

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

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**L.K., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Bangor, ME, Employer**

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**Docket No. 09-719  
Issued: December 30, 2009**

*Appearances:*

*Madonna M. Soctomah, for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge

COLLEEN DUFFY KIKO, Judge

MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On January 22, 2009 appellant, through his representative, filed a timely appeal from the November 19, 2008 decision of the Office of Workers' Compensation Programs finding an overpayment of compensation, for which he was without fault, and denying waiver of the recovery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment in the amount of \$23,425.15 during the period November 30, 1996 through December 15, 1998 for which he was not at fault; and (2) whether the Office properly denied waiver of the recovery of the principle balance.

**FACTUAL HISTORY**

On October 4, 1971 appellant, then a 38-year-old letter carrier, twisted his right knee while exiting his postal vehicle. The Office accepted that he sustained a torn medial meniscus

and authorized surgical repair. Appellant was placed on the periodic rolls on March 1, 1972. He returned to work in 1972. On September 18, 1981 the Office granted appellant a schedule award for 16 percent impairment to the right lower extremity. Appellant filed a recurrence of disability claim on January 10, 1992 which the Office denied on September 18, 1992.

On October 25, 1979 appellant sustained a left knee injury. He underwent left knee arthroscopy on November 29, 1979 and received a schedule award for 12 percent impairment of the left lower extremity. Appellant filed an occupational disease claim for left knee injury on June 9, 1988. He underwent left knee surgery on August 23, 1988. The Office accepted this claim for a traumatic aggravation of underlying degenerative changes in left knee on January 2, 1989. Appellant underwent additional left knee surgery on January 25, 1990. The Office granted a schedule award for an additional 16 percent impairment of the left lower extremity on May 9, 1991. Dr. Philip R. Kimball, a Board-certified orthopedic surgeon, performed an arthroscopy of the left knee with irrigation and debridement of the chondromalacia on November 23, 1992. He performed a total knee arthroplasty on August 24, 1993. On December 12, 1994 the Office granted appellant a schedule award for an additional 15 percent impairment of the left lower extremity for a total impairment rating of 43 percent.

Appellant filed a claim for a new right knee traumatic injury on October 2, 1992 alleging that on October 21, 1991 he again twisted his right knee dismounting his postal vehicle. The Office denied his claim for an additional schedule award on May 15, 1995. Dr. Kimball performed right knee arthroscopy with chondroplasty and resection of the medial meniscus on August 24, 1995. He performed a total knee arthroplasty on the right on May 30, 1996. The Office entered appellant on the periodic rolls on June 14, 1996. On February 27, 1997 the Office granted him a schedule award for 37 percent impairment of the right knee to run from November 30, 1996 to December 15, 1998. Appellant requested a lump-sum payment on March 4, 1997. The Office determined that he was entitled to \$44,466.82. Appellant accepted this sum on March 24, 1997.

On April 16, 1998 the Office made a preliminary determination that appellant received an overpayment of compensation in the amount of \$23,415.15 as he received schedule awards totaling 53 percent impairment of his right lower extremity but was only entitled to compensation for 37 percent impairment. It found that appellant was without fault in the creation of the overpayment. The Office finalized this decision on October 6, 2004.

In an order dated October 17, 2008, the Office vacated the October 6, 2004 overpayment determination and reissued the preliminary determination that appellant had received an overpayment in the amount of \$23,415.15 due to excessive schedule awards. On October 30, 2008 appellant contended that he had a service-related diagnosis of depression and anxiety complicated by alcohol and organ brain syndrome and had moved seven times since 1997. Appellant received a bankruptcy judgment on August 17, 2004, but did not include the Federal Employees' Compensation Act overpayment as he was unaware of it.<sup>1</sup> He requested waiver of

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<sup>1</sup> The Office's procedure manual provides: "A claimant's obligation to repay an overpayment is nullified if the bankruptcy court has discharged the debt in a bankruptcy proceeding." Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4e(3) (September 1994). Appellant has acknowledged that he did not bring the overpayment before the bankruptcy court and the decision did not list the overpayment as a discharged debt. *William E. McCarty*, 54 ECAB 525, 532-33 (2003).

the overpayment. Appellant completed an overpayment recovery questionnaire and advised that he currently had funds in the amount of \$1,020.00. His monthly income was \$5,054.70 and his spouse had income of \$1,047.00 for a total household income of \$6,101.25. Appellant had monthly expenses of \$7,191.31 including \$650.00 for food, \$850.00 for clothing, \$1,700.00 for utilities and medical expenses of \$689.52. He paid an insurance policy of \$901.79 per year and had a monthly car payment of \$765.84 and rent of \$370.00 in addition to rooms and meals at \$1,200.00 per month and credit card debt of \$1,200.00. Appellant also submitted a copy of his bankruptcy settlement.

By decision dated November 19, 2008, the Office determined that appellant had received an overpayment in the amount of \$23,415.15 for which he was not at fault. It determined that the overpayment principle balance was not subject to waiver, but waived recovery of interest. The Office found that recovery of the overpayment would not defeat the purpose of the Act. The claims examiner determined that the income of appellant's spouse should not be considered in determining his ability to repay the overpayment as she was not married to appellant at the time the overpayment occurred. He found that total household income was \$5,054.70. The claims examiner reviewed appellant's receipts and noted that his insurance expense of \$901.79 was an annual expense rather than a monthly expense in the amount of \$75.15. He agreed with the food expenses of \$650.00 per month. The claims examiner found that appellant submitted clothing and household receipts totaling \$349.68 and yearly furniture expenses of \$2,049.00 or \$170.75 per month. He found that appellant had \$2,849.00 in home improvements or monthly expense of \$237.42 and that he was allowed \$50.00 for miscellaneous expenses for a total monthly clothing, household, furniture, and miscellaneous expenses of \$807.85. The claims examiner reduced appellant's monthly expenses by noting that he purchased an oil tank for \$993.55 which should be divided by 12 to reach the monthly expenses of \$82.80 in addition to \$69.50 for Dish Network service, \$96.45 for telephone service, and \$49.70 for water and electric service totaling \$298.45 in monthly utilities. The claims examiner found appellant's medical expenses of \$689.52 as reasonable, but disallowed an additional \$1,200.00 in "rooms and meals" cost. The claims examiner noted that appellant's total credit card debt was \$1,181.64, and that his minimum monthly payments totaled \$30.00. He included a car note of \$765.84 plus gasoline and insurance costs totaling \$1,290.11 in automobile expenses. The claims examiner excluded appellant's rent in Florida of \$370.00 per month as he resided in Maine. He found appellant's total monthly expenses to be \$3,841.08 and that his income exceeded his expenses by \$1,213.62. Therefore, appellant did not need substantially all of his income to meet ordinary and necessary living expenses. The Office found that recovery would not be against equity and good conscience as appellant would not experience severe financial hardship, knew of the schedule award payments made and did not rely to his detriment due to the overpayment. As the overpayment was not listed in the bankruptcy proceedings, it was not discharged. The Office claims examiner determined that, based on appellant's age and resources, recovery would be made by payment of one-third of his excess available income or \$400.00 and waived collection of any interest on the debt.

On appeal, appellant submitted evidence regarding additional medical expenses incurred in the beginning in December 2008 and January 2009 as well as a reduction in his income. He submitted medical evidence regarding his ongoing mental impairments. Appellant disagreed with the claims examiner's determination of reasonable and necessary expenditures and requested additions and revisions.

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

Section 8116 of the Federal Employees' Compensation Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.<sup>2</sup> When a claimant receives a duplicative compensation payment for a period that he has already received compensation for wage loss, an overpayment of compensation is created.<sup>3</sup>

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

Appellant received schedule awards for 16 and 37 percent impairment of his right lower extremity. The medical evidence supported a total impairment of 37 percent. Appellant therefore received a duplicate payment in compensation for 53 percent impairment of his right lower extremity. The additional 16 percent represents an overpayment of compensation. The Office properly determined that appellant received an overpayment in the amount of \$23,425.15. Appellant did not contest this amount. Therefore, the Board will affirm the Office's determination as to fact and amount of overpayment.

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

Section 8129(b) of the Act<sup>4</sup> 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."<sup>5</sup> If a claimant is without fault in the creation of an overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 through 10.437 of the Office's regulations.

According to section 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current, ordinary and necessary living expenses, and, also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.<sup>6</sup> For waiver under the defeat the purpose of the Act standard, an appellant must meet the two pronged test and show that he needs

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<sup>2</sup> 5 U.S.C. § 8116(a).

<sup>3</sup> See *Lawrence J. Dubuque*, 55 ECAB 667, 670-671 (2004).

<sup>4</sup> 5 U.S.C. §§ 8101-8193, § 8129(b).

<sup>5</sup> *Id.* at § 8129(b).

<sup>6</sup> Office procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

substantially all of his current income to meet current ordinary and necessary living expenses,<sup>7</sup> and that her assets do not exceed the resource base.<sup>8</sup>

The burden is on the claimant to show that the expenses are reasonable and needed for a legitimate purpose. If the Office determines that the amount of certain expenses are not ordinary and necessary, particularly regarding the significant expenses of food, clothing and vehicles, the Office must state in writing the reasons for this finding. The finding must be supported by rationale, which may include reference to recognized research data that would show that the claimant's expenses exceed the average or range of expenses for the general population relevant to the claimant's circumstances.<sup>9</sup> The Office must be careful to avoid counting an expense twice when totaling the claimant's ordinary and necessary living expenses.<sup>10</sup>

In order to establish that recovery of an overpayment would be against equity and good conscience, an overpaid individual must either establish that she would experience a severe financial hardship in attempting to repay the debt<sup>11</sup> or overpaid individual could also establish that in reliance on such payment or on notice that such payments would be made, he gave up a valuable right or changed her position for the worse.<sup>12</sup> If the claimant is not entitled to waiver under the "defeat the purpose of the Act" clause the "against equity and good conscience" clause must be considered by the Office in the written decision.<sup>13</sup>

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

Appellant provided the Office with detailed financial records and advised that his monthly income was \$5,054.70. He also provided monthly expenses totaling \$7,191.31. The Office claims examiner examined each of the claimed monthly expenses to establish if recovery would cause financial hardship because he needed substantially all of his current income to meet current, ordinary and necessary living expenses.

The Office claims examiner reviewed appellant's claimed expenses and found that his monthly expenses totaled \$3,841.08. The Office excluded appellant's rent for his apartment in Florida and the \$1,200.00 listed in food and hotel expenses which appellant alleged were incurred due to travel for medical appointments as he did not submit sufficient evidence to

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<sup>7</sup> 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. *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

<sup>8</sup> *W.F.*, 57 ECAB 705 (2006).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(3) (May 2004).

<sup>10</sup> *Id.*

<sup>11</sup> 20 C.F.R. § 10.437(a).

<sup>12</sup> *Id.* at § 10.437(b).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b) (May 2004)

establish this amount as necessary. The Board notes that the claims examiner misread the fuel bill for \$993.55 as a fuel tank but as he prorated the amount as a monthly expense of \$82.80 and heating fuel expenses were properly included. The Board finds that the Office properly determined appellant's monthly expenses. The Office stated in writing the reasons for finding that the additional expenses were excluded and supported this determination with rationale. As appellant's monthly income exceeded his monthly expenses by more than \$50.00, the Board finds that appellant did not need substantially all of his income to meet ordinary living expenses. The Office properly denied waiver on this ground. The Board further finds that appellant did not establish that he would experience a severe financial hardship in attempting to repay the debt or that in reliance on such payment or on notice that such payments would be made, he gave up a valuable right or changed his position for the worse. Therefore appellant has not established that recovery of the overpayment would be against equity and good conscience. The Board finds that the Office properly denied waiver of the overpayment.

The Board notes that it does not have jurisdiction to review the Office's determination that the overpayment would be recovered by repayment of \$400.00 per month. The Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.<sup>14</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$23,425.15, and that recovery of the principle of the overpayment is not subject to waiver.

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<sup>14</sup> *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 19, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 30, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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