

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EMIL A. LEDESMA and DEPARTMENT OF THE NAVY,  
NAVAL PUBLIC WORKS CENTER, Concord, CA

*Docket No. 03-941; Submitted on the Record;  
Issued June 5, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$10,685.70 for the period October 1, 2000 to May 2, 2001; (2) whether the Office properly determined that appellant was at fault in creating the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$75.00 every four weeks from appellant's continuing compensation payments.

On September 23, 1997 appellant, then a 39-year-old electronics mechanic, sustained an employment-related lumbar sprain and a herniated disc at L4-5. Appellant returned to work in a part-time, limited-duty capacity on June 26, 2000. The Office paid appellant wage-loss compensation based on his ability to work only four hours per day. Appellant stopped work on July 21, 2000 and the Office later terminated compensation effective August 25, 2000 on the basis that appellant abandoned suitable employment.

Effective September 30, 2000, appellant was relieved of his employment duties due to a reduction-in-force. The Office was initially appraised of a planned reduction-in-force on July 6, 2000. The Office received a copy of the June 28, 2000 notice of reduction-in-force which indicated that appellant would be entitled to approximately \$29,130.50 in severance pay.

The Office's decision to terminate compensation effective August 25, 2000 was subsequently overturned by decision dated April 9, 2001. On May 25, 2001 the Office paid

appellant wage-loss compensation for four hours of lost wages per day retroactive to August 25, 2000 and continuing through May 19, 2001.<sup>1</sup> Thereafter, appellant received continuing wage-loss compensation based on his partial disability in the amount of \$1,430.00 every 28 days.

In June 2001, the employing establishment notified the Office that, because of the September 30, 2000 reduction-in-force, appellant was entitled to receive severance pay for 31 weeks at a rate of \$951.20 per week beginning October 1, 2000.

On June 12, 2001 the Office advised appellant that he had received an overpayment of benefits in the amount of \$10,685.70. The Office explained that the overpayment resulted from appellant's receipt of disability compensation during the same 31-week period he received severance pay from the employing establishment due to a September 30, 2000 reduction-in-force. The Office further advised appellant that he was at fault in creating the overpayment.

Appellant requested a preresoupment hearing, which was held on January 16, 2002. In a decision dated January 23, 2003, the Office hearing representative determined that appellant received an overpayment in the amount of \$10,685.70 for the period October 1, 2000 to May 2, 2001 and that appellant was at fault in creating the overpayment.<sup>2</sup> The hearing representative further determined that the overpayment would be recouped from appellant's continuing compensation benefits at the rate of \$75.00 every 28 days.

The Board finds that appellant received an overpayment in the amount of \$10,685.70 for the period October 1, 2000 to May 2, 2001.

The record indicates that appellant received disability compensation in the amount of \$10,685.70 for the period October 1, 2000 to May 2, 2001. The record further indicates that during this same timeframe appellant was entitled to receive weekly severance pay in the amount of \$951.20. This amount represents payment for 40 hours at appellant's hourly rate of \$23.78. At the hearing, appellant did not dispute that he received severance pay from the employing establishment over a 31-week period ending in May 2001. However, he testified that the payments of \$951.20 were dispersed on a bi-weekly basis instead of every week. He further indicated that he would provide pay stubs as verification. Appellant, however, did not submit this information post hearing.

The Board finds that appellant received severance pay equivalent to his full-time wages during the same period for which he received wage-loss compensation for 4 hours of lost wages per day. 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,

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<sup>1</sup> By letter dated May 23, 2001, the Office advised appellant that he was entitled to wage-loss compensation in the amount of \$13,341.60 for the period August 25, 2000 to May 19, 2001. The Office further advised appellant that his retroactive benefits would be reduced by \$8,749.56 due to an outstanding overpayment. Accordingly, the Office issued a check on May 25, 2001 in the amount of \$4,592.04.

<sup>2</sup> The Office initially determined that appellant was at fault because he reasonably should have been aware that he was not entitled to wage-loss compensation when there was no loss of wages. The Office hearing representative disagreed, but nonetheless found fault on the basis that appellant failed to provide information he knew or should have known to be material.

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.”<sup>3</sup> While appellant was compensated for his partial disability, the Office procedure manual clarifies that severance or separation pay may be received concurrently with partial disability compensation based upon a determination of loss of wage-earning capacity.<sup>4</sup> In this instance, although appellant received compensation based on his ability to work only four hours per day, the Office had not issued a formal decision regarding appellant’s loss of wage-earning capacity. Appellant had worked less than four weeks as a part-time modified electronics mechanic when he ceased work only July 21, 2000, and accordingly, the Office did not issue a formal wage-earning capacity determination. The Board further notes that appellant’s severance pay was equivalent to his regular full-time pay. Under the circumstances, appellant is not entitled to dual benefits. Accordingly, the Office properly determined that appellant received an overpayment in the amount of \$10,685.70 for the period October 1, 2000 to May 2, 2001.

The Board also finds that the Office properly determined that appellant was at fault in creating the overpayment.

Under section 8129 of the Act and the implementing regulations, an overpayment 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.<sup>5</sup> Waiver of an overpayment is not possible if the individual is at fault in creating the overpayment.<sup>6</sup>

Section 10.433 provides that an individual who has done any of the following will be found at fault in creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect.

The Office hearing representative found that appellant was at fault in creating the overpayment because he failed to provide information which he knew or should have known to be material. Prior to dispersing the May 25, 2001 compensation payment, the Office sent appellant a Form EN1032. Part D of the form inquires about receipt of “Other Federal Benefits or Payments.” Appellant completed the Form on April 27, 2001 and specifically responded “no” to each of the four questions regarding receipt of various other types of federal benefits. Although the Form EN1032 does not specifically request information regarding receipt of severance pay, the form inquires about “any other benefits paid by the Federal government, not including benefits under the [Act].” The Form EN1032 was intended to cover all benefits received in the 15 months prior to April 23, 2001, which includes the period of time appellant received severance pay from the employing establishment.

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<sup>3</sup> 20 C.F.R. § 10.421(c) (1999).

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

<sup>5</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437 (1999).

<sup>6</sup> 20 C.F.R. § 10.433(a) (1999).

The April 23, 2001 Form EN1032 provided sufficient information to alert appellant of the material nature of the information regarding his receipt of severance pay. Appellant, however, failed to report this information. Furthermore, appellant participated in a hearing on January 9, 2001 regarding another overpayment that arose as a result of his receipt of back pay in accordance with an April 19, 2000 settlement agreement. The hearing representative issued her opinion on April 9, 2001 and found appellant at fault for accepting compensation after appellant's representative executed an agreement indicating that appellant would have to repay any compensation received. Thus, appellant was not unfamiliar with the consequences of receiving dual benefits. Nonetheless, approximately three weeks after the hearing representative's April 9, 2001 decision, appellant failed to report his receipt of severance pay on the Form EN1032. Accordingly, the Board finds that appellant was at fault in creating the instant overpayment because he failed to provide information which he knew or should have known to be material.

With respect to the hearing representative's decision to deduct \$75.00 every four weeks from appellant's continuing compensation payments, the Board finds that such a repayment schedule is in accordance with 20 C.F.R. § 10.441(a). This section authorizes the Office to recover an overpayment by decreasing later payments of compensation. In exercising its authority under section 10.441(a), the Office must take 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>7</sup> The hearing representative acknowledged that appellant's monthly wage-loss compensation of approximately \$1,500.00 was his family's only source of income and that their reported monthly expenses exceeded this amount. Nonetheless, he properly found that the overpayment must be repaid. As the hearing representative correctly noted, it is impossible to eliminate all financial hardship given appellant's reported income and monthly expenses. However, section 10.441(a) does not require the elimination of financial hardship. The Office is required to take into account certain factors "so as to minimize any hardship."<sup>8</sup> The Board finds that the hearing representative reasonably concluded that a repayment schedule of \$75.00 every four weeks would minimize any resulting hardship while effecting recovery of the overpayment.

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<sup>7</sup> 20 C.F.R. § 10.441(a).

<sup>8</sup> *Id.*

The January 23, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
June 5, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member