

FACTUAL HISTORY

On December 16, 2003 appellant, then a 40-year-old clerk, filed an occupational disease claim alleging that on December 12, 2003 she first realized her anxiety and stress were employment related. On November 8, 2005 the Office accepted the claim for depressive disorder.

By letter dated November 21, 2005, the Office noted that the record showed that appellant might be receiving social security disability benefits and requested information. An October 18, 2005 letter from the Social Security Administration indicated that appellant had been receiving disability benefits from December 2004 at a regular monthly rate of \$1,489.60.

The record contains computer printouts showing appellant received wage-loss compensation during the period June 12, 2004 to December 31, 2005. For the period June 12 to 25, 2004, the Office noted that appellant was paid \$1,030.62 after Federal Employees' Retirement System (FERS) offset of \$256.00, for the period July 10 to November 30, 2004, the Office paid appellant \$2,438.00 after a FERS offset of \$2,438.00, for the period December 1, 2004 to November 30, 2005, the Office paid appellant \$28,145.96 after a FERS offset of \$6,329.00 and for the period December 1 to 31, 2005, the Office paid appellant \$2,405.67 after a FERS offset of \$549.00.

On March 7, 2006 appellant elected to receive benefits under the Federal Employees' Compensation Act effective that date.

In a letter dated March 31, 2006, the Office informed appellant that the offset for computation of benefits had been incorrectly calculated. The Office noted the computations were calculated based upon her Social Security Administration benefits with FERS and without FERS. The calculations were as follows:

“In your case, for the month of July [20]04, you received **\$1,489.60** for SSA with FERS. **Without** FERS, the amount is **\$513.60**. The difference is **\$976[.00]**, (\$1,489.60 – 513.60) is deducted from your compensation payments.

“Unfortunately, in my haste to get you paid since, 2004, I incorrectly computed the offset by simply deducting \$513.60 as opposed to \$976.00.... The over payment is \$8,395.82.” (Emphasis in the original.)

On April 5, 2006 the Office made a preliminary finding that appellant had been overpaid in the amount of \$8,395.92 because the receipt of dual benefits for social security disability and federal workers' compensation benefits for the period June 12, 2004 through December 31, 2005. The Office noted that appellant received compensation of \$42,638.44¹ for the period June 12, 2004 to December 31, 2005, when she was entitled to \$34,242.52, which resulted in an overpayment of \$8,395.92. The Office found that appellant was without fault in the creation of the overpayment. The Office advised that, if she disagreed with the fact or

¹ The calculations contain a typographical error for the period December 1 to 31, 2005. The amount noted is \$21,405.67 when it should be \$2,405.67.

amount of the overpayment, she had a right to submit any evidence or arguments and the right to request a precoupment hearing within 30 days.

In a letter dated and mailed on May 6, 2006, appellant requested a precoupment hearing and submitted an overpayment recovery questionnaire dated May 6, 2006. The only information she submitted in the overpayment questionnaire form was her Social Security monthly income of \$1,500.0. Appellant provided no information on expenses or any funds she might have on hand on the form.

By decision dated June 2, 2006, the hearing representative denied appellant's request for a hearing on the grounds that it was untimely. The hearing representative indicated that appellant was not entitled to a hearing as a matter of right.

By decision dated August 10, 2006, the Office finalized the overpayment of compensation in the amount of \$8,395.92 because it had miscalculated the dual benefits for Social Security disability and federal workers' compensation benefits offset for the period June 12, 2004 through December 31, 2005. The Office found that appellant was without fault in the creation of the overpayment but that she was not entitled to waiver. The Office further determined that the overpayment would be collected by withholding \$100.00 from her continuing compensation benefits.

LEGAL PRECEDENT -- ISSUE 1

Section 10.432 of the Office's regulations provides that, in response to a preliminary notice of an overpayment, a claimant may request a precoupment hearing within 30 days of the written notice of overpayment.² Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.³

ANALYSIS -- ISSUE 1

Appellant argued that she timely requested a precoupment hearing as the decision had been mailed April 6, 2006 and she mailed her request on May 6, 2006.

In computing a time period the date of the event from which the designated period of time begins to run shall not be included, while the last day of the period so computed shall be included unless it is a Saturday, Sunday or a legal holiday.⁴ The Office issued its preliminary overpayment determination on April 5, 2006. She had 30 days within which to respond. Therefore, she had until May 5, 2006 to respond to the preliminary determination. Appellant did not respond within the required 30-day period. Therefore, her right to a hearing is deemed waived.

² 20 C.F.R. § 10.432. See *Willie C. Howard*, 55 ECAB 564 (2004).

³ *Afegalai L. Boone*, 53 ECAB 533, 537 n.12 (2002); *John B. Montoya*, 43 ECAB 1148 (1992).

⁴ *Id.*

LEGAL PRECEDENT -- ISSUE 2

The Act 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 duty.⁵ When an overpayment has been made to an individual because of an error of fact or law, adjustments shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁶

ANALYSIS -- ISSUE 2

The Office accepted appellant's claim for a depressive disorder on November 8, 2005. The record established that she received disability benefits from the Social Security Administration during the period June 12, 2004 to December 31, 2005 and compensation benefits under the Act.

On March 31, 2006 the Office determined that appellant's offset for compensation of benefits had been incorrectly calculated using her Social Security Administration benefits with FERS when it should have been calculated without FERS. The record reflects that, from June 12, 2004 to December 31, 2005, the Office paid appellant a total of \$42,638.44 when it calculated her compensation offset with FERS. The Office incorrectly deducted \$513.60 from her compensation payments instead of \$976.00 which resulted in an overpayment. The Office calculated that, during the period June 12, 2004 to December 31, 2005, appellant received \$42,638.44 when she was only entitled to receive \$34,242.52. This difference created an overpayment of \$8,395.82.

The Board finds that, for the period June 12, 2004 to December 31, 2005, appellant received an overpayment of \$8,395.82 due to her receipt of benefits calculated using an incorrect computation for the Social Security Administration payments she received. Appellant argued that she should not be penalized due to the Office's computation error. It is well established that the Office's negligence in creating the overpayment by the erroneous deduction of benefits does not excuse the overpaid claimant from liability for repayment.⁷ The Office explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. The Office properly determined the amount of the overpayment that covered the period June 12, 2004 to December 31, 2005.

LEGAL PRECEDENT -- ISSUE 3

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.⁸ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless:

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *See Lawrence J. Dubuque*, 55 ECAB 667 (2004).

⁸ 20 C.F.R. § 10.33(a).

- (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.⁹

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.¹⁰

Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹¹

ANALYSIS -- ISSUE 3

Although the Office found that appellant was without fault in the creation of the overpayment, she nonetheless bears responsibility for providing financial documents. The Office explained the importance of this financial information and advised her that it would deny waiver if she failed to furnish the information within 30 days. Within the required 30-day period, appellant did not submit the financial information. Under these circumstances, the Office regulations mandate denial of waiver. The Board will affirm the Office's decision on the issue of waiver.

LEGAL PRECEDENT -- ISSUE 4

Section 10.441(a) of the Office's regulations provides:

“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 probably extent of future payments, the rate

⁹ *Id.* 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 expense; 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. *Id.* at § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. *Id.* at § 10.437(a). 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. *Id.* at § 10.437(b).

¹⁰ *Id.* at § 10.438(a).

¹¹ *Id.* at § 10.438(b).

of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”¹²

ANALYSIS -- ISSUE 4

The Office, in determining the rate of repayment by deduction from appellant’s continuing compensation payments, had no financial information in which to consider whether the withholding \$100.00 from continuing compensation would result in any hardship. It is appellant’s burden to submit evidence establishing that repayment would cause a hardship. The Office directed appellant to submit financial information in its letter of April 5, 2006. Appellant did not timely submit any financial information other than noting her monthly income from Social Security on the overpayment recovery form. Based upon the circumstances of this case, the Board finds the record devoid of any indication that repayment of \$100.00 from appellant’s continuing compensation payments would result in a severe hardship.

CONCLUSION

The Board finds that the Office properly denied appellant’s request for a prerecoupment hearing as it was untimely filed. The Board also finds that the Office properly found an overpayment in the amount of \$8,395.92 and properly denied waiver for her failure to submit requested financial information. Lastly, the Board finds that the Office properly determined repayment would be collected by deducting \$100.00 from her continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated August 10, 2006 is affirmed.

Issued: June 1, 2007
Washington, DC

David S. Gerson, Judge
Employees’ Compensation Appeals Board

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

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

¹² 20 C.F.R. § 10.441(a).