

FACTUAL HISTORY

This case has previously been before the Board.¹ By decision dated December 11, 2007, the Board found that appellant received an overpayment in compensation because she concurrently received a VSIP payment of \$25,000.00 from the employing establishment and compensation for total disability. The Board found the case not in posture for decision regarding the amount of the overpayment because the Office did not support its use of the dollar-for-dollar off set method in calculating the overpayment. The case was remanded to the Office to apply the method of offset used when a buyout is based on weeks of pay to determine the amount of the overpayment. The case was also not in posture as to whether appellant was at fault in the creation of the overpayment.² In a September 3, 2009 decision, the Board found the case not in posture for decision regarding the amount of overpayment. The Board noted that a \$25,000.00 incentive would be the equivalent of 18.42 weeks or 128 days of pay in appellant's case and the record supported that from June 30, 2006, the date of her retirement, to November 4, 2006, a period of 128 days, she received gross compensation totaling \$20,312.64. The Board found that the Office did not explain why it chose to base the overpayment calculation on the gross amount of the VSIP buyout, \$25,000.00, which yielded an overpayment of \$20,312.64, when the record supported that appellant received a net buyout of \$16,760.01 and the latter figure was used in the Office's initial calculation of the overpayment on May 18, 2007. The case was remanded to the Office for proper findings as to the amount of the overpayment in compensation, to be followed by an appropriate decision.³ The facts of the case as set forth in the previous Board decisions are incorporated herein by reference.

By decision dated October 9, 2009, the Office found that an overpayment in compensation in the amount of \$20,312.64 had occurred because appellant was paid a VSIP buyout on or about July 20, 2006 and concurrently received wage-loss compensation. It advised that the overpayment was calculated in accordance with Office procedures which provided that to determine the number of weeks for which compensation payments should be suspended, the total amount of severance pay was to be divided by the salary used to compute it. The Office then divided the amount of the VSIP by the salary used to compute it or the weekly amount, noting that the salary used to compute the VSIP was \$70,558.00 annually or \$1,356.88 per week and that when the amount of the VSIP, \$25,000.00, was divided by the weekly salary, 18.42 weeks or 128 days of pay was found. It advised that the weekly pay for compensation purposes, that included premium pay, was \$1,481.13 and when multiplied by the 3/4, augmented, rate

¹ On April 27, 2005 appellant, then a 59-year-old nurse, sustained employment-related lumbar and neck strains while lifting a patient. She received compensation for temporary total disability on the periodic rolls and on July 20, 2006 received a VSIP in the amount of \$25,000.00, with a net payment of \$16,760.01. Appellant has not returned to work.

² *L.J.*, 59 ECAB ____ (Docket No. 07-1844, issued December 11, 2007).

³ Docket No. 08-1958 (issued May 09, 2008). The Board also found that a determination of whether the Office properly denied waiver of the recovery of the overpayment and whether it properly required repayment of the overpayment in full was premature. The Board notes that appellant, who was found without fault, did not respond to the preliminary overpayment finding or provide any financial documentation to support her argument that she had spent the VSIP incentive to repair her home destroyed by Hurricane Katrina. See *John Skarbek*, 53 ECAB 630 (2002).

yielded a weekly compensation rate of \$1,110.85 or \$158.69 a day. When \$158.69 was multiplied by 128 days, an overpayment in the amount of \$20,312.64 resulted. The Office explained that the gross amount was used because no deductions were taken from appellant's compensation. Appellant was found without fault in the creation of the overpayment because she had no way of knowing that by accepting the VSIP incentive and continued wage-loss compensation, an overpayment would be created. The Office found that appellant did not provide an overpayment questionnaire or other financial information and waiver could not be considered. It directed recovery at the rate of \$250.00 from her continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Employing establishments may offer separation pay or buyouts to encourage employees to leave federal employment voluntarily. Office procedures provide that compensation for temporary total disability may not be paid for the period covered by separation pay.⁴ Some separation payments are based on a specific number of weeks of pay while others are capped at a specified amount of money. In order to apply uniform standards to all claimants, however, offsets for both types of payments should be computed in the same manner regardless of the way an employing establishment has offered separation pay.⁵ Whether separation pay is based on weeks of pay or a specified dollar amount, compensation should be suspended for the number of weeks of salary that the separation pay represents.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in compensation of \$20,312.64. Following the September 3, 2009 remand by the Board, the Office issued an October 9, 2009 decision which explained its calculation of the overpayment amount. The VSIP was based on appellant's annual salary of \$70,557.75 and she was awarded \$25,000.00. In accordance with Office procedures, to determine the number of weeks for which compensation payments should be suspended, the total amount of severance pay was to be divided by the salary used to compute it. The Office divided the amount of the VSIP by the salary used to compute it, or the weekly amount, noting that the salary used to compute the VSIP was \$70,558.00 annually or \$1,356.88 per week. When the amount of the VSIP, \$25,000.00, was divided by the weekly salary, 18.42 weeks or 128 days of pay was found. The Office advised that the weekly pay for compensation

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.c(1) (June 2009).

⁵ See *Lynne M. Schaack*, Docket No. 05-695 (issued November 9, 2005).

⁶ The Board notes that the Office's Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17 (April 1996) originally provided that separation pay could be offset by either a dollar-for-dollar amount or based on the period of weeks' salary the payment represented. Following the Board's decisions in *Schaack, id.* and *L.J., supra* note 1, the Office revised this section of the procedure manual in FECA Transmittal Docket No. 09-05 (issued June 1, 2009). Where severance or separation pay is based on weeks of pay, compensation should be suspended for the period in question effective the date of retirement or separation. Where the payment is based on an amount of money, the claims examiner is to calculate the number of week's worth of salary that the separation pay represents and suspend compensation for the number of weeks calculated. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1700.17(d) (June 2009); see *R.H.*, 60 ECAB ____ (Docket No. 08-2025, issued July 20, 2009).

purposes, that included premium pay, was \$1,481.13, when multiplied by the 3/4, augmented rate yielded a weekly compensation rate of \$1,110.85 or \$158.69 a day. When \$158.69 was multiplied by 128 days, an overpayment in the amount of \$20,312.64 was found. The Office explained that the gross amount was used because no deductions were taken from appellant's compensation.

The Board finds that the Office properly set forth how the amount of overpayment was calculated.⁷ It properly determined that an overpayment in compensation of \$20,312.64 was created because appellant received a VSIP payment concurrently with wage-loss compensation equivalent to 128 days of pay.⁸

LEGAL PRECEDENT -- ISSUE 2

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."⁹ Section 10.438 of Office regulations provides that [t]he 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 on an overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁰ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹¹

ANALYSIS -- ISSUE 2

As the Office found appellant without fault in the creation of the overpayment, 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.¹²

⁷ See *Jenny M. Drost*, 56 ECAB 587 (2005).

⁸ *L.D.*, 59 ECAB ____ (Docket No. 08-678, issued August 7, 2008).

⁹ 5 U.S.C. § 8129.

¹⁰ 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 or 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. 20 C.F.R. § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an 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. *Id.* at § 10.437.

¹¹ 20 C.F.R. § 10.438.

¹² *Supra* note 9.

Appellant, however, had the responsibility to provide financial information to the Office¹³ in order that it could proceed with consideration of waiver. She did not do so.

In the April 18, 2007 preliminary determination, the Office clearly explained the importance of providing the requested financial information and advised appellant that it would deny waiver if she failed to furnish such information within 30 days. In the September 3, 2009 decision, the Board noted that appellant has not responded to the April 18, 2007 preliminary overpayment finding or provided any financial documentation.¹⁴ Appellant did not submit a completed overpayment questionnaire or otherwise submit financial information supporting her income and expenses. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act or whether recovery would be against equity and good conscience. Appellant failed to support her contention that she used the VSIP payment to recover from Hurricane Katrina. Because she did not submit the financial information required under section 10.438 of the Office's regulations, it properly denied waiver of recovery of the overpayment in compensation in the amount of \$20,312.64.¹⁵

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of the Office's regulations provide that when 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.¹⁶

ANALYSIS -- ISSUE 3

As noted, appellant failed to submit an overpayment recovery questionnaire or any other financial information that the Office requested prior to the final October 9, 2009 overpayment decision. The overpaid individual is responsible for providing information about income, expenses and assets as specified by the Office.¹⁷ When an individual fails to provide requested financial information, the Office should follow minimum collection guidelines designed to collect the debt promptly and in full.¹⁸ Because appellant did not submit the requested financial

¹³ 20 C.F.R. § 10.438.

¹⁴ Supra note 3.

¹⁵ *Id.*

¹⁶ 20 C.F.R. § 10.441; see *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

¹⁷ *Id.*

¹⁸ *Frederick Arters*, 53 ECAB 397 (2002); Federal (FECA) Procedure Manual, Part 6 -- *Debt Management*, Chapter 6.200.4(c)(2) (September 1994).

information there is no evidence of record to establish that the Office erred by directing recovery at a rate of \$250.00 each compensation period.

CONCLUSION

The Board finds that an overpayment in compensation in the amount of \$20,312.64 was received by appellant and that the Office properly denied waiver of the overpayment and required repayment by deducting \$250.00 each period from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the October 9, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 1, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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