

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

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**H.H., Appellant**

**and**

**DEPARTMENT OF THE NAVY, MARE  
ISLAND NAVAL SHIPYARD, Vallejo, CA,  
Employer**

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**Docket No. 07-1688  
Issued: December 20, 2007**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 11, 2007 appellant filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated April 4, 2007 finding an overpayment of compensation in the amount of \$17,816.71, that appellant was not without fault in its creation, thereby precluding waiver of recovery, requiring him to repay \$245.00 every four weeks. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

**ISSUES**

The issues are: (1) whether appellant received an overpayment in compensation in the amount of \$17,816.71, for which he was at fault, because he received compensation at the augmented rate; (2) whether the Office properly determined that appellant was not entitled to waiver; and (3) whether the Office properly required repayment of the overpayment by deducting \$245.00 every four weeks from his continuing compensation.

## **FACTUAL HISTORY**

On May 15, 1984 appellant, then a 38-year-old equipment specialist, filed a traumatic injury claim alleging that on that date he injured his back while trying to stop some boxes from falling.<sup>1</sup> The Office accepted the claim for lumbosacral strain and herniated disc at L5-S1. Appellant has not worked since May 15, 1984 and was placed on the periodic rolls for temporary total disability by letter dated October 16, 1984.

On August 9, 1996 appellant completed a request for information (Form EN1032) indicating that he was married but his spouse did not live with him and he did not provide her with any support. The form explained that compensation is paid at 66 2/3 percent of the applicable pay rate if no dependants and 75 percent for a claimant with one or more dependants and provided the definition of an eligible dependant. Appellant submitted responses to a request for information (Form EN1032) on September 10, 1997, August 18, 1996 and September 6, 2000, indicating that he was not married.

On July 1, 1997 appellant informed the Office that he was divorced as of January 27, 1997 and wished to change his health insurance to self only.

On October 25, 2001 the Office informed appellant that he had been receiving compensation at the augmented 75 percent rate when he was not entitled to it. The Office informed him that effective October 7, 2001 his compensation rate would be changed to 66 2/3. Appellant was requested to complete a CA-1032 form and indicate the effective date of separation with no support payments.

On November 1, 2001 appellant completed a request for information (Form EN1032) indicating that he was separated on July 24, 1996 and his divorce was final on September 3, 1996. He also noted that he was not required to provide support to his wife while they were separated.

The record contains computer record forms for the period July 21, 1996 to October 6, 2001 reflecting appellant was paid \$2,212.00 for the period July 21, 2006 to March 1, 1997, \$2,285.00 for the period March 2, 1997 to February 28, 1998, \$2,319.00 for the period March 1, 1998 to March 27, 1999, \$2,356.00 for the period March 28, 1999 to March 25, 2000 and \$2,420.00 for the period March 26 to October 6, 2001.

On December 7, 2001 the Office noted that appellant was paid \$159,423.77 for the period July 24, 1996 to October 6, 2001 when he should have been paid \$141,687.06. This resulted in an overpayment of \$17,816.71.

On December 11, 2001 the Office issued a preliminary notice of an overpayment in the amount of \$17,816.71. The Office stated that an overpayment occurred for the period July 24, 1996 to October 6, 2001 because appellant was paid at the augmented rate of three-fourths.

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<sup>1</sup> This was assigned claim number 130740103. The record contains evidence of injuries sustained on April 27, 1979 and February 25, 1980. The Office accepted that appellant sustained lumbosacral strains on both dates and assigned claim number 13-606238 to both injuries.

However, appellant was separated from his wife on July 24, 1996 and his compensation rate should have been reduced to the 66 2/3 statutory rate on that date. The Office found that he was at fault in the creation of the overpayment because he should have known he was not entitled to the augmented rate of 75 percent. The Office informed appellant of the options available to him and asked him to submit financial information within 30 days.

In a letter dated December 17, 2001, appellant noted that he had informed the Office of his divorce and had “no way to figure the amount of any overpayment.” He noted that after informing the Office of his divorce that his “payment was changed a short time later.” Appellant also noted that the Office did not provide him with a statement every time he was paid. He advised the Office that he was married on December 2, 2001 and requested his wife be included in his compensation and added to his health insurance.

By decision dated April 4, 2007, the Office finalized the preliminary determination of fault in the creation of the overpayment, thereby, denying waiver of the recovery of the overpayment, and set up a repayment schedule of withholding \$245.00 from appellant’s compensation checks beginning September 4, 2005 and continuing until the debt had been repaid.<sup>2</sup>

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

The Federal Employees’ Compensation Act provides that the United States shall pay compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>3</sup> If the disability is total, the United States shall pay the employee during the disability monetary compensation equal to 66 2/3 percent of his monthly pay, the basic compensation rate for total disability.<sup>4</sup> Under section 8110 of the Act, entitled augmented compensation for dependants, an employee is entitled to compensation at the augmented rate of 75 percent of his weekly pay if he has one or more dependants.<sup>5</sup>

If a claimant receives augmented compensation during a period when he has no eligible dependants, the difference between the compensation he was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-fourths rate constitutes an overpayment of compensation.<sup>6</sup> When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations

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<sup>2</sup> The record does not indicate the reason for the delay in issuance of the final overpayment decision.

<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at 8105(a); see *Carl R. Benavidez*, 56 ECAB \_\_\_\_ (Docket No. 04-2264, issued June 20, 2005).

<sup>5</sup> *Id.* at 8110; see *Carl R. Benavidez*, *id.*

<sup>6</sup> *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004) (the Board held that claimant received compensation at the augment rate for a period of time when his son was over 18 and not enrolled full time as a student for other periods thereby disqualifying him as a dependant for these periods of time); *Diana L. Booth*, 52 ECAB 370 (2001) (the Board held that as the claimant received compensation at the augmented rate for certain periods, even though she had no dependants, she received an overpayment of compensation).

prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.<sup>7</sup>

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

The Board finds that appellant received an overpayment in the amount of \$17,816.71. Appellant indicated that he was separated July 24, 1996 and divorced on September 3, 1996. However, he continued to receive compensation at the augmented rate of three-fourths from July 24, 1996 to October 6, 2001, whereas the rate of compensation should have been reduced to two-third statutory rate. The Office properly calculated the amount of the overpayment. Appellant received compensation for this period in the amount of \$159,423.77 whereas he should have received compensation in the amount of \$141,607.06. Accordingly, the Office properly determined that an overpayment was made in the amount of \$17,816.71, as this was the difference between the amount of compensation he actually received and the amount of compensation he was entitled to receive.

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

Section 8129(b) of the Act 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>8</sup> Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.<sup>9</sup>

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.<sup>10</sup>

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

The Office found appellant was at fault because he accepted a payment which he knew or should have known was incorrect. The EN1032 forms provided information to appellant regarding dependants and augmented compensation. He was advised as to the requirements for claiming a spouse as a dependant and that a claimant with no dependants is paid at 66 2/3 percent of the applicable pay rate, not 75 percent. Appellant indicated that he was separated on July 24, 1996 and was not required to provide support payments and that his divorce was final on September 3, 1996. He should have known at the time he was separated on July 24, 1996 and not paying any support his continuing compensation payments at \$2,212.00 were incorrect.

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<sup>7</sup> 5 U.S.C. § 8129; see *Ricky Greenwood*, 57 ECAB \_\_\_\_ (Docket No. 05-1739, issued March 10, 2006).

<sup>8</sup> 5 U.S.C. § 8129(b). See *Terry A. Keister*, 56 ECAB \_\_\_\_ (Docket No. 04-1136, issued May 23, 2005).

<sup>9</sup> *Tammy Craven*, 57 ECAB \_\_\_\_ (Docket No. 05-249, issued July 24, 2006).

<sup>10</sup> 20 C.F.R. § 10.433(a).

Appellant received a payment on August 17, 1996 for the period July 21 to August 17, 2006 with no reduction in compensation and he continued to receive compensation payments every 28 days showing no reduction. 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).

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441 provides that, if an overpayment of compensation has been made to an individual entitled to further payments and 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.<sup>11</sup>

### **ANALYSIS -- ISSUE 3**

With respect to the Office's decision to deduct \$245.00 every four weeks from appellant's continuing compensation, the Board finds that such a repayment schedule is in accordance with section 10.441(a). In exercising its authority under section 10.441(a), the Office must take 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 any hardship.<sup>12</sup> Appellant did not provide detailed information regarding his current financial circumstances. It is his responsibility to provide information about income, expenses and assets.<sup>13</sup> Accordingly, the Board finds that the Office properly imposed a repayment from continuing compensation at the rate of \$245.00 every four weeks pursuant to its recovery procedures.<sup>14</sup>

### **CONCLUSION**

The Office properly determined that an overpayment of \$17,816.71 was created from July 24, 1996 to October 6, 2001. 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 \$245.00 every 28 days from continuing compensation.

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<sup>11</sup> 20 C.F.R. § 10.441.

<sup>12</sup> *Id.*

<sup>13</sup> 20 C.F.R. § 10.438.

<sup>14</sup> See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.8 (May 2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 4, 2007 is affirmed.

Issued: December 20, 2007  
Washington, DC

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

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

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