

<sup>1</sup> The Board notes that, in its preliminary finding of overpayment dated July 1, 2004, the Office incorrectly noted that appellant was improperly paid at an augmented rate from January 27, 2002 through July 22, 2003. The record reflects that the period at issue is from January 27, 2002 through February 22, 2003, the date the Office ended appellant's augmented compensation.

### **FACTUAL HISTORY**

On April 17, 1998 appellant, then a 48-year-old U.S. Marshall, filed a traumatic injury claim alleging injuries resulting from duties related to his federal employment. The Office accepted his claim for low back strain and permanent aggravation of L5-S1 disc herniations, and he was placed on the periodic rolls. Appellant was paid compensation benefits at the rate of 75 percent pursuant to listing that he had one or more dependents.

Appellant's youngest daughter attained the age of 23 on December 2, 2001, whereupon the Office adjusted his compensation rate to 66 2/3 percent. However, the Office restored the compensation rate to 75 percent for the periodic cycle commencing January 27, 2002, based on a November 29, 2001 telephone call from appellant that a court order had not yet been issued directing that appellant's support payments were to stop. Although appellant notified the Office on January 25, 2002 that the augmented payments should again be reduced, the Office failed to make the adjustment until the periodic cycle beginning February 23, 2003.

The record contains daily computation logs showing appellant's income from January 27, 2002 through February 22, 2003 and a payment work sheet reflecting the Office calculation of appellant's overpayment during that period. The documents reveal that appellant was entitled to receive compensation in the gross amount of \$41,423.21 but actually received \$46,620.50, an overpayment of \$5,203.29.

On July 1, 2004 the Office made a preliminary finding that an overpayment of \$5,203.29.00 arose because appellant was paid at the augmented compensation rate of 75 percent for the period January 27, 2002 through February 22, 2003. The Office found that appellant was not at fault in the creation of the overpayment.

Appellant requested a waiver of the overpayment. In support of his request, he submitted an overpayment recovery questionnaire dated July 24, 2004, which reflected a total monthly income of \$3,030.00; total monthly expenses of \$3,196.00; and total liquid assets in the amount of \$1,091.00. Appellant contended that it would cause a severe financial hardship to make repayment and that, if he did not receive assistance from his family from time to time, he "could not get by."

In a telephone conference which occurred on September 3, 2004, appellant stated that his net monthly income was \$2,864.44 and that his monthly expenses were \$3,196.00. He explained that he received financial assistance from his brother, "as he needs it," in cash on a weekly basis and in an amount approximately equal to the difference between his income and expenses. He further indicated that he had not intentionally provided erroneous information in his questionnaire and that he could not afford to repay the debt. The claims examiner delayed making a final decision on the overpayment for 15 days pending receipt of a certified statement from appellant's brother attesting to his providing monthly assistance to appellant.

In an undated letter received by the Office on September 16, 2004, appellant's brother, Sheldon Stone, stated that he provided approximately \$100.00 per week to his brother to "help him pay his bills."<sup>2</sup>

By decision dated November 12, 2004, the Office finalized its preliminary findings on the fact and amount of overpayment. The Office found that, although appellant was without fault, the circumstances of his case did not warrant waiver. The Office advised that the overpayment would be recovered at the rate of \$75.00 per month with interest accruing until the debt was absorbed.

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

The Federal Employees' Compensation Act<sup>3</sup> 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 his duty.<sup>4</sup> When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.<sup>5</sup>

The basic statutory rate of compensation under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, he is entitled to have basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.<sup>6</sup> Under the Act a dependent includes "an unmarried child, while living with the employee or receiving regular contributions from the employee toward his support," who is either under 18 years of age, or over 18 years of age and "incapable of self-support because of physical or mental disability."<sup>7</sup> The Act further provides that compensation payable for a child that would otherwise end at the time she reaches 18 years of age shall continue if she is a student as defined by 5 U.S.C. § 8101.<sup>8</sup>

The Office regulations provide that "an employee who is receiving augmented compensation shall be periodically required to submit a statement as to any dependents, or to submit supporting documents such as birth or marriage certificates or court orders, to determine

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<sup>2</sup> In a previously submitted letter, appellant's brother stated that he provided appellant with approximately \$100.00 per month. In a second letter, he corrected an error allegedly made by his secretary to clarify that he provided appellant with approximately \$100.00 per week.

<sup>3</sup> 5 U.S.C. §§ 8101 *et seq.*

<sup>4</sup> *See id.* at § 8102(a).

<sup>5</sup> *See id.* at § 8129(a).

<sup>6</sup> 5 U.S.C. § 8110(b); *see also Jacqueline S. Harris*, 56 ECAB \_\_\_\_ (Docket No. 04-1730, issued January 13, 2005).

<sup>7</sup> 5 U.S.C. § 8110(a)(3).

<sup>8</sup> *Id.* 5 U.S.C. § 8101(17) defines student as an individual under 23 years of age who has not completed 4 years of education beyond the high school level and is regularly pursuing a full-time course of study.

if he or she is still entitled to augmented compensation.”<sup>9</sup> According to section 10.536, “If an employee fails to submit a requested statement or supporting document within 30 days of the date of the request, [the Office] will suspend his or her right to augmented compensation until [the Office] receives the requested statement or supporting document. At that time, [the Office] will reinstate augmented compensation retroactive to the date of suspension, provided that the employee is entitled to receive augmented compensation.”<sup>10</sup>

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

Because appellant’s youngest daughter attained the age of 23 on December 2, 2001, appellant should have received compensation at the adjusted rate of 66 2/3 percent commencing January 27, 2002. However, the evidence reflects that appellant received compensation at the augmented rate from January 27, 2002 through February 22, 2003.

The record contains daily computation logs showing appellant’s income from January 27, 2002 through February 22, 2003 and a payment worksheet reflecting the Office calculation of appellant’s overpayment during that period. The documents reveal that appellant was entitled to receive the gross amount of \$41,423.21 but actually received \$46,620.50, an overpayment of \$5,203.29. The Board finds that the Office properly determined that appellant received an overpayment of compensation for the period January 27, 2002 through February 22, 2003 in the amount of \$5,203.29.

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

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>11</sup> If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of the Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.<sup>12</sup>

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 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. A higher amount is specified for a beneficiary with one or more dependents.<sup>13</sup> Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe

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<sup>9</sup> 20 C.F.R. § 10.535(c) (2004).

<sup>10</sup> 20 C.F.R. § 10.536 (2004).

<sup>11</sup> 20 C.F.R. § 10.433(a) (2003).

<sup>12</sup> See *id.* at § 10.434. See also 5 U.S.C. § 8707(d).

<sup>13</sup> 20 C.F.R. § 10.436.

financial hardship in attempting to repay the debt.<sup>14</sup> Recovery of an overpayment is also considered to be against equity and good conscience when any 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.<sup>15</sup>

The 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 of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.<sup>16</sup>

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

Appellant contends that, because he was without fault, he should not have to make repayment. However, the Act and its implementing regulations are clear that entitlement to waiver is not established solely by a finding that appellant is without fault in creating the overpayment. Rather, such a finding entitles appellant only the opportunity to establish a basis for granting waiver of the recovery of the overpayment.<sup>17</sup>

Although the Office found that appellant was without fault in the matter of the overpayment, 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.<sup>18</sup> The financial evidence submitted by appellant indicates that he receives monthly compensation benefits in the net amount of \$2,864.44. Other evidence of record reflects that he also receives \$433.33 per month from his brother.<sup>19</sup> Therefore, appellant's total monthly income is \$3,297.77. In the instant case, appellant's monthly income exceeded monthly expenses by \$101.77, in excess of the amount specified in the Federal (FECA) Procedure Manual.<sup>20</sup> Because his monthly income exceeds his expenses by more than \$50.00, appellant is not deemed to need substantially all of his current income (including compensation benefits) to meet current ordinary and necessary

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<sup>14</sup> See *id.* at § 10.437(a).

<sup>15</sup> See *id.* at § 10.437(b).

<sup>16</sup> See *id.* at § 10.438(a).

<sup>17</sup> See *James Lloyd Otte*, 48 ECAB 334, 338 (1997).

<sup>18</sup> See *Keith H. Mapes*, 56 ECAB \_\_\_\_ (Docket No. 03-1747, issued October 20, 2004).

<sup>19</sup> The Office's procedure manual provides that an individual's total income includes any funds which may reasonably be considered available for his use, regardless of the source. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(2) (September 1994). See also *Otto A. Fernandez*, 55 ECAB \_\_\_\_ (Docket No. 03-1942, issued May 27, 2004).

<sup>20</sup> See *supra* note 18.

living expenses<sup>21</sup> and has sufficient funds available for debt repayment. Therefore, the Office properly concluded that recovery of the overpayment would not cause hardship to appellant or defeat the purpose of the Act.

Additionally, recovery of the overpayment is not considered to be against equity and good conscience, since appellant would not experience severe financial hardship in attempting to repay the debt and he made no argument that he gave up a valuable right or changed his position for the worse in reliance on the overpaid compensation. The Board finds that the Office properly denied waiver of the overpayment and is required by law to recover the debt by decreasing later payments to which appellant is entitled.<sup>22</sup>

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

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 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 any hardship.<sup>23</sup>

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

The record reflects that appellant's monthly income is comprised of net compensation benefits in the amount of \$2,864.44 and \$433.33 in assistance from his brother, for a total monthly income of \$3,297.77. His reported monthly expenses are \$3,196.00, for a surplus of \$101.77. The Office determined that appellant could repay the debt at \$75.00 per month without great hardship. The Board finds that the Office gave due regard to the relevant factors noted above and did not abuse its discretion in setting a rate of recovery that left appellant with approximately \$25.00 in discretionary income per month. The Board will affirm the Office's November 12, 2004 decision on the issue of the rate of recovery.

### **CONCLUSION**

The Board finds that an overpayment of \$5,203.29 occurred from January 27, 2002 through February 22, 2003, when the Office paid compensation at the augmented rate of 75

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<sup>21</sup> See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6a(1) (September 1994). ("An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00)).

<sup>22</sup> 5 U.S.C. § 8129(a).

<sup>23</sup> 20 C.F.R. § 10.441(a) (2003).

percent;<sup>24</sup> that the Office properly denied waiver of the overpayment on the grounds that recovery would not defeat the purpose of the Act or be against equity and good conscience; and that the Office did not abuse its discretion in setting the rate of recovery from continuing compensation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 12, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 2005  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>24</sup> The fact that the Office may have been negligent in paying appellant compensation at the augmented rate after notification on January 25, 2002 that his dependency status had changed, does not preclude the Office from recovering the overpayment. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000).