

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

W.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Trenton, NJ, Employer**

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**Docket No. 08-1876
Issued: May 22, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 23, 2008 appellant filed a timely appeal from the May 5, 2008 merit decision of an Office of Workers' Compensation Programs' hearing representative, who denied waiver of an overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.¹

ISSUE

The issue is whether the Office properly denied waiver of the \$6,026.04 overpayment that arose from appellant's November 21, 2006 schedule award. On appeal, he argues that the Office overlooked his bankruptcy when it denied waiver.

¹ The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its May 5, 2008 decision. 20 C.F.R. § 501.2(c). The Board has no jurisdiction to review the documents appellant submitted on appeal relating to credit and loan requests and to a 1999 discharge in U.S. Bankruptcy Court, as these documents were not before the Office when it issued its final decision.

FACTUAL HISTORY

On July 29, 1994 appellant, then a 36-year-old letter carrier, twisted his left knee while walking down steps in the performance of duty. The Office accepted his claim and on November 21, 2006 issued a schedule award for 26 percent impairment of his left lower extremity. On appeal,² the Board found that appellant had no more than 23 percent impairment.

Following the Board's decision, the Office issued a preliminary determination on October 24, 2007 that appellant received a \$6,026.04 overpayment from the November 21, 2006 schedule award. It explained how it arrived at that amount.³ The Office made a preliminary finding that appellant was without fault in the creation of this overpayment.

Appellant requested a precoupment hearing before an Office hearing representative, which was held on February 11, 2008. At the hearing, he noted that he had filed for bankruptcy. Appellant's wife was diagnosed with cancer in 1999, she lost her job and they filed for bankruptcy. She passed away in 2004, before they were able to come out of bankruptcy. Appellant testified about his income and expenses. He asked the hearing representative to take into account that he was just coming out of bankruptcy.

In a decision dated May 5, 2008, the Office hearing representative found that appellant was without fault in the creation of the overpayment. Based on the financial information appellant provided, the hearing representative denied waiver on the grounds that appellant's monthly income exceeded his monthly expenses by over \$2,000.00.

LEGAL PRECEDENT

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.⁴ 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.⁵ 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

² Docket No. 07-463 (issued July 6, 2007).

³ The Office originally paid for 13 percent impairment. It then paid for an additional 8 percent impairment, or for a total of 21 percent. When the Office determined that appellant had 26 percent impairment, it paid \$9,479.16 for the additional 5 percent. But, as the Board found, his impairment was actually 23 percent. So the correct payment should have been \$3,453.12 for the additional two percent. The difference between \$9,479.16 and \$3,453.12 was the resulting overpayment.

⁴ 5 U.S.C. § 8129(a).

⁵ 20 C.F.R. § 10.433(a) (1999).

defeat the purpose of the Federal Employees' Compensation Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁶

A claimant's obligation to repay an overpayment is forgiven if the bankruptcy court has discharged the debt in a bankruptcy proceeding, unless the debt is found to be non-dischargeable.⁷

ANALYSIS

Appellant does not dispute that he received an overpayment of compensation. The Office paid him for 26 percent impairment of his left lower extremity. The Board, however, found that appellant's impairment was only 23 percent. So he received more compensation than he was entitled to. Appellant does not dispute the amount of the overpayment, which the Office clearly explained in its October 24, 2007 preliminary determination.⁸

Appellant contends that the Office hearing representative overlooked his bankruptcy status in denying waiver. He submitted to the Board a bankruptcy document dated December 22, 1999 granting him a discharge. Appellant added that his financial situation was in grave condition due to bankruptcy and the nation's economy, and that he was no longer able to repay the debt as the Office directed.

As noted, a claimant's obligation to repay an overpayment is forgiven if the bankruptcy court has discharged the debt in a bankruptcy proceeding. But appellant has submitted no evidence that the \$6,026.04 debt arising from the hearing representative's May 5, 2008 final decision was discharged by any bankruptcy court. He appears to argue that his bankruptcy and discharge some years ago should continue to protect him against any future debts he might incur,

⁶ *Id.* at § 10.434. 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 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. *Id.* at § 10.436. Under Office procedures, an individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. If this condition is met *and* the individual's nonexempt assets do not exceed \$8,000.00 (the asset limit for an individual with one dependent), recovery of an overpayment will defeat the purpose of the Act and warrant waiver. Waiver requires that both conditions be met. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapters 6.0200.6.a(1), .6(a)(4) (October 2004). 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. 20 C.F.R. § 10.437(a) (1999). 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 position for the worse. *Id.* at § 10.437(b).

⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4.e(3) (May 2004).

⁸ The circumstances were a little complicated, but the math was straightforward. The Office made a direct payment of \$9,479.16 when it thought appellant's impairment was 26 percent. But because his impairment was in fact 23 percent, the Office should have paid only \$3,453.12.

but he cites no provision of the U.S. Bankruptcy Code or any other authority to support such a contention.

Although appellant was without fault in creating this overpayment, the Office is still required to recover the debt unless: (1) recovery would defeat the purpose of the Act; or (2) recovery would be against equity and good conscience. He reviewed his income and expenses with the hearing representative during the February 11, 2008 hearing. Apart from that portion of appellant's daughter's dental expenses covered by insurance, the hearing representative essentially accepted every financial figure appellant provided. Because his monthly income exceeded monthly expenses by well over \$50.00, the hearing representative properly found that appellant did not need substantially all of his current income to meet current ordinary and necessary living expenses.⁹ Recovery of the overpayment will therefore not defeat the purpose of the Act.

Neither is recovery considered to be against equity and good conscience. The financial information does not support that appellant, with over \$2,000.00 in disposable monthly income, would experience severe financial hardship in attempting to repay the debt. Appellant made no argument that he gave up a valuable right or changed his position for the worse in reliance on the overpayment or on notice that the payment would be made.

As recovery of the overpayment will neither defeat the purpose of the Act nor be considered against equity and good conscience, the Board will affirm the hearing representative's decision to deny waiver. The Office must recover the overpayment.

The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, where the Office decreases later payments of compensation to which the individual is entitled.¹⁰ The record does not establish that appellant is currently in receipt of continuing compensation for his accepted injury. Therefore, the Office must recover the debt by other means and the Board lacks jurisdiction to review the rate of recovery determined by the hearing representative.¹¹

CONCLUSION

The Board finds that the Office properly denied waiver of the \$6,026.04 overpayment that arose from appellant's November 21, 2006 schedule award.

⁹ See note 6.

¹⁰ 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

¹¹ If appellant's financial circumstances have changed since the Office's May 5, 2008 decision such that he can no longer make any payment on the debt, he may write to the district Office to request waiver of the balance. But as before, it would be his burden of proof to submit the financial documentation or other evidence necessary to establish that further recovery would defeat the purpose of the Act or be against equity and good conscience, as those phrases are defined in note 6 above.

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 22, 2009
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