

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

W.W., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
SUPPLY CENTER, Norfolk, VA, Employer**

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**Docket No. 08-739
Issued: September 19, 2008**

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 15, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decision dated December 17, 2007 finding that he had received an overpayment of \$2,178.36 and denying waiver of the recovery of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether the Office properly found that appellant received an overpayment of compensation in the amount of \$2,178.36 due to receiving compensation at the augmented three-fourths rate; and (2) whether the Office properly denied waiver of the recovery of the overpayment.

FACTUAL HISTORY

This case has been before the Board before. The facts and the circumstances of the Board's April 15, 1999 decision are hereby incorporated by reference.¹

On January 31, 2006 the Office made a preliminary determination that appellant was overpaid benefits in the amount of \$2,178.36 because he received compensation at the augmented three-fourths rate for a claimant with a dependent instead of at the basic two-thirds rate for a claimant with no dependents during the period January 11, 2005 through January 21, 2006. It noted that he was not entitled to the higher rate as of the date of his divorce, January 11, 2005.

In a response received by the Office on March 1, 2006, appellant requested a prerecoupment hearing and a waiver of the recovery of the overpayment. He indicated that he disagreed that an overpayment had been created, disagreed as to the amount of the overpayment and believed that the alleged overpayment was not his fault.

By decision dated December 17, 2007, the Office finalized its determination that appellant received an overpayment in the amount of \$2,178.36. Although it found that appellant was without fault in the creation of the overpayment, it found that he had not provided justification for waiver of the recovery of the overpayment and accordingly, he was responsible for the overpayment. The Office noted that no response had been received to its preliminary determination.

LEGAL PRECEDENT

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 If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.⁴ Where the employee has one or more dependents as defined in the Act, he or she is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.⁵ If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation he was entitled to receive at the two-thirds

¹ Docket No. 96-2393 (issued April 15, 1999).

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8105(a).

⁵ *Id.* at § 8110(b).

compensation rate and the augmented compensation received at the three-quarters rate constitutes an overpayment of compensation.⁶

Section 8129(b) of the Act provides as follows:

“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.”⁷

No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁸

Section 10.432 of the Office’s regulations provides in pertinent part:

“The individual may present this evidence to [the Office] in writing or at a precoupment hearing. The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.”⁹

ANALYSIS

In a preliminary determination dated January 31, 2006, the Office found that appellant was overpaid compensation in the amount of \$2,178.36. It notified appellant of the rights he had if he objected to the preliminary determination and informed appellant that his response must be submitted within 30 days of the date of the preliminary determination letter. On March 1, 2006 appellant timely requested a precoupment hearing within 30 days of the January 31, 2006 preliminary determination as required under 20 C.F.R. § 10.432. Pursuant to the Office’s procedure manual, if a hearing is requested, a case must be referred to the Branch of Hearings and Review.¹⁰ The Office failed to provide appellant a precoupment hearing and deprived him of his rights.¹¹ Accordingly, this case will be remanded to the Branch of Hearings and Review for a precoupment hearing.

CONCLUSION

The case is not in posture for decision.

⁶ *Diana L. Booth*, 52 ECAB 370 (2001).

⁷ 5 U.S.C. § 8129(a).

⁸ *Willie C. Howard*, 55 ECAB 564, 569 (2004).

⁹ 20 C.F.R. § 10.432; *see also Willie C. Howard*, *supra* note 8.

¹⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Overpayment Overview*, Chapter 6.100 (May 2004).

¹¹ *See Willie C. Howard*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 17, 2007 is set aside and the case is remanded to the Office for further action consistent with this opinion.

Issued: September 19, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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