

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

M.B., Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Chicago, IL, Employer**

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**Docket No. 09-176
Issued: September 23, 2009**

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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 23, 2008 appellant timely appealed the September 24, 2008 merit decision of the Office of Workers' Compensation Programs, which found that she had been overpaid approximately \$43,092.99. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of her claim.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation benefits in the amount of \$43,092.99 for the period October 29, 1999 through September 4, 2004; (2) whether appellant is entitled to waiver of recovery of the overpayment; and (3) whether the Office properly deducted \$350.00 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

This case was previously before the Board. Appellant, a 57-year-old former management analyst, has an accepted claim for lumbar radiculopathy.¹ When her case was last on appeal, the Board set aside an October 26, 2007 Office decision that found an overpayment of \$26,665.39 for the period October 29, 1999 through September 4, 2004.² While it was evident that the Office had overpaid appellant based on an incorrect pay rate, the exact amount of the overpayment was not readily discernable. Dating back to October 29, 1999, it had paid wage-loss compensation based on a weekly pay rate of \$1,245.42, which represents an annual salary of approximately \$65,000.00. But appellant's date-of-injury annual salary was closer to \$50,000.00.

At the time of the first appeal, the record before the Board indicated that appellant's date-of-injury hourly rate was \$23.87, which corresponds to a GS-11, Step 7, with an annual salary of \$49,812.00. However, in calculating the \$26,665.39 overpayment, the Office relied on an hourly pay rate of \$23.28, which corresponds to a GS-11, Step 6. The Office's overpayment calculation also failed to properly offset appellant's early-retirement incentive pay of \$25,000.00. Because the exact amount of the overpayment could not be determined based on the record provided, the Board found that the case was not in posture for decision. Accordingly, the Board set aside the Office's finding that appellant had been overpaid \$26,665.39 for the above-noted period. The Board instructed the Office on remand to incorporate appellant's incentive pay in its overpayment calculation and to recalculate the amount of overpayment based on a date-of-injury pay rate of a GS-11, Step 7.

On August 7, 2008 the Office received a copy of a May 5, 2008 discharge of debtor from the U.S. Bankruptcy Court. Appellant had filed for Chapter 7 Bankruptcy. The May 5, 2008 discharge lists the Office as one of appellant's creditors.

In a preliminary determination dated August 21, 2008, the Office indicated that appellant received an overpayment of \$43,092.99 for the period October 29, 1999 through September 4, 2004. It explained that she had been compensated based on an erroneous weekly pay rate of \$1,245.42 instead of her date-of-injury pay rate of \$958.01 per week³ Additionally, the Office advised that appellant was not at fault in creating the \$43,092.99 overpayment. In a separate letter, also dated August 21, 2008, the Office advised her that it would resume collection of the \$4,057.40 overpayment the Board affirmed in its June 18, 2008 decision.

¹ Appellant injured herself on August 12, 1999 while descending stairs. She stopped working the date of her injury and later accepted an early retirement, which was effective September 3, 2000.

² Docket No. 08-460 (issued June 18, 2008). The Board also affirmed, in part, a second Office decision dated October 26, 2007. This latter decision pertained to an overpayment of \$4,385.75 during the period February 4, 2002 through September 4, 2004. The overpayment was the result of uncollected health insurance premiums. The Board found that there was an overpayment of \$4,057.40 for the period May 18, 2002 through September 4, 2004. However, the purported overpayment of \$328.35 for the period February 4 to April 20, 2002 was not supported by the record. The Board's June 18, 2008 decision is incorporated herein by reference.

³ The Office also took into account the \$25,000.00 appellant received from the employing establishment in connection with her September 3, 2000 early retirement.

In response to the Office's August 21, 2008 preliminary determination, appellant submitted an overpayment questionnaire dated September 16, 2008. She reported a monthly income of \$3,060.00 and monthly expenses of \$3,217.00. Appellant's reported assets totaled \$5,020.00, of which \$20.00 represented cash on hand. The other \$5,000.00 represented her personal property, such as clothing and furniture. In an accompanying letter, appellant disputed the amount of the overpayment. She enclosed copies of various benefit statements that she received over the years. Appellant calculated that she had been paid \$182,515.44 during the period October 29, 1999 through September 4, 2004, rather than \$207,515.42 as the Office had indicated in its August 21, 2008 preliminary determination. According to her, the overpayment totaled only \$18,093.01. Appellant also provided copies of utility bills, a recent checking account statement and her property tax assessment. The Office received the above-referenced documents on September 24, 2008.

In a decision dated September 24, 2008, the Office finalized its August 21, 2008 preliminary determination. The decision indicated, *inter alia*, "No response has been received to the preliminary determination." The Office found that appellant was not entitled to waiver of recovery of the \$43,092.99 overpayment. Additionally, it determined that \$350.00 should be withheld from her continuing compensation.⁴

By letter dated September 26, 2008, the Office acknowledged receipt of "correspondence or evidence received" after the final decision dated September 24, 2008. It advised that no action would be taken at this time, but that the materials submitted would be placed in the case file. The Office further advised appellant that if she wished to dispute the September 24, 2008 decision she should follow the appeal rights that accompanied her decision.

LEGAL PRECEDENT

The amount of compensation paid is a function of the injured employee's pay rate.⁵ Section 8101(4) of the Federal Employees' Compensation Act provides that the rate of pay to be used in calculating compensation is based on the greatest of either the monthly pay at the date of injury, the date disability began or the date compensable disability recurred if it recurred more than six months after the employee returned to work.⁶ When an injured employee receives payments in excess of the amounts provided for under the Act, an overpayment is created and the Office must determine the questions of fact, amount, fault and recovery.⁷

An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.⁸ Recovery of an overpayment will

⁴ This was in addition to the \$50.00 the Office was already deducting every 28 days to recover the \$4,057.40 overpayment.

⁵ 20 C.F.R. §§ 10.401(b), 10.404(b) (2008).

⁶ 5 U.S.C. § 8101(4) (2006); *see Bette L. Kvetensky*, 51 ECAB 346, 348-49 (2000).

⁷ See 20 C.F.R. §§ 10431, 10.433-437

⁸ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because 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 the beneficiary's assets do not exceed a specified amount as determined by the Office.⁹ Additionally, 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 or when any individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁰

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office.¹¹ 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.¹² This information will also be used to determine the repayment schedule, if necessary.¹³

Section 10.441(a) 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 any hardship.¹⁴

ANALYSIS

The issue on appeal is not whether the Office overpaid appellant, but by how much. Appellant claims that the overpayment is substantially less than \$43,092.99. Another issue is whether she is entitled to waiver of recovery of the overpayment and if not, then whether the Office properly withheld an additional \$350.00 from her continuing compensation. In appellant's appeal to the Board, she continues to challenge the Office's finding regarding the amount of overpayment. She also takes issue with the Office's decision to deny waiver of recovery of the overpayment. Appellant argues that in reducing her periodic compensation by a total of \$400.00 the Office has caused a financial hardship. She further notes that she responded to the Office's preliminary determination, but the information she submitted apparently was not received until after the Office issued its September 24, 2008 decision. However, appellant's

⁹ 20 C.F.R. § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (October 2004).

¹⁰ *Supra* note 8 at § 10.437(a), (b).

¹¹ *Id.* at § 10.438(a).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at § 10.441(a).

delivery confirmation reportedly indicates that the Office received her response on September 23, 2008.

The Board finds that the case is not in posture for decision regarding the issues of the amount of overpayment, waiver of recovery and debt collection. The Board's jurisdiction over a case is limited to reviewing the evidence that was before the Office at the time of its final decision.¹⁵ As the Board's decisions are final with regard to the subject matter appealed, it is crucial that all relevant evidence that was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.¹⁶ The record indicates that the Office received appellant's response to the preliminary determination on September 24, 2008. However, the final decision indicated that "No response [had] been received to the preliminary determination." The Board also notes that the Office's decision did not specifically address the impact of appellant's May 5, 2008 Chapter 7 Bankruptcy discharge.¹⁷ Whether the Office receives relevant evidence on the date of the decision or several days prior, such evidence must be considered.¹⁸ As it failed to address all relevant evidence before it at the time of its September 24, 2008 decision, the case is remanded for a proper review of the evidence and issuance of an appropriate final decision.

CONCLUSION

The case is not in posture for decision.

¹⁵ *Id.* at § 501.2(c) (2008).

¹⁶ *Id.* at § 501.6(c); *see William A. Couch*, 41 ECAB 548, 553 (1990).

¹⁷ The Board has held that a discharge in bankruptcy may relieve a claimant of the obligation to repay an overpayment. *W.H.*, Docket No. 08-1876 (issued May 22, 2009). Office procedures to determine the effect of appellant's alleged discharge now are set forth in the Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 6.200.4.e(3) (June 2009).

¹⁸ *Willard McKennon*, 51 ECAB 145 (1999).

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further action consistent with this decision.

Issued: September 23, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board