

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLES J. HUGHES and TENNESSEE VALLEY AUTHORITY,  
JOHN SEVIER FOSSIL PLANT, Rogersville, TN

*Docket No. 98-1490; Submitted on the Record;  
Issued February 4, 2000*

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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 determined that an overpayment of compensation existed in the amount of \$18,000.00; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$500.00 from appellant's compensation payments every 4 weeks.

On April 14, 1987 appellant, then a 41-year-old postal worker, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on February 25, 1987 he injured his back and leg in the performance of duty. The Office accepted appellant's claim for low back strain and herniated disc at L5-S1. Appellant worked light duty for most of the period from the date of injury until August 24, 1987 when he returned to regular duty. Appellant subsequently filed several claims for recurrence of disability, which were eventually all accepted by the Office. Appellant filed his final claim for recurrence of disability on September 9, 1994, after which he stopped work entirely. While this final claim for recurrence of disability was still pending before the Office, on October 16, 1994 appellant voluntarily retired from the employing establishment. As part of his retirement package, appellant received \$11,403.36 in severance pay and \$18,000.00 in separation, or early retirement incentive pay. On October 19, 1995 the Office accepted appellant's September 9, 1994 claim for recurrence of disability and placed appellant on the daily rolls.

By letter dated October 25, 1995, the Office advised appellant that his compensation benefits were not payable for the period during which he received his severance pay in the

amount of \$11,403.36. The Office did not discuss appellant's \$18,000.00 separation pay.<sup>1</sup> The Office subsequently determined that the amount of appellant's separation pay was also subject to offset and by letter dated July 10, 1996, advised appellant that it had made a preliminary determination that he received an \$18,000.00 overpayment of compensation because he received compensation for total disability effective February 20, 1995 in addition to his separation pay. The Office also determined that appellant was without fault in creating the overpayment. Appellant was informed that he could request a prerecoupment hearing and that he might request waiver of recovery. The Office advised appellant to submit a completed financial questionnaire to assist the Office in deciding whether or not to waive the overpayment, or in the event that waiver is not granted, to assist the Office in deciding how to recover the overpayment.

By decision dated February 19, 1998, the Office finalized its preliminary determination that an overpayment in the amount of \$18,000.00 had been created, that appellant was not at fault in the creation of the overpayment, that appellant was not eligible for waiver and that the overpayment would be recovered by withholding \$500.00 from his continuing compensation checks every 4 weeks.

The Board finds that appellant received an overpayment of compensation in the amount of \$18,000.00 due to his dual receipt of separation or early retirement incentive pay and compensation benefits for total disability.

Appellant received compensation for total disability for the period February 20 to November 25, 1995, but also received separation pay in the amount of \$18,000.00, following his voluntary retirement from the employing establishment on October 16, 1994. FECA Bulletin No. 96-2 defines separation pay as a "buyout" offered by an employer to encourage employees to leave federal employment voluntarily. The FECA bulletin further provides that a claimant may not concurrently receive separation pay and payment for total disability and explains that "[t]he employing establishment should advise the Office of the total dollar amount of the separation pay and the date of the separation or retirement. This amount should be applied to the amount of compensation for wage loss on a dollar-for-dollar basis."<sup>2</sup>

On appeal appellant asserts that because he actually received only the after-tax portion of his \$18,000.00 separation amount, to require him to repay the entire \$18,000.00 is inequitable. However, as the Office procedures clearly provide for a dollar-for-dollar offset, the Office

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<sup>1</sup> The record reflects that the Office initially considered the \$18,000.00 lump sum early retirement incentive to be exempt from offset, as the Tennessee Valley Authority is a private pension plan and not a federal benefit, and thus is not considered a dual benefit subject to offset. The Office relied on the Federal (FECA) Procedure Manual, Chapter 2.1000, section 12 (February 1995), which acknowledges that the Tennessee Valley Authority Retirement System is a private pension plan and states that the limitations in 5 U.S.C. § 8116 apply solely to situations where there is concurrent entitlement to compensation and to some other federal benefit(s). The procedure manual further provides that an election between FECA benefits and benefits under the Tennessee Valley Authority Retirement System is not required by the Office. Under certain circumstances, the Tennessee Valley Authority may find that all or part of its retirement benefits are not payable concurrently with FECA benefits. Requests for offset of FECA compensation payments to repay overpayments made under the Tennessee Valley Authority Retirement System will be honored only upon written authority of the affected beneficiary.

<sup>2</sup> See FECA Bulletin No. 96-2 (issued November 5, 1995).

properly determined that appellant received an overpayment of compensation in the amount of \$18,000.00 due to his receipt of dual benefits.

The Board further finds that the Office properly denied waiver of recovery of the overpaid compensation.

Section 8129 of the Federal Employees' Compensation Act<sup>3</sup> provides that an overpayment of compensation must be recovered unless "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. Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then 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."<sup>4</sup>

Section 10.322(a) of the implementing regulations<sup>5</sup> provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses. Recovery will defeat the purpose of the Act to the extent that: (1) the individual from whom recovery is sought needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses; and (2) the individual's assets do not exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an additional dependent. This base includes all of the individual's assets not exempt from recoupment.<sup>6</sup>

In the instant case, appellant did not provide the requested financial information to the Office. The Office was, therefore, unable to determine whether recovery would defeat the purpose of the Act.

With respect to whether recovery would be against equity and good conscience, section 10.323(b) of the implementing regulations provides that "[r]ecovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or notice that such payments will be made, relinquished a valuable right or changed his position for the worse."<sup>7</sup> At a December 2, 1996 conference between appellant, his counsel and the Office, appellant asserted that he relinquished a valuable right or changed his position for the worse in reliance on the erroneous compensation, which formed the basis for the overpayment. Appellant specifically asserted that, at the time he opted for early retirement, his claim for federal workers' compensation benefits was still pending and that he would not have accepted the \$18,000.00 separation amount had he known his claim for compensation was going to be

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<sup>3</sup> 5 U.S.C. § 8129.

<sup>4</sup> See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

<sup>5</sup> 20 C.F.R. § 10.322(a).

<sup>6</sup> *Robert F. Kenney*, 42 ECAB 297 (1991).

<sup>7</sup> 20 C.F.R. § 10.323(b).

accepted. The record reflects that appellant's claim was not accepted until October 19, 1995, a year after he opted for early retirement. Therefore, appellant cannot show that, on October 16, 1994, when he elected to receive the \$18,000.00 early retirement amount, he accepted his early retirement package in reliance on the erroneous compensation, which formed the basis for the overpayment. As appellant has not shown that recovery would "defeat the purpose of the Act" or would "be against equity and good conscience" the Board finds that the Office properly denied waiver of recovery of the overpayment.

The Board also finds that the Office properly required repayment by withholding \$500.00 from appellant's monthly continuing compensation.

The Office's implementing regulations provide:

"Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to 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 resulting hardship upon such individual."<sup>8</sup>

The record establishes that appellant failed to submit an overpayment recovery questionnaire or any other evidence from which the Office could determine what amount appellant could afford to repay out of his continuing compensation benefits.<sup>9</sup> Therefore, the Board finds that the Office did not abuse its discretion in deciding to withhold \$500.00 per month from appellant's continuing compensation in order to facilitate recovery of the overpayment.

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<sup>8</sup> 20 C.F.R. § 10.321(a); *see Roger Seay*, 39 ECAB 441 (1988).

<sup>9</sup> *See* 20 C.F.R. § 10.321(h) which provides that if additional financial information is not submitted, or a prereducement hearing is not requested, within 30 days of the Office's preliminary overpayment determination, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action; *see Connie L. Potratz-Hasson*, 42 ECAB 359 (1991).

The decision of the Office of Workers' Compensation Programs dated February 19, 1998 is affirmed.

Dated, Washington, D.C.  
February 4, 2000

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member