

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

SAMUEL A. RAY, Appellant

and

**DEPARTMENT OF THE ARMY,
Fort Sam Houston, TX, Employer**

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**Docket No. 05-1440
Issued: December 12, 2005**

Appearances:

*David J. Moussette, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On June 23, 2005 appellant filed a timely appeal from the February 9, 2005 merit decision of the Office of Workers' Compensation Programs which found that he received an overpayment of \$151,032.98 and that waiver of the recovery of the overpayment was not warranted. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$151,032.98; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On July 23, 1986 appellant, then a 53-year-old mail clerk, filed a traumatic injury claim alleging that on July 15, 1986 he sustained an injury to his neck while lifting mailbags from the vehicle to the loading cart. The Office accepted his claim for aggravation of spondylosis and appropriate compensation benefits were paid.

By letter dated December 24, 2003, the Office informed appellant that he received dual benefits from the Department of Veterans Affairs (VA) and the Office and that he was required to make an election between the Office and VA benefits. He responded that effective March 1, 2004 he elected to receive disability benefits from VA in lieu of compensation benefits from the Office. By letter dated February 10, 2004, the Office informed the employing establishment that appellant's compensation would be terminated as of March 1, 2004.

By letter dated December 10, 2004, the Office informed appellant that he had received an overpayment. The Office noted that he had a 10 percent VA award on September 8, 1989, but that his disability with VA for his neck was increased on April 14, 1992 to 60 percent to reflect the additional impairment caused by the work-related injury. As appellant received disability benefits from the Office at the same time, this constituted a dual benefit. The Office informed him that, since he received increased VA benefits from April 14, 1992 until February 29, 2004, he must make an election between the entire amount received from the Office from April 14, 1992 to February 29, 2004 and the amount of the increase appellant received from VA over the original impairment percentage (10 percent), since September 8, 1989.¹

On December 20, 2004 appellant elected to receive increased benefits from VA effective April 14, 1992 at the 60 percent rate for his neck in lieu of benefits from the Office.

On January 3, 2005 the Office calculated the amount of the overpayment due to receipt of dual benefits as \$151,032.98.

On January 10, 2005 the Office advised appellant that a preliminary determination had been made with respect to an overpayment of compensation during the period April 12, 1992 to February 29, 2004. The Office advised him that due to his receipt of dual benefits from the Office and VA an overpayment had occurred in the amount of \$151,032.98, but that appellant was not at fault in the creation of the overpayment. The Office explained the procedure for appellant to request a waiver of the overpayment and noted that waiver would be denied if the required material was not received within 30 days. No response was received within 30 days.

In a decision dated February 9, 2005, the Office determined that the circumstances did not warrant waiver of the overpayment and requested that appellant forward a check in the amount of \$151,032.98 or contact the Office so that appropriate payment arrangements can be made.

¹ The Office noted that at the time appellant's benefits were terminated on March 1, 2004 he was in receipt of compensation entitlement of \$1,071.00 every 28 days which equated to \$267.75 a week. The Office noted that this equated to compensation every four weeks of \$1,071.00 for every 28 days or \$1,147.50 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Federal Employees' Compensation Act provides:

“(a) While an employee is receiving compensation under this subchapter or if he has been paid a lump sum in computation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive a salary, pay or remuneration of any type from the United States, except --

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) other benefits administered by VA unless such benefits are payable for the same injury or the same death; and
- (4) retired pay, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services....”²

ANALYSIS -- ISSUE 1

Appellant was in receipt of a 10 percent VA award for cervical injury on September 8, 1989. However, the VA increased this award on April 14, 1992 to 60 percent to reflect the additional impairment caused by the employment injury of July 15, 1986. On December 20, 2004 appellant elected to receive increased benefits from VA in lieu of benefits from the Office effective April 14, 1992. Accordingly, an overpayment occurred as a result of him receiving dual benefits. The Office calculated this overpayment as \$151,032.98, based upon his receipt of \$1,071.00, every 28 days or \$1,147.50, every month during the period of the overpayment. The Board will affirm the Office's decision that appellant received an overpayment of \$151,032.98, due to receipt of dual benefits from VA and the Office.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.³ If the Office finds that the

² See also 20 C.F.R. § 10.435(a).

³ 20 C.F.R. § 10.433(a) (1999).

recipient of an overpayment was not at fault, repayment will still be required unless; (1) adjustment or recovery of the overpayment would defeat the purpose of the Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁴

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 Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.⁵

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.⁶

ANALYSIS -- ISSUE 2

Although the Office found that appellant was without fault in the matter of the overpayment, he nonetheless bears responsibility for providing financial documents. The Office explained the importance of this financial information and advised him that it would deny waiver if he failed to furnish the information within 30 days. Within the required 30-day period, appellant did not submit the financial information. Under these circumstances, the Office regulations mandate denial of waiver. The Board will affirm the Office's decision on the issue of waiver.⁷

CONCLUSION

The Board finds that the Office correctly found that appellant received an overpayment of \$151,032.98 and that the Office properly denied waiver of the overpayment.

⁴ *Id.* 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 expense; 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. *Id.* at § 10.436. 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. *Id.* at § 10.437(a). 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. *Id.* at § 10.437(b).

⁵ *Id.* at § 10.438(a).

⁶ *Id.* at § 10.438(b).

⁷ The Board notes that subsequent to the Office's February 9, 2005 decision appellant submitted additional evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision; see *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952); 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 9, 2005 is affirmed.

Issued: December 12, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board