

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JORGE O. DIAZ and DEPARTMENT OF THE ARMY,  
ROCK ISLAND ARSENAL, Rock Island, IL

*Docket No. 97-334; Submitted on the Record;  
Issued October 13, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that an overpayment existed in the amount of \$53,666.90; and (2) whether the Office properly denied waiver of recovery of the overpayment under section 8129(a) of the Federal Employees' Compensation Act.<sup>1</sup>

On September 16, 1991 appellant, then a 42-year-old journeyman machinist and Vietnam veteran, filed a notice of occupational disease, claiming that his diabetes and post-traumatic stress disorder were worsened by harassment at work from his newly-appointed supervisor. On July 20, 1992 the Office accepted the claim for aggravation of post-traumatic stress disorder and paid appropriate compensation.

On January 27, 1994 the Office advised the Department of Veterans Affairs (VA) that appellant was receiving compensation for total disability due to his post-traumatic stress disorder and asked that the VA provide information regarding his service-connected benefits for the same condition. The VA responded on February 23, 1994 that appellant had been receiving 40 percent disability, but was entitled to a 100 percent rating based on his hospitalization for post-traumatic stress disorder on April 16, 1992 and was now being paid 100 percent disability.

On March 18, 1994 appellant elected VA benefits and stated that he would take disability retirement from the Office of Personnel Management (OPM). On November 24, 1994 the Office notified the VA, with a copy to appellant, that appellant had also elected VA benefits for the period from April 16, 1992 through June 25, 1994 and that the Office would start the process of recouping the overpayment.

On February 28, 1995 the Office informed appellant that an overpayment of \$53,666.90 had occurred because he had received dual benefits from April 16, 1992 through June 25, 1994.

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<sup>1</sup> 5 U.S.C. § 8129(a); 5 U.S.C. §§ 8101-8193 (1974).

The Office found that appellant was without fault because he was not initially informed that the VA had increased his benefits and therefore was unaware that he was not eligible to receive both the VA increase and disability compensation.

Appellant requested a waiver of recovery of the overpayment and completed a financial questionnaire. Following a telephone conference on September 25, 1996, the Office determined that appellant did not qualify for waiver of recovery of the overpayment and set a proposed repayment schedule of \$250.00 a month from appellant and \$250.00 a month from his retirement benefits.

The Board finds that the Office properly determined that appellant received an overpayment of \$53,666.90 resulting from his dual receipt of benefits and did not abuse its discretion in denying waiver of the overpayment after finding that appellant was without fault.

The record establishes that the Office properly calculated an overpayment of \$53,666.90 in this case. On October 28, 1994 the Office completed a disability payment worksheet in which it computed that appellant was paid disability compensation at the rate of \$459.31 every week during the period April 16, 1992 until February 28, 1993 and therefore received benefits totaling \$20,918.29 during this period; that appellant was paid disability compensation at the rate of \$472.75 every week during the period March 1, 1993 until February 28, 1994 and therefore received benefits totaling \$24,650.54 during this period; and that appellant was paid disability compensation at the rate of \$484.50 every week during the period March 1 until June 25, 1994 and therefore received benefits totaling \$8,098.07 during this period. The Office properly calculated that during the period April 16, 1992 until June 25, 1994 appellant received disability compensation benefits totaling \$53,666.90. As appellant elected to receive VA benefits during this period, for the same injury, he was not entitled to receipt of Office disability benefits during this period and the \$53,666.90 he received from the Office was an overpayment of compensation.

Section 8116<sup>2</sup> of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides in pertinent part as follows:

“(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, *he may not receive salary, pay, or remuneration of any type from the United States, except --*

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;

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<sup>2</sup> 5 U.S.C. § 8116.

*(3) other benefits administered by the Veterans Administration unless such benefits payable for the same injury or the same death....” (Emphasis added.)*

Commencing April 16, 1992, appellant was in receipt of VA benefits for 100 percent disability due to post-traumatic stress disorder. As appellant was in receipt of Office compensation benefits for total disability due to aggravation of this preexisting post-traumatic stress disorder, once appellant began to receive 100 percent total disability benefits from the VA, such benefits were paid for the same injury as benefits were paid by the Office and became dual benefits pursuant to section 8116(a)(3).<sup>3</sup> The Office properly concluded that an overpayment of \$53,666.90 had occurred in this case.

The Board also finds that the Office properly denied waiver of this overpayment.

Section 8129(a)<sup>4</sup> of the Act provides that when an overpayment of compensation occurs “because of an error of fact or law,” adjustment or recovery shall be made by decreasing later payments to which the individual is entitled. The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b):

“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 [the Act] or would be against equity and good conscience.” (Emphasis added.)<sup>5</sup>

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.<sup>6</sup> The Office must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of [the Act] or would be against equity and good conscience,” pursuant to the guidelines provided in sections 10.322 and 10.323 of the implementing federal regulations.<sup>7</sup>

Section 10.322 provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a beneficiary of income and resources needed for ordinary and necessary living expenses, when the individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses, and the individual’s assets do not exceed the resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent, plus \$600.00 for each additional dependent.

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<sup>3</sup> See *Gary L. Bartolucci*, 34 ECAB 1569 (1983).

<sup>4</sup> 5 U.S.C. § 8129(a).

<sup>5</sup> 5 U.S.C. § 8129(b).

<sup>6</sup> *William J. Murphy*, 40 ECAB 569, 571 (1989).

<sup>7</sup> 20 C.F.R. §§ 10.322-23; *James M. Albers, Jr.*, 36 ECAB 340, 345 (1984).

For waiver under the “defeat the purpose” of the Act standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the applicable resource base.<sup>8</sup> An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.<sup>9</sup>

In this case, appellant argued that because he was found to be without fault he should not have to repay the overpayment. 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.<sup>10</sup> Rather, such a finding entitles appellant only to the opportunity to establish a basis for granting waiver of the recovery of the overpayment pursuant to section 8129.

Here, appellant provided updated financial information as requested by the Office. His monthly income, as of July 1996, was \$4,987.00, consisting of \$1,299.00 from the Social Security Administration, \$2,285.00 from the VA, \$343.00, from a railroad retirement annuity, and \$1,060.00 from his wife’s work. As the Office noted, appellant did not report the \$543.45 he received each month for disability retirement. Thus, total monthly income was \$5,530.45.

Total monthly expenses were listed as \$4,987.00, from which amount the Office excluded \$270.00 listed for lunches for appellant and his wife, \$27.00 for cable television, \$100.00 each for entertainment, allowances and a credit card payment and \$125.00 for holidays/birthdays, for a total of \$722.00, which left \$4,265.00 for ordinary and necessary living expenses. Thus, the Office found that \$1,265.45 per month remained of appellant’s monthly income.

The Board finds that exclusion of the \$270.00 lunch expense as unnecessary was proper, given that appellant claimed \$1,200.00 a month for groceries and was not working. While the rest of the excluded expenses might be considered as ordinary and necessary, particularly the cable television cost, entertainment and the children’s allowances, even if these excluded sums were included, appellant’s monthly expenses, as reported by him and his wife, were still almost \$1,000.00 less than his correct monthly income. Thus, appellant has not established that he needs substantially all of his current monthly income to meet his ordinary and necessary living expenses.

Appellant also had assets which exceeded the applicable resource base. The record substantiates that appellant set aside FECA checks and noted on the recovery questionnaire that he had \$13,300.00 worth of checks in his possession. The same form lists appellant’s assets as totaling \$49,225.00, which includes the \$13,300.00 but excludes the unknown value of a small lot he owns and a \$3,700.00 loan against a retirement account. As appellant had adequate

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<sup>8</sup> *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

<sup>9</sup> *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

<sup>10</sup> See *William J. Murphy*, *supra* note 6 (finding that waiver is not automatic when appellant is without fault in creating the overpayment).

income and assets, recovery of the overpayment would not “defeat the purpose” of the Act. Therefore, the Board finds that appellant is not entitled to waiver of recovery of the overpayment under the “defeat the purpose” of the Act standard.

Section 10.323 of the regulations provides that recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse. To establish that a valuable right was relinquished, the individual must show that the right was valuable, that it cannot be regained and the action taken was based chiefly or solely on the payments or notice of such payments.<sup>11</sup>

To establish a change in position for the worse, the individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amounts and that this decision resulted in a loss; conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose.<sup>12</sup> In making such a decision, the individual’s present ability to repay the overpayment is not considered.<sup>13</sup>

There is no evidence in this case that appellant relinquished a valuable right or changed his position for the worse in reliance on the dual benefits he received from 1992 to 1994. While the Office found appellant to be without fault in creating the overpayment due to receipt of dual benefits -- the VA failed to notify appellant of his 100 percent disability rating until December 1993 -- appellant has offered no evidence that he relinquished a valuable right or changed his financial position for the worse in reliance on the extra money he received from April 1992 through June 1994. Appellant merely stated that he and his family lived on the VA funds, as well as his disability compensation, until January 1994 when notified by the Office of a possible overpayment. As previously noted, conversion of the overpayment into a different form, *i.e.* consumer goods, food, or real estate, from which the claimant derived some benefit does not constitute loss for this purpose.<sup>14</sup> Appellant has therefore not established that repayment of this overpayment would be against equity and good conscience. The Office properly denied waiver of the overpayment in this case.

Finally, appellant argues that the interest charge is not warranted because he was found to be without fault. Appellant is being charged a total of \$17,214.68 in interest on the \$53,555.70 overpayment at an annual five percent rate.

The statutory authority for the Office to charge interest on an overpayment is found in 31 U.S.C. § 3717(a)(1) and (g)(1). Section 3717(a)(1) provides in relevant part that the head of an executive or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person. Subsection (g)(1)

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<sup>11</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (September 1989).

<sup>12</sup> *John B. Moore*, 44 ECAB 709, 711 (1993).

<sup>13</sup> *Stanley K. Hendler*, 44 ECAB 698, 707 (1993).

<sup>14</sup> *Id.*

states that section 3717 does not apply if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges.<sup>15</sup> Inasmuch as the Act does not prohibit the charging of interest on overpayments, the Office has the requisite statutory authority to assess interest on an overpayment,<sup>16</sup> as it did in this case. The Board also notes that appellant has not explicitly requested waiver of this interest,<sup>17</sup> and only raised objection to the payment of interest for the first time on appeal. The Board's jurisdiction is limited to review of final decisions issued by the Office. Appellant did not request that the Office waive interest in this matter, and the Office did not issue a final, appealable decision regarding the issue of waiver of interest. The Board therefore lacks jurisdiction to review this matter.<sup>18</sup>

The September 25, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
October 13, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>15</sup> 29 U.S.C. § 3717(a)(1), (g)(1).

<sup>16</sup> *Marie D. Sinnett*, 40 ECAB 1009, 1015 (1989).

<sup>17</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.7 (September 1994).

<sup>18</sup> *John F. Dunleavy*, 45 ECAB 891 (1994).