

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

L.J., Appellant

and

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

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**Docket No. 07-1844
Issued: December 11, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 6, 2007 appellant filed a timely appeal from the May 18, 2007 merit decision of the Office of Workers' Compensation Programs which found that she received a \$16,760.01 overpayment of compensation and that the overpayment was not subject to waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the overpayment issues.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation; (2) if so, whether the Office properly determined that the amount of the overpayment was \$16,760.01; and (3) whether the Office properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby, precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On April 27, 2005 appellant, then a 59-year-old nurse, sustained an injury in the performance of duty when she assisted a patient getting out of bed. The Office accepted the

claim for lumbar and neck strain. Appellant received compensation for temporary total disability from the periodic rolls.

On September 26, 2006 the employing establishment notified the Office that appellant had received a voluntary separation incentive payment (VSIP) in the amount of \$16,760.01 on July 20, 2006. On December 1, 2006 the Office was informed that appellant voluntarily retired effective June 30, 2006.

On May 11, 2007 the Office requested information from appellant concerning her wages during the period January 1, 2004 to December 31, 2006.

On April 18, 2007 the Office made a preliminary finding that appellant was overpaid \$16,760.01 in compensation because she received a lump-sum VSIP payment dated July 14, 2006, while receiving Office benefits. The Office also made a preliminary finding that appellant was at fault in creating the overpayment.

The Office received a copy of an April 20, 2006 letter from appellant's employing establishment notifying appellant that she was approved for optional retirement with VSIP effective June 30, 2006 and that the gross incentive pay would be \$25,000.00.

In a decision dated May 18, 2007, the Office finalized its preliminary findings. It found that appellant received an overpayment of \$16,760.01 because she received a VSIP of \$16,760.01, while receiving compensation for total disability and that she accepted a payment that she knew or reasonably should have known was incorrect.¹

In a May 14, 2007 letter, received by the Office on May 25, 2007, appellant requested that the Office grant a waiver of repayment based on the following reasons: repayment would be a financial hardship; she contacted governmental agencies and was told she was eligible to receive the buyout; therefore, she did not know that the VSIP would be determined an overpayment; the money was immediately spent rebuilding her home which had been devastated by Hurricane Katrina such that she not have it available; and it was not her fault that she was given the VSIP.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² Section 8116, however, limits the right of an employee to receive compensation: While an employee is receiving compensation she may not receive salary, pay, or remuneration of any type from the United States.³ More specifically,

¹ The Office decision indicated that the overpayment will be recovered in the manner described on the "attached EN2223 enclosure" however no enclosure was included in the record; therefore, the Board does not have jurisdiction over the manner of repayment.

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8116(a) (with specified exceptions).

section 10.421 of the implementing regulations provides that an employee may not receive compensation for total disability concurrently with separation pay.⁴ When the Office discovers concurrent receipt, it must declare an overpayment of compensation and give the usual due process rights.⁵

ANALYSIS -- ISSUE 1

While receiving compensation for total disability resulting from her April 27, 2005 employment injury, appellant entered into a VSIP agreement that paid her \$16,760.01 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 injury⁶ 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.

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 May 18, 2007 decision on the issue of fact of overpayment.⁷

LEGAL PRECEDENT -- ISSUE 2

Employing establishments may offer separation pay or buyouts to encourage employees to leave federal employment voluntarily. FECA Bulletin 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

⁴ 20 C.F.R. § 10.421(c).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.d(4) (April 1996).

⁶ This is the definition of disability. 20 C.F.R. § 10.5(f).

⁷ *Kathleen L. Alder*, Docket No. 03-1339 (issued August 1, 2003) (holding that the claimant may not receive compensation for temporary total disability during the period presented by her separation incentive, which was half a year); *Lynne M. Schaack*, Docket No. 05-695 (issued November 9, 2005.).

less. The method of offset differs somewhat according to how the separation pay is defined.”⁸

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

The employing establishment notified the Office that appellant received a VSIP in the amount of \$16,760.01. According to Office procedures, the total dollar amount of this separation pay should be applied to the amount of compensation appellant received for wage loss on a dollar-for-dollar basis. The Office followed these procedures when it determined that appellant received an overpayment of compensation equaling the total dollar amount of the separation pay, or \$16,760.01.

The Board, however, can find no justification for this method of offset. Neither the Office bulletin that announced this method,¹³ nor the Office procedure manual that incorporates it¹⁴ identifies a rational basis for distinguishing the separation pay offered by different establishments. The Office procedure manual simply explains that separation pay is offered in different forms by different agencies, sometimes as a number of weeks of pay, other times as a specific amount of money. A buyout based on a number of weeks of pay can be expressed as an amount of money and a buyout based on an amount of money can be expressed as a number of weeks of pay. So the distinction appears arbitrary. The mere fact that different agencies offer

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

⁹ *Id.*

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.c(1) (April 1996).

¹¹ *Id.* at Chapter 2.1000.17.d(1).

¹² *Id.* at Chapter 2.1000.17.d(3).

¹³ FECA Bulletin No. 96-02 (issued November 5, 1995).

¹⁴ *Id.* at Chapter 2.1000.17.d(3) see accompanying text.

separation pay in one form or the other is no basis for the Office to apply different methods of offset, particularly when one method works a harsher result on some federal employees.¹⁵

For example an employee who works for the Postal Service who receives a VSIP worth six months of base pay in the amount of \$25,000.00. Under Office procedures, because the employing establishment based the separation pay on an amount of time, the Office would offset the employee's compensation 100 percent, effective the date of separation, for a period of six months. The compensation paid over these six months or the overpayment arising in this scenario, is always going to be significantly less than \$25,000.00, because compensation is paid tax free at a rate of three-fourths of the employee's monthly pay, assuming she has a dependent.¹⁶ So this employee finds herself in a more favorable position than appellant simply because her employing establishment offered the same incentive in one form and not the other.

The Board finds that the Office has not justified calculating the overpayment in appellant's case under the harsher dollar-for-dollar method of offset. For this reason, 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.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of the Act¹⁷ 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.”¹⁸

No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹⁹

On the issue of fault, 20 C.F.R. § 10.433(a) provides in pertinent part: An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with

¹⁵ *Lynne M. Schaack, supra* note 7.

¹⁶ 5 U.S.C. §§ 8105(a), 8110(b). A dollar of compensation is, therefore, worth more than a dollar of monthly pay. The Office's dollar-for-dollar method of offset erroneously equates the two.

¹⁷ 5 U.S.C. § 8129(b).

¹⁸ *Id.*

¹⁹ *Gregg B. Manston*, 45 ECAB 344 (1994).

respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.²⁰

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

“(b) Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”²¹

ANALYSIS -- ISSUE 3

The Office applied the third standard in determining that appellant was at fault in creating the overpayment of \$16,760.01. 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.²²

In a May 14, 2007²³ letter to the Office, appellant argued that she was not at fault as she asked various governmental agencies as to whether she was eligible for the buyout while informing them of her workers' compensation status and was informed that she was eligible. In determining whether a claimant is at fault in creating an overpayment, the Office will consider the circumstances surrounding the overpayment.²⁴ It did not consider the circumstances. In the May 18, 2007 decision, the Office did not address appellant's argument that she was without fault in creating the overpayment. For this reason, the Board finds that the case is not in posture for a decision on the issue of the amount of fault. On remand, the Office shall address appellant's argument that she was without fault.

CONCLUSION

The Board finds that the case is not in posture for a decision regarding whether the Office properly determined that appellant received a \$16,760.01 overpayment and whether the Office properly found that she was at fault in the creation of the overpayment such that it was not subject to waiver. The case is remanded to the Office for further development to be followed by the issuance of an appropriate decision.

²⁰ *Kenneth E. Rush*, 51 ECAB 116 (1999).

²¹ 5 U.S.C. § 10.433(b).

²² *Diana L. Booth*, 52 ECAB 370, 373 (2001).

²³ The date used is the date of the letter as the envelope was not retained in the record.

²⁴ *Neill D. Dewald*, 57 ECAB ____ (Docket No. 06-117, issued February 21, 2006).

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2007 decision of the Office of Workers' Compensation Programs is affirmed in part with respect to fact of overpayment. With respect to the amount of overpayment and the issue of waiver, the case is aside and the case remanded to the Office for further proceedings consistent with this decision.

Issued: December 11, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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