

**United States Department of Labor
Employees' Compensation Appeals Board**

<p>ROYCE M. GARSHAK, Appellant</p> <p>and</p> <p>DEPARTMENT OF JUSTICE, FEDERAL CORRECTIONAL COMPLEX, Beaumont, TX, Employer</p>)))))))))	<p>Docket No. 04-0080</p> <p>Issued: December 28, 2004</p>
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Appearances:
 Royce M. Garshak, pro se
 Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
 COLLEEN DUFFY KIKO, Member
 DAVID S. GERSON, Alternate Member
 MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 29, 2003 appellant filed a timely appeal from the August 13, 2003 merit decision of the Office of Workers' Compensation Programs, which denied waiver of an overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision.

ISSUES

The issues are: (1) whether the Office properly denied waiver of the \$51,715.91 overpayment appellant received from the Office's use of an incorrect pay rate; and if so, (2) whether the Office properly set the rate of recovery from continuing compensation payments.

FACTUAL HISTORY

On the prior appeal of this case,¹ the Board affirmed the Office's November 5, 2002 final overpayment decision on the issues of fact and amount of overpayment.² The Board set aside the decision on the issue of waiver and remanded for further consideration because the Office had erroneously computed appellant's expenses and income. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

On July 14, 2003 the Office requested additional information from appellant within 30 days:

"Copies of your spouse's check stubs showing the weekly deductions taken out of her check for the following: (a) income tax; (b) SSA-FICA deduction.

"Receipt showing your rental/mortgage payment on your current residence: 10185 Stonehenge Circle, # 1319, Boynton Beach, FL.

"Receipts establishing your monthly expense of \$570.00 monthly payment on your second vehicle, and document showing the date by which this loan will be paid off, as well as receipts showing your claimed monthly payment of \$96.66 per month in insurance for this vehicle only. Your insurance statement indicating the amount you pay in insurance each renewal cycle can also be used as proof, as these usually show the semi-annual cost and may be divided by six to arrive at your monthly cost.

"Since you are claiming 'several financial responsibilities,' you **MUST** provide receipts that establish that these claimed monthly expenses are **FIXED** monthly expenses, not covered by health insurance, and/or other sources, from who you receive disbursements." (Emphasis in the original.)

Appellant replied on July 17, 2003.

In a decision dated August 13, 2003, the Office denied waiver of recovery. Using the information appellant supplied to augment information obtained during an October 15, 2002 conference call, the Office determined that net monthly income exceeded net monthly expenses by \$387.43. The Office explained the basis of its decision to recover the overpayment:

"It has been determined, that the circumstances of your case **DO NOT** warrant waiver of recovery of the \$51,715.91 (original amount) which you owe the US government, and that you should be absorbed [sic] of any liability to repay this amount, as you have requested.

¹ Docket No. 03-0392 (issued April 8, 2003).

² Fault was not an issue on appeal because the Office found appellant without fault in the matter.

“Further, the evidence that you have submitted, has NOT demonstrated that recovery in the amount of \$300.00 as previously determined and recovery of the debt will cause undue hardship, as claimed.

“It has been concluded that the circumstances in your case do not warrant a waiver of recovery. The Office will continue its deduction of \$300.00 each pay cycle from your compensation check, until the full amount of the debt, plus appropriate interest has been recovered. Your request for waiver is denied.” (Emphasis in the original.)

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees’ Compensation Act provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Section 8129(b) describes the only exception:

“Adjustment or recovery by the United States may not be made when incorrect payment had 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.”³

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 (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.⁴

Under Office procedures, an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. If this condition is met *and* the individual’s nonexempt assets do not exceed \$5,000.00 (the asset limit for an individual with a spouse), recovery of an overpayment will defeat the purpose of the Act and warrant waiver. Waiver requires that both conditions be met.⁵

The burden is on the claimant to show that the expenses are reasonable and needed for a legitimate purpose. But if the Office determines that the amount of certain expenses is not ordinary and necessary, particularly regarding the significant expenses of food, clothing and vehicles, the Office must state in writing the reasons for the finding. The finding must be

³ 5 U.S.C. § 8129(b).

⁴ 20 C.F.R. § 10.436 (1999).

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6.a(1) (April 2003).

supported by rationale, which may include reference to recognized research data (such as current statistics from the Bureau of Labor Statistics) that would show that the claimant's expenses exceed the average or range of expenses for the general population relevant to the claimant's circumstances.⁶

ANALYSIS -- ISSUE 1

The Office noted that appellant's current compensation payments are \$2,592.00 each 28 days, from which \$148.58 is deducted for health insurance premiums, leaving \$2,443.42. Multiplying by 13 pay cycles per year and dividing by 12 months, this translates to a net monthly income of \$2,647.04. A pay stub for appellant's wife shows that she has net income of \$768.60 on a biweekly basis, which means every two weeks, not twice a month or semi-monthly, as appellant suggests on appeal. Multiplying by 26 pay cycles per year and dividing by 12 months, this translates to a net monthly income of \$1,665.08. Net monthly income therefore totals \$4,312.12.

The Office accepted net monthly expenses of \$3,931.65. In making this finding, the Office disallowed only a few expenses, including \$54.28 in long distance telephone calls, \$54.50 for cable services and an undocumented amount for storage rental, all on the grounds that these items were not considered "essential" living expenses. The proper standard of review is whether these living expenses are "ordinary and necessary." As the Board noted earlier, if the Office finds that certain expenses are not ordinary and necessary, it must state the reasons for this finding. Here, the Office made no showing that long distance telephone calls and cable television service are not ordinary and necessary living expenses.⁷ The Board finds, however, that this lack of rationale was harmless error: Were the Office to allow the full amount claimed for both these expenses, monthly income would still exceed monthly expenses by \$271.69, well over the \$50.00 buffer specified in the Office's procedures.⁸ For this reason, the Board will affirm the Office's August 13, 2003 denial of waiver on the grounds that appellant does not need substantially all of his current income to meet current ordinary and necessary living expenses, and therefore recovery of the overpayment will not defeat the purpose of the Act.⁹

LEGAL PRECEDENT -- ISSUE 2

Office regulations provide 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. If no refund is made, the Office shall decrease later payments of compensation, taking into account the

⁶ *Id.* at Chapter 6.0200.6.a(3).

⁷ The lack of documentation for storage rental charges is sufficient to support the Office's disallowance without an examination of whether the expense is ordinary and necessary.

⁸ *See supra* note 5.

⁹ The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board therefore has no jurisdiction to review new evidence or documentation of monthly expenses submitted by appellant on appeal.

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.¹⁰

ANALYSIS -- ISSUE 2

In its August 13, 2003 decision, the Office set the rate of recovery from continuing compensation at \$300.00 each pay cycle, or \$325.00 per month (\$300.00 times 13 pay cycles per year divided by 12 months). Knowing the probable extent of future payments, the rate of compensation and appellant's financial circumstances, the Office was well able to take into account the factors specified in the regulation above. As appellant's monthly income exceeds his monthly expenses by \$380.47, recovery at the rate of \$325.00 per month should help to minimize, but not necessarily eliminate, any hardship on appellant in repaying the debt. This is so even if the Office had allowed some expense for long distance telephone calls and cable television service based on statistics from the Bureau of Labor.¹¹ The Board will affirm the Office's August 13, 2003 decision on the issue of rate of recovery.

CONCLUSION

The Board finds that the Office properly denied waiver of the \$51,715.91 overpayment appellant received in this case. The Board also finds that the Office properly set the rate of recovery from continuing compensation.

¹⁰ 20 C.F.R. § 441(a) (1999).

¹¹ The Office used these statistics to allow a certain amount of expense for vehicle maintenance, prescription and nonprescription medication and medical services.

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 28, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member