



## **FACTUAL HISTORY**

On March 11, 2004 appellant, then a 42-year-old custodian, filed an occupational disease claim alleging that she suffered from plantar fasciitis in both feet as a result of walking on concrete floors during her federal employment. Her claim was accepted for bilateral plantar fasciitis and authorization was given for left plantar fascia ligament surgery, which was performed on July 10, 2003 and right plantar fascia release which was performed on May 6, 2004. Compensation and medical benefits were paid.

On September 13, 2005 the Office made a preliminary determination that appellant received an overpayment in the amount of \$2,134.82 and that she was without fault in its creation. Initially, the Office noted that appellant erroneously received augmented compensation for the period July 11 to December 25, 2004. Specifically, the Office noted that during this period appellant was paid at a compensation rate applicable to claimants with dependents as opposed to the proper rate for those without dependents. The Office noted that appellant had not lived with her ex-husband since July 11, 2004. The Office further noted that appellant's daughter did not qualify as a dependent because she had completed four years of education beyond high school and was now in her fifth year of college. The Office found that appellant was paid compensation for the period July 11 through December 25, 2004 at the augmented rate for a total of \$14,223.60 whereas appellant should have been paid compensation at the rate for a person without dependents or a total of \$12,607.60. The Office determined that the difference between these two amounts, \$1,616.00 was an overpayment. Next, the Office noted that appellant received wage loss for total disability for the period December 26, 2004 through January 22, 2005. However, the Office noted that at the same time appellant received a paycheck for work hours, holiday pay and sick leave from the employing establishment for January 14, 17, 18, 19 and 20, 2005.<sup>1</sup> The Office determined that this resulted in an overpayment of \$584.85. However, the Office noted that it deducted too much for basic and optional life insurance for the period January 8 through February 9, 2005 and, therefore, gave appellant a credit of \$66.03. The Office then determined that the amount of appellant's overpayment was \$2,134.82. The Office indicated that, if appellant wished a hearing, she should contact the Office within 30 days. The Office also informed appellant that, if she wished to pursue waiver of the overpayment, she should complete the enclosed financial form and submit supporting documents including, *inter alia*, income tax returns, bills and pay slips.

On November 11, 2005 appellant requested a precoupment hearing on the issues of fault and possible waiver of the overpayment and submitted financial documentation.

By decision dated December 8, 2005, the Office's Branch of Hearings and Review denied appellant's request for a hearing as it was not made within 30 days of the date of the September 13, 2005 preliminary determination of an overpayment. The Office further stated that it also denied appellant's request under its discretionary power as it found that the request could be equally well addressed by requesting reconsideration.

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<sup>1</sup> The Office noted that appellant returned to work on January 14, 2005, worked for 3.9 hours and used annual leave for the rest of the day. Appellant was not scheduled to work on January 15 or 16, 2005. She received holiday pay for January 17, 2005 and sick leave for January 18, 19 and 20, 2005.

On November 23, 2005 appellant submitted a completed overpayment recovery questionnaire. She listed her monthly income as \$2,088.00. She listed her monthly expenses as \$650.00 for rent or mortgage, \$300.00 for food, \$50.00 for clothing, \$520.00 for utilities and \$260.00 for other expenses. Appellant indicated that she made monthly car payments of \$220.11 and paid \$120.00 a month on two other loans. She listed her assets as cash on hand of \$10.00, checking account balance. In support thereof, appellant submitted copies of her bank statements.

By decision dated January 26, 2006, the Office finalized its finding that appellant received an overpayment of compensation in the amount of \$2,134.82. The Office noted that appellant had not “provided any documentation to support your expenses or your income as outlined on the OWCP-20 form. However, you have completed the form, provided a statement ... and made numerous [tele]phone calls to our office outlining your financial situation.” The Office thus declined appellant’s application for waiver but ordered monthly payments in the amount of \$150.00 to avoid appellant having to pay a lump sum and ordered the payment starting March 1, 2006 and continuing each month until the payment had been made in full.

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

Section 10.432 of the Office’s regulations provides that in response to a preliminary notice of an overpayment, a claimant may request a precoupment hearing within 30 days of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.<sup>2</sup>

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

By its preliminary overpayment determination dated September 13, 2005, the Office provided appellant with written notice of her right to a precoupment hearing and informed her that, in order to protect her right, she must request a hearing within 30 days of the date of the letter. On November 11, 2005 appellant requested a precoupment hearing. Appellant accordingly failed to request a hearing within 30 days of the Office’s September 13, 2005 preliminary overpayment determination. Pursuant to 20 C.F.R. § 10.432, such failure to timely request a precoupment hearing constitutes a waiver of her right to do so. The Office, therefore, properly denied appellant’s request for a precoupment hearing.<sup>3</sup>

The Office’s Branch of Hearings and Review further indicated that the overpayment issue could equally well be addressed on reconsideration. The Board notes, however, that a request for reconsideration is not available to a claimant in response to a preliminary notice of an overpayment and the only review of a final decision concerning an overpayment is to the Board.<sup>4</sup> The Office’s finding in this regard, however, is harmless error as appellant’s untimely request for a precoupment hearing waived her rights to review of the preliminary overpayment decision.

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<sup>2</sup> 20 C.F.R. § 10.432.

<sup>3</sup> *Id.*

<sup>4</sup> 20 C.F.R. §§ 10.432 and 10.440.

## LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Federal Employees' Compensation Act provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter 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.<sup>5</sup>

The basic rate of compensation paid under the Act is  $66 \frac{2}{3}$  percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, the employee is entitled to have his or her basic compensation augmented at the rate of  $8 \frac{1}{3}$  percent for a total of 75 percent of monthly pay.<sup>6</sup>

Section 8110(a)(2) of the Act provides that a husband qualifies as a dependent if he is a member of the same household as the employee, is receiving regular contributions from the employee for his support or the employee has been ordered by a court to contribute to his support.<sup>7</sup> A student qualifies as a dependent child if she is under 23 years of age, has not completed 4 years of education beyond the high school level and is regularly pursuing a full-time course of study or training at a college or university.<sup>8</sup>

## ANALYSIS -- ISSUE 2

The record in this case supports that appellant's compensation payments were at the augmented three-quarters rate from July 11 through December 25, 2004 and that appellant was no longer residing with her husband at this point.<sup>9</sup> Furthermore, the record reflects that appellant's daughter was in fifth year of post-high school education and, therefore, was no longer qualified as a dependent under the Act.<sup>10</sup> Appellant was, therefore, not entitled to augmented compensation at the three-quarters rate after July 11, 2004, the date that she stopped residing with her husband. The record shows that appellant received augmented compensation totaling \$14,223.60 for the period July 11 through December 25, 2004, when she should have received \$12,607.60 at the statutory two-thirds rate. The Board finds that an overpayment in compensation in the amount of \$1,616.00 has been created because appellant improperly received compensation at the augmented rate for the period July 11 through December 25, 2004.

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<sup>5</sup> 5 U.S.C. § 8129.

<sup>6</sup> 5 U.S.C. § 8110(b)

<sup>7</sup> 5 U.S.C. § 8110(a)(2); *Nancy J. Masterson*, 52 ECAB 507 (2001).

<sup>8</sup> 5 U.S.C. § 8101(17).

<sup>9</sup> The Board notes that appellant makes no allegation that her husband is receiving regular contributions from her or that she has been ordered by a court to contribute to his support. See 20 C.F.R. § 8110(a)(2).

<sup>10</sup> 5 U.S.C. § 8110(a)(2).

The Board further finds that appellant received an additional overpayment of compensation in the amount of \$584.85. Appellant received compensation from the Office for total disability for the period December 26, 2004 through January 22, 2005. However, appellant worked and was paid for 3.9 hours on January 14, 2005 and she took annual leave for the rest of the day. Appellant also received holiday pay for January 17, 2005 and sick leave for January 18, 19 and 20, 2006. An employee cannot be paid by the employing establishment or receive paid leave and receive compensation for the same period.<sup>11</sup> Accordingly, appellant received an overpayment of \$585.85. Finally, the Office found that it had deducted too much for life insurance premiums from December 26, 2004 through January 7, 2005. The Office found that this resulted in appellant overpaying \$66.03. The Office properly added the figures for the overpayment for improper augmentation (\$1,616.00) to the amount of overpayment for appellant receiving dual compensation (\$584.85) and subtracted the amount that appellant overpaid for life insurance (\$66.03) to arrive at the amount of the overpayment (\$2,134.82). Therefore, the Office properly found that appellant was overpaid \$2,134.82.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8129(b) of the Act provides: Adjustment or recovery by the United States may not be made when 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>12</sup> Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

Section 10.436 of the implementing regulation<sup>13</sup> provides that 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 or 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.<sup>14</sup> An individual is deemed to need all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>15</sup>

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<sup>11</sup> See *Lee B. Bass*, 40 ECAB 334 (1988); 5 U.S.C. §§ 8116, 8118.

<sup>12</sup> 5 U.S.C. § 8129(b).

<sup>13</sup> 20 C.F.R. § 10.436.

<sup>14</sup> An individual's assets must exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all the individual's assets not exempt from recoupment. See *Robert F. Kenney*, 42 ECAB 297 (1991).

<sup>15</sup> See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an 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.<sup>16</sup>

Section 10.438 of the regulations provides that 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. Failure to submit the requested information within 30 days of the request shall result in the denial of the waiver.<sup>17</sup>

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

In the instant case, appellant submitted his overpayment recovery questionnaire which listed her expenses and income. She also submitted copies of her bank records. However, she did not provide sufficient support for her expenses. No copies of income tax returns, pay slips or copies of bills were submitted, information that had been specifically requested by the Office. As appellant failed to provide sufficient documentation supporting her finances, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act or if recovery would be against equity and good conscience.<sup>18</sup>

Consequently, as appellant did not submit the financial information required by section 10.438 of the Office's regulation, which was necessary to determine eligibility for waiver, the Office properly denied waiver of recovery of the overpayment. Inasmuch as appellant has not shown that recovery of overpayment would defeat the purpose of the Act or would be against equity and good conscience, the Board finds that the Office properly denied waiver of the overpayment of compensation.

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

Section 8129(a) of the Act provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled.<sup>19</sup> However, where no further compensation benefits are due to an individual, the Board does not have jurisdiction and the recovery of an overpayment remains within the discretion of the Office. The Board's jurisdiction over recovery is limited to review of those cases where the Office seeks recovery from continuing

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<sup>16</sup> 20 C.F.R. § 437.

<sup>17</sup> 20 C.F.R. § 10.438.

<sup>18</sup> See 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

<sup>19</sup> 5 U.S.C. § 8129(a).

compensation under the Act.<sup>20</sup> For waiver under the defeat the purpose of the Act standard, appellant must show that she needs substantially all of her current income to meet current ordinary and necessary living expenses and that her assets do not exceed the resource base.<sup>21</sup>

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

With respect to the recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act.<sup>22</sup> As appellant was no longer receiving compensation benefits at the time of the January 26, 2006 decision, the Board lacks jurisdiction to review the recovery of the overpayment.

#### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for a prerecoupment hearing. The Board further finds that appellant received an overpayment in the amount of \$2,134.82 and that the Office properly denied waiver of that overpayment. The Board does not have jurisdiction to review the repayment schedule.

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<sup>20</sup> *Terry A. Keister*, 56 ECAB \_\_\_\_ (Docket No. 04-1136, issued May 23, 2005); *see also Albert Pineiro*, 51 ECAB 310 (2000).

<sup>21</sup> *See Robert W. Wenholz*, 38 ECAB 311 (1986); *see also* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a.(1) (December 2004).

<sup>22</sup> *See Robert W. Wenholz*, *supra* note 21.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 26, 2006 and December 8, 2005 are hereby affirmed.

Issued: September 26, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board