

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

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MARSHA J. HINES-WAHRBURG, Appellant

and

DEPARTMENT OF THE NAVY, CAMP  
LEJEUNE, NC, Employer

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**Docket No. 06-439  
Issued: May 12, 2006**

*Appearances:*  
*Marsha J. Hines-Wahrburg, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On December 19, 2005 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated August 26, 2005 which denied entitlement to dual benefits and dated September 12, 2005 which found that she received an overpayment of compensation in the amount of \$14,585.60. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant was not entitled to receive a dual benefit consisting of a \$25,000.00 retirement incentive and wage-loss compensation; (2) whether appellant received an overpayment in compensation in the amount of \$14,585.60 for the period April 30 through November 27, 2004; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office properly required repayment of the overpayment by deducting \$300.00 every four weeks from appellant's continuing compensation.

## **FACTUAL HISTORY**

On September 1, 1998 the Office accepted that appellant, then a 43-year-old military personnel clerk, sustained an employment-related cervical strain. She began working four-hour days and returned to full duty on July 19, 1999. On August 6, 2003 she filed a CA-2a form, alleging that she sustained a recurrence of disability on July 21, 2003. On October 15, 2003 the Office accepted the recurrence claim and appellant was placed on the periodic compensation rolls. Her claim was expanded to include aggravation of cervical disc herniation at C4-6 with bulging at C6-7 and aggravation of cervical spondylosis at C4-5.<sup>1</sup> On June 16, 2004 the employing establishment informed the Office that appellant had retired, effective April 30, 2004, and received a separation incentive of \$25,000.00. In a letter dated December 29, 2004, the Office of Personnel Management (OPM) informed the Office that appellant had elected civil service retirement effective November 28, 2004.

By decision dated February 18, 2005, the Office found that appellant was not entitled to receive wage-loss compensation for temporary total disability and the separation incentive pay that she elected to receive. The Office provided calculations to show that her wage-loss compensation was based on a weekly pay rate of \$642.15 which, at the augmented 75 percent rate, yielded weekly compensation of \$481.61. When the weekly compensation was divided into the \$25,000.00 incentive payment, 51.91 weeks of compensation were offset, or for the period April 30, 2004 to April 28, 2005. Her compensation was suspended for this period. On March 10, 2005 appellant requested a review of the written record.

On March 22, 2005 the Office issued a preliminary finding that an overpayment in compensation of \$14,585.60 had been created for the period April 30 through November 27, 2004. The Office explained that the overpayment resulted because, pursuant to section 10.421(c) of Office regulations, injured workers are not entitled to receive compensation benefits concurrently with severance or separation pay. As appellant received a retirement incentive of \$25,000.00 on April 30, 2004, she was not entitled to the \$14,585.60 in compensation benefits she received for the period April 30 through November 27, 2004. She was found to be without fault in the creation of the overpayment.

On April 18, 2005 appellant requested a decision on the record regarding the preliminary overpayment finding. She submitted an overpayment questionnaire in which she noted a monthly income of \$2,681.67 and expenses of \$2,562.42, plus \$9,000.00 of equity in a time-share. In an attached statement, she argued that repayment would cause financial hardship and documented additional medical expenses, expenses regarding her husband's father, and provided other financial information.<sup>2</sup>

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<sup>1</sup> The record indicates that by decision dated June 9, 2004, the Office found an overpayment in compensation in the amount of \$255.92 caused by an incorrect life insurance deduction. This amount was withheld from appellant's next compensation payment. Appellant did not appeal this decision.

<sup>2</sup> The record indicates that appellant received OPM retirement benefits from November 28, 2004 through April 29, 2005, when she elected to receive benefits under the Federal Employees' Compensation Act. She was returned to the periodic compensation rolls effective that day.

By decision dated August 26, 2005, an Office hearing representative modified the February 18, 2005 decision to find that appellant was not entitled to compensation benefits for the period April 30, 2004 to April 26, 2005 due to her receipt of separation pay, a prohibited dual benefit whose total dollar amount must be applied to appellant's wage-loss compensation beginning April 30, 2004. The hearing representative modified the decision to show that appellant's compensation rate was increased on March 1, 2005 to \$498.00 per week, based on a cost-of-living increase, which would place the ending date of the offset at April 26, 2005.

On September 12, 2005 the Office finalized the overpayment decision. The Office found that appellant was not at fault but denied waiver noting that, even though monthly household income exceeded household expenses as her additional asserts exceeded the resource base of \$8,000.00, she would not meet the financial criteria for waiver. The Office ordered repayment by deducting \$300.00 every four weeks from appellant's continuing compensation.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8116(a) of the Act<sup>3</sup> defines the limitations on the right to receive compensation benefits. This section of the Act provides in pertinent part as follows:

*“(a) While an employee is receiving compensation under this subchapter, . . . he may not receive 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 the [Department of Veterans Affairs] unless such benefits are payable for the same injury or the same death....”<sup>4</sup>

Section 8116(b) provides that in such cases an employee shall elect which benefits he or she shall receive.<sup>5</sup> Thus, the Act prevents payment of dual benefits in cases where an employee receives an incentive for voluntary retirement and receives compensation benefits for total disability.<sup>6</sup> Section 10.421(c) of Office regulations states that an employee may not receive compensation for total disability concurrently with severance pay or separation pay.<sup>7</sup>

When an employee voluntarily retires from an employing agency and receives separation incentive pay, this separation incentive pay is remuneration from the United States in

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8116(a).

<sup>5</sup> 5 U.S.C. § 8116(b).

<sup>6</sup> *Michael A. Grossman*, 51 ECAB 673 (2000).

<sup>7</sup> 20 C.F.R. § 10.421(c).

consideration of the voluntary retirement. This pay, therefore, falls under both the category of “pay” and the category of “remuneration of any type” as specified in section 8116. An employee who receives “pay” in the form of separation incentive pay is not eligible for compensation benefits during the period of that “pay.”<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant was not entitled to receipt of compensation for temporary total disability for the period April 30, 2004 through April 26, 2005 because she was receiving separation incentive pay for that same period. When she voluntarily retired from the employing establishment effective April 30, 2004, she accepted a lump-sum separation incentive payment of \$25,000.00 which covered the period April 30, 2004 through April 26, 2005.<sup>9</sup> This separation incentive payment was remuneration from the United States in consideration of her voluntary retirement and, therefore, falls under both the category of “pay” and the category of “remuneration of any type” as specified in section 8116 of the Act. Section 8116 makes clear that an employee cannot receive both “pay” and compensation during the same period. As appellant received “pay” in the form of a separation incentive of \$25,000.00, she was not eligible for wage-loss compensation until this amount was offset, as she was not eligible to receive separation pay or a buyout for the same period that she was receiving wage-loss compensation under the Act. The receipt of both for the same period constitutes dual benefits, which is precluded by section 8116. Consequently, she was not eligible to receive compensation benefits for loss of wages until that amount was offset, or for the period April 30, 2004 to April 26, 2005.<sup>10</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

When an overpayment has been made to an individual 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 the individual is entitled.<sup>11</sup> When an overpayment has been made to an

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<sup>8</sup> *Id.* See *William Taylor*, 50 ECAB 234 (1999); see also FECA Bulletin No. 95-24, issued August 23, 1995, which states: “In instances where the employing agency has granted severance pay to employees who are involuntarily separated due to reduction-in-force, or where the employing agency has offered separation pay ‘buyout,’ compensation must be suspended. Both severance pay and separation pay constitute dual benefits.”

<sup>9</sup> The record demonstrates that appellant’s weekly pay rate on April 30, 2004, when the offset period began, was \$642.15 yielding compensation at the  $\frac{3}{4}$  augmented rate of \$481.61. Appellant remained on the periodic rolls until November 27, 2004 when she elected OPM retirement. This compensation rate would have been effective until February 28, 2005, and for this period of 305 days, compensation would total \$20,984.44. Beginning March 1, 2005, appellant’s compensation rate would have been \$498.00, based on a cost-of-living increase. Dividing the remaining \$4,015.56 to be offset by \$498.00 yields 56.44 days, placing the ending date for offset at April 26, 2005.

<sup>10</sup> *Supra* note 7.

<sup>11</sup> 5 U.S.C. § 8129(a).

individual who is not entitled to further payments, the individual shall refund to the Office the amount of the overpayment soon as the error is discovered or his or her attention is called to same.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant received an overpayment in compensation in the amount of \$14,585.60. As stated above, appellant received a retirement incentive in the amount of \$25,000.00 when she retired effective April 30, 2004. The record demonstrates that for the period April 30 through November 27, 2004 when she elected OPM retirement benefits, appellant received wage-loss compensation in the amount of \$14,585.60. The receipt of both incentive pay and compensation for temporary total disability for the same period constitutes dual benefits, which is precluded by section 8116 of the Act.<sup>13</sup> The amount of incentive pay must be offset on a dollar-for-dollar basis.<sup>14</sup> As appellant concurrently received separation pay and compensation for temporary total disability for this period, an overpayment in compensation in the amount of \$14,585.60 was created.

### **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.<sup>15</sup> If the Office finds that the 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.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup> Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such

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<sup>12</sup> 20 C.F.R. § 10.441(b).

<sup>13</sup> *Supra* note 5.

<sup>14</sup> *See Willard S. Moger, Jr.*, 51 ECAB 550 (2000).

<sup>15</sup> 20 C.F.R. § 10.433(a).

<sup>16</sup> 20 C.F.R. § 10.434.

<sup>17</sup> 20 C.F.R. § 10.436.

<sup>18</sup> 20 C.F.R. § 10.437(a).

payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>19</sup>

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.<sup>20</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that appellant was without fault in the creation of the overpayment in compensation. Waiver must therefore be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.<sup>21</sup>

Appellant submitted an overpayment questionnaire and additional financial information which demonstrated that monthly expenses exceeded monthly income. She, however, also indicated that she had \$9,000.00 equity in a time-share. Subsections (a) and (b) of section 10.436 of Office regulations are meant to be read conjunctively. Thus, a claimant must meet both conditions before recovery will defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, a claimant must show that he or she needs substantially all of his or her income to meet current and ordinary living expenses and also that his or her assets do not exceed the applicable resource base.<sup>22</sup> Office procedures provide that waiver would defeat the purpose of the Act if the assets of a claimant with a dependent do not exceed \$8,000.00.<sup>23</sup> Appellant's \$9,000.00 in time-share equity exceeds the amount stipulated as the maximum allowable for a claimant with a dependent, or \$8,000.00. She, therefore, has not demonstrated that recovery would defeat the purpose of the Act as is required for waiver.<sup>24</sup>

With respect to whether recovery would be against equity and good conscience, section 10.437(a) provides that 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 or show that he or she gave up a valuable right or changed his or her position for the worse in reliance on the overpaid compensation.<sup>25</sup> In this

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<sup>19</sup> 20 C.F.R. § 10.437(b).

<sup>20</sup> 20 C.F.R. § 10.438(a).

<sup>21</sup> 20 C.F.R. §§ 10.436, 10.437.

<sup>22</sup> 20 C.F.R. § 10.436; see *William S. Moger, Jr.*, *supra* note 14.

<sup>23</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (May & October 2004).

<sup>24</sup> *Id.*

<sup>25</sup> 20 C.F.R. § 10.437.

case, while appellant argued that repayment would cause financial hardship and submitted financial information, she provided no specific explanation in this regard other to indicate increased medical expenses and document expenses regarding her father-in-law. The applicable regulatory section applies only to the beneficiary.<sup>26</sup> There expenses for her father-in-law should not be considered. Furthermore, she did not explain whether the medical expenses listed were for her or her husband or whether they were covered under the Act.<sup>27</sup> Appellant therefore has not demonstrated the severe financial hardship contemplated under Office regulations, and as she made no argument that she gave up a valuable right or changed her position for the worse in reliance on the overpaid compensation, the Office properly determined that recovery would not be against equity and good conscience. The Board therefore finds that the Office properly denied waiver of the overpayment and is required by law to recover the debt by decreasing later payments to which appellant is entitled.<sup>28</sup>

#### **LEGAL PRECEDENT -- ISSUE 4**

The Office's implementing regulation provides that, if an overpayment of compensation has been made to an individual entitled to further payments and 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.<sup>29</sup>

#### **ANALYSIS -- ISSUE 4**

The Board finds that the Office gave due regard to the relevant factors noted above in setting a rate of recovery of \$300.00 per compensation period. While appellant's reported monthly expenses exceeded her monthly income, an overpayment in compensation must be recovered in a reasonable manner. The Board therefore finds that the Office did not abuse its discretion<sup>30</sup> in finding that appellant should repay his overpayment at the rate of \$300.00 per compensation period.

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<sup>26</sup> Federal (FECA) Procedure Manual, *supra* note 23 at Chapter 6.200.6.b.

<sup>27</sup> Section 8103(a) of the Act provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation. 5 U.S.C. § 8103(a); *William D. Farrior*, 54 ECAB 566 (2003).

<sup>28</sup> 5 U.S.C. § 8129(a).

<sup>29</sup> 20 C.F.R. § 10.441(a).

<sup>30</sup> Abuse of discretion is generally shown through proof of manifest error, a clear unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. *See Wayne G. Rogers*, 54 ECAB 482 (2003).

**CONCLUSION**

The Board finds that appellant was not entitled to receive concurrent retirement incentive pay and wage-loss compensation. The Board further finds that the Office properly determined that she received an overpayment of compensation in the amount of \$14,585.60, that the Office properly denied waiver, and properly required recovery of the overpayment by deducting \$300.00 every 28 days from her continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 12 and August 26, 2005 be affirmed.

Issued: May 12, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board