

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of J. PENDLETON JONES and DEPARTMENT OF DEFENSE,
WASHINGTON HEADQUARTERS SERVICES, Arlington, VA

*Docket No. 02-2283; Submitted on the Record;
Issued July 18, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$25,000.00, because he claimed and received compensation benefits for the period immediately following his retirement and had received separation incentive pay in the amount of \$25,000.00; (2) whether the Office properly denied waiver of the overpayment of compensation; and (3) whether the Office abused its discretion in determining that repayment should be made by withholding \$1,000.00, a month from appellant's continuing compensation benefits.

On February 25, 1993 appellant, then a 55-year-old management analyst, filed a claim for a traumatic injury occurring on February 24, 1993, when he tripped and fell over a desk. The Office accepted his claim for upper back strain, cervical sprain and a herniated nucleus pulposus at C2-3. Appellant continued working for the employing establishment until February 28, 1995, when he retired and accepted a separation incentive payment of \$25,000.00. He thereafter received retirement benefits from the Office of Personnel Management.

On February 15, 1996 appellant elected to receive benefits under the Federal Employees' Compensation Act¹ effective March 1, 1995.² In a decision dated August 2, 1999, the Office determined that he had received an overpayment in the amount of \$991.54, because he received an under deduction of basic life insurance premiums from March 1, 1995 through April 25, 1998. The Office further determined that appellant was without fault in the creation of the overpayment and that he was not entitled to waiver.

¹ 5 U.S.C. §§ 8101-8193.

² In a decision dated August 8, 1996, the Office denied appellant's compensation claim on the grounds that the evidence did not establish that he was disabled from employment after March 1, 1995 due to his February 24, 1993 employment injury. By decision dated April 28, 1997, a hearing representative set aside the Office's August 8, 1996 decision and remanded the case for further development. Following further development of the medical evidence, the Office paid appellant compensation for total disability beginning March 1, 1995.

On September 15, 1999 the Office notified appellant of its preliminary determination that he had received an overpayment in the amount of \$18,317.74, because he had received separation pay and workers' compensation benefits at the same time. The Office found that appellant was not at fault in the creation of the overpayment. By decision dated October 13, 1999, the Office finalized its overpayment determination. The Office denied waiver of the overpayment and found that the overpayment should be recovered by withholding \$800.00 a month from appellant's continuing compensation payments.

In a memorandum of conference dated November 10, 1999, the Office informed appellant that the overpayment of \$18,317.74 would have to be recalculated because Office procedures required the amount received at the date of separation to be applied to the amount of compensation on a dollar-for-dollar basis. On August 28, 2000 the Office notified appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$25,000.00, because he elected and received workers' compensation benefits effective March 1, 1995 and also received separation incentive pay. The Office found that appellant was not at fault in the creation of the overpayment. The Office advised appellant that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

Appellant requested a prerecoupment hearing, which was held on March 6, 2001. By decision dated May 30, 2001, a hearing representative found that appellant received an overpayment in the amount of \$25,000.00, because of his dual receipt of compensation benefits for wage-loss beginning March 1, 1995 and a separation incentive in the amount of \$25,000.00, at the time of his retirement. The hearing representative found that appellant was not at fault in the creation of the overpayment but did not meet the criteria for waiver. The hearing representative determined that the overpayment would be recovered by withholding \$1,000.00, a month from appellant's continuing compensation benefits.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$25,000.00, due to his dual receipt of separation incentive pay and compensation benefits for total disability.

Section 8116(a) of the Act states that, while an employee is receiving compensation under the Act, he or she "may not receive salary, pay or remuneration of any type from the United States, "except in return for service actually performed or for certain payments connected with service in the Armed Forces." Section 10.421(c) of the Office's regulations states:

"An employee may not receive compensation for total disability concurrently with severance pay or separation pay. However, an employee may concurrently

receive compensation for partial disability or permanent impairment to a schedule member, organ or function with severance pay or separation pay.”³

In this case, appellant elected to receive compensation for total disability for the period commencing March 1, 1995. The record establishes that he also received separation pay in the amount of \$25,000.00, during that period after his voluntary retirement from the employing establishment on February 28, 1995. As the Act provides that an employee may not concurrently receive separation pay and compensation for total disability, appellant received an overpayment of compensation. He argued that he should not have to repay the entire \$25,000.00, because he paid taxes on the amount. However, Office procedures provide that, when calculating the method of offset, “the total dollar amount of separation pay should be applied to the amount of compensation for wage loss on a dollar-for-dollar basis.”⁴ Consequently, the Office properly determined that appellant received an overpayment of compensation in the amount of \$25,000.000, due to his receipt of dual benefits.

The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment after finding that appellant was without fault.

Where an overpayment of compensation has been made because of an error of fact or law, collection of the compensation shall be waived, when an overpayment has been made to an individual who is without fault and adjustment or recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.⁵ The waiver of an overpayment of compensation by the Office is a matter that rests within its discretion to be exercised pursuant to statutory guidelines.⁶

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, 20 C.F.R. § 10.436 provides as follows:

“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 or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and

³ 20 C.F.R. § 10.421(c).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17(d)(2) (April 1996).

⁵ 20 C.F.R. § 10.434.

⁶ *William Phillips, Jr.*, 39 ECAB 330 (1987).

(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. A higher amount is specified for a beneficiary with one or more dependents."⁷

In *Robert E. Wenholz*,⁸ the Board found that the guidelines for recovery of an overpayment from an individual who is without fault, such as those set forth in section 10.436 and the applicable Office procedures, were meant to read conjunctively and that the overpaid individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his income to meet his current ordinary and necessary living expenses and also that his assets, those which are not exempted, do not exceed the set resource base. The Office procedure manual sets the asset resource base of \$3,000.00 for a single person and \$5,000.00 for a married person, with an additional \$600.00 for each dependent. The procedure manual's test for determining whether a claimant needs substantially all of his current income to meet his current ordinary and necessary living expenses is whether a claimant's income is less than his monthly expenses or does not exceed his monthly expenses by more than \$50.00.⁹ In this case, appellant listed assets well in excess of \$5,000.00; specifically that he and his wife had \$8,000.00 in a checking account and \$70,000.00 in a stock, bond or mutual fund account. As appellant's resource base clearly exceeds the maximum allowable for a claimant with dependents, he has not shown that recovery of the overpayment would defeat the purpose of the Act.

With regard to the "against equity and good conscience" standard, section 10.437 of the regulations provides:

"(a) 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.

"(b) 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 or her position for the worse. In making such a decision, [the Office] does not consider the individual's current ability to repay the overpayment."¹⁰

In this case, there is no evidence that appellant relinquished a valuable right or changed his position for the worse in relying on the overpaid compensation. The Office, therefore,

⁷ 20 C.F.R. § 10.436.

⁸ 38 ECAB 311 (1986).

⁹ Federal (FECA) Procedure Manual, Part 6 -- Overpayments and Collections, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (September 1994).

¹⁰ 20 C.F.R. § 10.437.

properly found that recovery of the overpayment would not be against equity or good conscience.

The Board further finds that the Office properly determined the rate of recovery of the overpayment.

“Section 10.441(a) of Title 20 of the Code of Federal Regulations provides that, 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.¹¹ 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.

In this case, appellant indicated that he had liquid assets valued at over \$70,000.00. Hence the Board finds that the Office gave due regard to appellant’s financial circumstances in determining the rate of repayment in this case and, thus, did not abuse its discretion under the standard noted above in determining that repayment of the overpayment could be accomplished by withholding \$1,000.00, every four weeks from appellant’s compensation.

The decision of the Office of Workers’ Compensation Programs dated May 30, 2001 is affirmed.

Dated, Washington, DC
July 18, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

¹¹ 20 C.F.R. § 10.441(a).