

L5-S1. She received compensation for temporary total disability on the periodic rolls and underwent a posterior fusion of L5-S1 on May 15, 2003.

On January 21, 2004 the employing establishment notified the Office that appellant had resigned her position effective May 31, 2003:

“She was affected by a [r]eduction-[i]n-[f]orce (RIF) and elected to defer her retirement benefits until age 62 to avoid a reduction; she also was paid a Voluntary Separation Incentive Payment (VSIP) of \$25,000.00. The VSIP agreement indicates that an employee who receives the buyout and accepts employment with the Government of the United States within five years of separation will be required to repay the entire amount (gross, before taxes and deductions).”

On March 5, 2004 the Office made a preliminary finding that appellant was overpaid \$25,000.00 in compensation because she received a VSIP in that amount: “The employing agency verified the VSIP and that your retirement¹ was effective May 31, 2003. The VSIP is offset dollar for dollar. The offset would have been from June 1, 2003 to February 1, 2004.” The Office also made a preliminary finding that appellant was at fault in creating the overpayment.

Appellant requested that the Office make a decision on the issues of fault and waiver based on the written evidence. She argued that she was not at fault in the matter and that the Office should waive recovery because recovery would be against equity and good conscience:

“I acted on incorrect information provided to me by my employing agency and spent funds which I otherwise would not have. In all honesty, if I had known I would *not* have taken the VSIP. The monies I received went into property I am now living at. To repay the full \$25,000.00 when I only collected after taxes a little over \$12,500.00 would be a tremendous hardship on me, as would repaying the \$12,5000.00.” (Emphasis in the original.)

In a decision dated October 22, 2004, the Office finalized its preliminary findings. The Office found that appellant received an overpayment of \$25,000.00 because she received a VSIP of \$25,000.00 while receiving compensation for total disability. The Office also found that she was at fault in the matter and therefore was not eligible for waiver.

On appeal, appellant argued that she was not at fault and noted the absurdity of accepting a buyout she would have to pay back:

“I understood this was a separation incentive because we were losing our jobs. Other people who lost their jobs were able to collect unemployment benefits without a conflict. My God, why would I accept a \$25,000.00 buyout if I knew I would have to pay it back? This just doesn’t make sense. And it’s important to know that I only received \$12,566.15 after taxes. Now I’m asked to pay back a

¹ As the employing establishment advised, appellant resigned her position on May 31, 2003. She did not retire.

full \$25,000.00. Therefore it would cost me an extra \$12,433.85?!! I just don't understand.”

On August 11, 2005 in response to the Board's request for a pleading, the Director of the Office filed a motion to affirm in part and remand in part. He cited statutory and regulatory provisions prohibiting concurrent receipt of compensation for total disability and separation pay. The Director also cited Office procedures supporting a dollar-for-dollar offset against compensation, rendering the amount of the overpayment \$25,000.00. He acknowledged, however, that he was now persuaded that appellant was without fault in the creation of the overpayment. He requested that the Board affirm fact and amount of overpayment, find that the case was not in posture for decision on the issue of waiver, and remand the case for a new preliminary overpayment decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² Section 8116, however, limits the right of an employee to receive compensation: “While an employee is receiving compensation ... [she] may not receive salary, pay, or remuneration of any type from the United States.”³ More specifically, section 10.421 of the implementing regulations provides that an employee may not receive compensation for total disability concurrently with separation pay.⁴ When the Office discovers concurrent receipt, it must declare an overpayment of compensation and give the usual due process rights.⁵

ANALYSIS -- ISSUE 1

While receiving compensation for total disability resulting from her March 21, 2002 employment injury, appellant entered into a voluntary separation incentive pay agreement that paid her \$25,000.00 in exchange for her voluntary resignation. Although compensation under the Act is paid for the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury,⁶ and although appellant was no less disabled for having accepted the buyout, the law is clear: she may not concurrently receive compensation for total disability and separation pay.

When they entered into the VSIP agreement, neither appellant nor the employing establishment, it appears, understood that the Office's regulations prohibiting concurrent receipt effectively remove the incentive for voluntary separation, at least where the employee is totally

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8116(a) (with specified exceptions).

⁴ 20 C.F.R. § 10.421(c) (1999).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.d(4) (April 1996).

⁶ This is the definition of disability. 5 U.S.C. § 10.5(f) (1999).

disabled for work as a result of an employment injury. Suspension or recovery by the Office of an amount of compensation equal to the total amount of the incentive, or payable for the number of weeks the incentive represents, effectively leaves the employee no consideration in exchange for her resignation. Thus appellant's complaint on appeal: "My God, why would I accept a \$25,000.00 buyout if I knew I would have to pay it back?" The Board appreciates appellant's position but may not rewrite the law. Because her separation pay created an overpayment of compensation, the Board must affirm the Office's October 22, 2004 decision on the issue of fact of overpayment.⁷

LEGAL PRECEDENT -- ISSUE 2

Employing agencies may offer separation pay or buyouts to encourage employees to leave federal employment voluntarily. Separation pay is offered in different forms by different agencies. Sometimes it is defined as a number of weeks of pay, and other times as a specific amount of money. How separation pay is defined is determined by the law governing the operations of the agency in question. For example, in 1992 the Postal Service calculated its payments as six months of the employee's base pay, while the Department of Defense, beginning in 1993, used the amount of severance pay to which the individual would have been entitled, or \$25,000.00, whichever was less. The Office's method of offset differs somewhat according to how an agency defines the separation pay.⁸

Office procedures provide that compensation for temporary total disability may not be paid "for the period covered by ... separation pay."⁹ Where separation pay is based on weeks of pay, the Office should suspend compensation payments for the period in question, effective the date of separation, by a 100 percent offset for the number of weeks (not the amount of money) that the separation pay represents.¹⁰ Where separation pay is based on an amount of money, the total dollar amount of separation pay should be applied to the amount of compensation for wage loss on a dollar-for-dollar basis. The claimant should be advised of the approximate time the offset will end.¹¹

ANALYSIS -- ISSUE 2

The employing establishment notified the Office that appellant received a VSIP in the amount of \$25,000.00. According to Office procedures, the total dollar amount of this separation pay should be applied to the amount of compensation appellant received for wage loss on a dollar-for-dollar basis. The Office followed these procedures when it determined that appellant

⁷ *Kathleen L. Alder*, Docket No. 03-1339 (issued August 1, 2003) (holding that the claimant may not receive compensation for temporary total disability during the period represented by her separation incentive, which was half a year).

⁸ FECA Bulletin No. 96-02 (issued November 5, 1995).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.c(1) (April 1996).

¹⁰ *Id.* at Chapter 2.1000.17.d(1).

¹¹ *Id.* at Chapter 2.1000.17.d(3).

received an overpayment of compensation equaling the total dollar amount of the separation pay, or \$25,000.00.

The Board, however, can find no justification for this method of offset. Neither the Office bulletin that announced this method¹² nor the Office procedure manual that incorporates it¹³ identifies a rational basis for distinguishing the separation pay offered by different agencies. The Office procedure manual simply explains that separation pay is offered in different forms by different agencies, sometimes as a number of weeks of pay, other times as a specific amount of money. But a buyout based on a number of weeks of pay can be expressed as an amount of money, and a buyout based on an amount of money can be expressed as a number of weeks of pay. So the distinction appears arbitrary. The mere fact that different agencies offer separation pay in one form or the other is no basis for the Office to apply different methods of offset, particularly when one method works a harsher result on some federal employees.

Take an employee who works for the Postal Service. She receives a VSIP worth six months of her base pay, which happens to come to the same \$25,000.00 appellant received. Under Office procedures, because the agency based the separation pay on an amount of time, the Office would offset the employee's compensation 100 percent, effective the date of separation, for a period of six months. The compensation paid over these six months, or the overpayment arising in this scenario, is always going to be significantly less than \$25,000.00, because compensation is paid tax free at a rate of three-fourths of the employee's monthly pay, assuming she has a dependent.¹⁴ So this employee finds herself in a more favorable position than appellant simply because her agency offered the same incentive in one form and not the other.

The Board finds that the Office has not justified calculating the overpayment in appellant's case under the harsher dollar-for-dollar method of offset. For this reason the Board finds that the case is not in posture for a decision on the issue of the amount of the overpayment. On remand, the Office shall calculate the amount of the overpayment by applying the method of offset used when a buyout is based on weeks of pay.

LEGAL PRECEDENT -- ISSUE 3

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.¹⁵ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless

¹² *Supra* note 8.

¹³ *See* text accompanying note 11, *supra*.

¹⁴ 5 U.S.C. §§ 8105(a), 8110(b). A dollar of compensation is therefore worth more than a dollar of monthly pay. The Office's dollar-for-dollar method of offset erroneously equates the two.

¹⁵ 20 C.F.R. § 10.433(a) (1999).

- (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.¹⁶

ANALYSIS -- ISSUE 3

The Office found that appellant was at fault in creating the overpayment, thereby precluding consideration of waiver. But the director of the Office has since filed a motion on appeal stating that he is now persuaded appellant was not at fault. The Board accordingly finds that this case is not in posture for decision on the issue of waiver. The Board will remand the case to the Office for a new preliminary overpayment decision finding appellant to be without fault and affording her the usual due process rights, including an opportunity to submit current financial documentation to support waiver and to determine, if necessary, a repayment schedule. In deciding whether to waive the overpayment, the Office shall consider carefully whether recovery of the overpayment will be against equity and good conscience because appellant, in reliance on the overpaid compensation, gave up a valuable right or changed her position for the worse.¹⁷

CONCLUSION

The Board finds that an overpayment of compensation arose in this case when appellant received separation pay concurrently with compensation for total disability. The case is not in posture on the amount of the overpayment because the Office did not justify its use of the dollar-for-dollar method of offset. The case is also not in posture on the issue of waiver because the director of the Office is now persuaded that appellant was not at fault in creating the overpayment, making her eligible for consideration of waiver. Further development is therefore warranted.

¹⁶ *Id.* at § 10.434. 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. *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).

¹⁷ In support of her initial request for waiver, she argued recovery would be against equity and good conscience: "In all honesty, if I had known I would *not* have taken the VSIP."

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2004 decision of the Office of Workers' Compensation Programs is affirmed on the issue of fact of overpayment and is set aside on the issues of amount of overpayment and fault. The case is remanded for further action consistent with this opinion.

Issued: November 9, 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