment in question. For example, in 1992 the Postal Service calculated its payments as six months of the employee's base pay, while the Department of Defense, beginning in 1993, used the amount of severance pay to which the individual would have been entitled, or \$25,000.00, whichever was less. The method of offset differs somewhat according to how the separation pay is defined.”⁸

⁵ 20 C.F.R. § 10.421(c); *see L.J.*, 59 ECAB ____ (Docket No. 07-1844, issued December 11, 2007).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.d(4) (April 1996).

⁷ *L.J.*, *supra* note 5.

⁸ FECA Bulletin No. 96-02 (issued November 5, 1995).

The bulletin further notes that, where separation pay is based on an amount of money, the amount should be applied to the amount of compensation for wage loss on a dollar-for-dollar basis.⁹

Office procedures provide that compensation for temporary total disability may not be paid for the period covered by separation pay.¹⁰ Where separation pay is based on weeks of pay, the Office should suspend compensation payments for the period in question, effective the date of separation, by a 100 percent offset for the number of weeks (not the amount of money) that the separation pay represents.¹¹ Where separation pay is based on an amount of money, the total dollar amount of separation pay should be applied to the amount of compensation for wage loss on a dollar-for-dollar basis. The claimant should be advised of the approximate time the offset will end.¹²

ANALYSIS -- ISSUE 2

In this case, appellant received a VSIP in the amount of \$6,456.00, and this was apparently based on six weeks pay. Instead of applying Chapter 2.100.17.d(1) of Office procedures which provides that, if separation pay is based on weeks of pay, the Office should suspend compensation payments for the period in question, effective the date of separation, by an offset for the number of weeks and not the amount of money, in this case the Office used the dollar-for-dollar offset method. As the Office was not justified in calculating the overpayment under this harsher method of offset,¹³ the Board finds that the case is not in posture for a decision on the issue of the amount of the overpayment. On remand, the Office shall calculate the amount of the overpayment by applying the method of offset used when a buyout is based on weeks of pay.¹⁴

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless “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.”¹⁵

⁹ *Id.*

¹⁰ Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1000.17.c(1).

¹¹ *Id.* at Chapter 2.1000.17.d(1).

¹² *Id.* at Chapter 2.2000.17.d(3).

¹³ Computer printouts in the record indicate that appellant received wage-loss compensation at the augmented 75 percent rate based on a weekly pay rate of \$1,076.37. This would equal a weekly compensation pay rate of \$807.28 or \$4,843.67 for a six-week period.

¹⁴ *See L.J.*, *supra* note 5.

¹⁵ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

Section 10.433(a) of the Office's regulation provides that the Office:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in 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. (This provision applies only to the overpaid individual).”¹⁶

ANALYSIS -- ISSUE 3

The Office applied the third standard in determining that appellant was at fault in creating the overpayment of \$6,456.00. In order for it to establish that she was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, she knew or should have known that the payment was incorrect.¹⁷

In an April 25, 2007 letter to the Office, appellant argued that she was not at fault as she reported the receipt of the buyout to the Office when it was received, that she delayed depositing the check in an effort to determine if any special action was necessary and called again after receiving wage-loss compensation on October 28, 2006. She stated that she was informed that, even though she had received a buyout, she was still eligible to receive monthly compensation and was told “the check is yours.” Appellant spoke with her claims examiner several days later and was told that her compensation case was still open and that she was eligible for benefits until she returned to work or was released by her physician. She asserted that she was not told that she should not cash the check by any representative of the Office.

In determining whether a claimant is at fault in creating an overpayment, the Office will consider the circumstances surrounding the overpayment, and the degree of care expected by a recipient of compensation may vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁸ Appellant's actions on calling the Office demonstrate that she knew she was not entitled to receive a buyout and wage-loss compensation concurrently. The record shows that she received wage-loss compensation from March 2006 until July 2007. While the Office may have told her that she was eligible to continue receiving benefits, this does not preclude that an overpayment in compensation was

¹⁶ 20 C.F.R. § 10.433 (1999); see *Tammy L. Craven*, 57 ECAB 689 (2006); see also 20 C.F.R. § 10.430.

¹⁷ *Id.*

¹⁸ *Neill D. Dewald*, 57 ECAB 451 (2006).

created for some portion of that period or that she was at fault in its acceptance. The Office immediately began pursuing the overpayment upon being notified that appellant had received a buyout.

In applying the tests to determine fault, the Office applies a “reasonable person” test.¹⁹ Under the circumstances of this case, the Board finds that appellant was at fault in the creation of the overpayment in compensation.²⁰

CONCLUSION

The Board finds that the Office properly determined that an overpayment in compensation was created and that appellant was at fault and would thus not be entitled to waiver. The case is not in posture for decision regarding the amount of the overpayment and is remanded for a determination of the correct amount.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated October 25, 2007 be affirmed in part, vacated in part, and the case remanded for further proceedings consistent with this opinion of the Board.

Issued: August 7, 2008
Washington, DC

David S. Gerson, Judge
Employees’ Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees’ Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees’ Compensation Appeals Board

¹⁹ *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

²⁰ With respect to recovery of the overpayment, where no further compensation benefits are due an individual, as in this case, the Board does not have jurisdiction and the recovery of an overpayment remains within the discretion of the Office. The Board’s jurisdiction over recovery is limited to reviewing those cases whether the Office seeks recovery from continuing compensation payments under the Act. *Terry A. Keister*, 56 ECAB 559 (2005).