

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GERALD W. HILLARD and DEPARTMENT OF THE NAVY,  
MARINE CORPS BASE, Quantico, VA

*Docket No. 01-2111; Submitted on the Record;  
Issued May 28, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether appellant received an overpayment in compensation of \$11,440.21; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment; and, (3) whether the Office properly required repayment of the overpayment by withholding \$330.00 every four weeks from his continuing compensation.

On October 29, 1998 appellant, then a 38-year-old firefighter, sustained multiple employment-related injuries<sup>1</sup> when he was hit by a falling tree while fighting a fire. He stopped work that day and was placed on the periodic rolls. He has not returned to work.

On May 23, 2001 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$15,201.08 which arose because he had been compensated at an incorrect pay rate for the period December 14, 1998 to March 24, 2001. The Office further found that he was without fault in the creation of the overpayment. On an attached Office form, the Office requested that appellant indicate whether he wished to contest the existence or amount of the overpayment or to request waiver of the overpayment.<sup>2</sup> The Office also asked him to complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. The Office indicated that the financial

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<sup>1</sup> The record indicates that appellant's accepted conditions are inhalational injuries that include bilateral pneumothoraces and acute respiratory distress syndrome, a pneumomediastinum, multiple rib fractures, a right acetabulum fracture, a retroperitoneal hemorrhage, a burst fracture of the T12 vertebra, compression fractures of T3-6 and T8 and T9 vertebrae, a C5-6 disc bulge, third degree burns to the abdomen and right thigh, a diaphragmatic hernia, deep vein thromboses, erectile dysfunction due to penile plaque, decreased testosterone levels and depression and adjustment disorder/post-traumatic stress disorder.

<sup>2</sup> The form provides a claimant with three choices: (1) A request of waiver and a telephone conference; (2) a request of waiver with the Office making the decision on the written record; and, (3) a request of waiver with a hearing before the Branch of Hearings and Review. With each of these choices, a claimant is to provide supporting financial documents.

information would be used to determine whether he was entitled to waiver and that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment. The Office enclosed a worksheet detailing its calculation of the overpayment.

In a July 3, 2001 decision, the Office finalized its preliminary determination that appellant received an overpayment in compensation. The Office indicated that the amount of the overpayment was \$11,440.21. The Office revised the amount of the overpayment based on an April 2001 revision of FECA No. Bulletin 01-08 which incorporated changes mandated by the Federal Firefighters Overtime Pay Reform Act of 1998. Utilizing this revision, the Office determined that appellant was entitled to a pay rate of \$917.69 per week,<sup>3</sup> which reduced his overpayment to \$11,440.21. The Office further noted that, as appellant did not respond to the preliminary overpayment determination, his case did not warrant waiver of recovery of the overpayment because he failed to submit the required financial information. The Office determined that recovery of the overpayment would be made from appellant's continuing compensation at a rate of \$330.00 every 28 days.

The Board finds that appellant received an overpayment of compensation in the amount \$11,440.21.

The record in this case reflects the period December 14, 1998 to March 24, 2001, appellant received compensation totaling \$90,335.93. An April 2001 amendment to FECA Bulletin No. 01-08 provides procedures to follow in determining the appropriate pay rate for firefighters.<sup>4</sup> Utilizing the procedures set forth in the April amendment, the Office determined that appellant was entitled to a weekly pay ray of \$917.69. Based on this weekly pay rate, he should have received \$78,895.72. Therefore, an overpayment in compensation in the amount of \$11,440.21 was created.

The Board further finds that, while appellant was not at fault in the creation of the overpayment, he is not entitled to waiver.

Section 8129(a) of the Federal Employees' Compensation Act<sup>5</sup> provides that, where an overpayment of compensation has been made "because of an error of fact or law" adjustments shall be made by decreasing later payments to which an individual is entitled.<sup>6</sup> The only

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<sup>3</sup> A firefighter, such as appellant, who worked a 24-hour shift had a regular biweekly tour of 144 hours (six 24-hour shifts) consisting of 106 regular hours and 38 "extra pay" hours. A formula, provided in the April 2001 revision outlined a five-step procedure to be followed in determining weekly pay rate: (1) Annual salary was divided by 2756 (53 hours of regular pay per week times 52 weeks) to equal a firefighter's hour rate; (2) the hourly rate was multiplied by 106 hours to reach a biweekly base pay; (3) the hourly rate was multiplied by 1.5 to reach the "extra pay;" (4) the "extra pay" was multiplied by 38 to equal the biweekly "extra pay;" (5) the biweekly base pay was then added to the biweekly "extra pay" and divided by two to find the weekly pay rate. In appellant's case, his annual salary was \$31,040.00; his hour rate was \$11.26; his biweekly base pay was \$1,193.56; his "extra pay" rate was \$16.89; and his biweekly "extra pay" was \$641.82. Adding his biweekly base pay of \$1,193.56 to his biweekly "extra pay" of \$641.82 equaled \$1,835.38 which was divided by two to find appellant's weekly pay rate of \$917.69.

<sup>4</sup> FECA Bulletin No. 01-08 was initially issued on January 31, 2001. A revision was issued on April 23, 2001.

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> 5 U.S.C. § 8129(a).

exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “[a]djustments or recovery by the United States may not be made when incorrect payments 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.”<sup>7</sup> Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.<sup>8</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 10.434-437 of the implementing federal regulations.<sup>9</sup> Furthermore, section 10.438 of the federal regulations provides:

“(a) 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 [the Act] or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

(b) 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.”<sup>10</sup>

On appeal appellant contends that he made numerous telephone calls to the Office regarding the preliminary overpayment determination. In its letter dated May 23, 2001, the Office clearly instructed appellant that he should return the requested information within 30 days. Appellant did not comply.<sup>11</sup> Without an accurate and complete breakdown of appellant’s monthly income, monthly expenses and assets, supported by financial documentation, the Office was not able to calculate whether appellant’s assets exceeded the specified resource base. The Office therefore, properly found that appellant was not entitled to waiver on the grounds that recovery would defeat the purpose of the Act.<sup>12</sup>

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in

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<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

<sup>9</sup> 20 C.F.R. § 10.434-437 (1999).

<sup>10</sup> 20 C.F.R. § 10.438 (1999).

<sup>11</sup> The record indicates that an overpayment questionnaire, dated July 21, 2001, several weeks following the final overpayment decision, was stamped received by the Office on August 20, 2001.

<sup>12</sup> See *Gail M. Roe*, 47 ECAB 268 (1995).

attempting to repay the debt<sup>13</sup> or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.<sup>14</sup>

While on appeal appellant generally contended that recovery would be against equity and good conscience, he provided no specific information in that regard in the record. The Board therefore, finds that, as appellant submitted no evidence to establish that he relinquished a valuable right or changed his position for the worse in reliance on the overpaid compensation, the Office properly found that recovery of the overpayment would not be against equity or good conscience.

Lastly, the Board finds that the Office properly required repayment by withholding \$330.00 every four weeks from appellant's continuing compensation.

With regard to the amount withheld from appellant's continuing compensation payments to recover the amount of the overpayment, section 10.441(a) of Office 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 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.”<sup>15</sup>

When, as in this case, an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.<sup>16</sup> The Board finds that the Office did not abuse its discretion in following those guidelines in this case.<sup>17</sup>

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<sup>13</sup> 20 C.F.R. § 10.437(a) (1999).

<sup>14</sup> 20 C.F.R. § 10.437(b) (1999).

<sup>15</sup> 20 C.F.R. § 10.441(a) (1999).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.4.d(1)(b) (September 1994).

<sup>17</sup> The Board notes that appellant submitted additional evidence subsequent to the May 15, 2000 decision of the Office and with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Lastly, the Board notes that the record contains a decision dated September 13, 2001 in which an Office hearing representative denied appellant's hearing request. The Office and the Board, however, may not have simultaneous jurisdiction over the same issue in the same case. Following the docketing of an appeal with the Board, which in the instant case was on August 2, 2001, the Office does not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction. Any decision rendered by the Office on the same issues for which an appeal is filed are null and void. *Noe L. Flores*, 49 ECAB 344 (1998).

The decision of the Office of Workers' Compensation Programs dated July 3, 2001 is hereby affirmed.

Dated, Washington, DC  
May 28, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member