

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

L.C., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION)
OUTPATIENT CLINIC, Orem, UT, Employer)

Docket No. 07-153
Issued: April 19, 2007

Appearances:
David J. Holdsworth, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 23, 2006 appellant filed a timely appeal from the October 26, 2006 merit decision of an Office of Workers' Compensation Programs' hearing representative, finding that she received an overpayment in the amount of \$2,246.35, denying waiver of the overpayment and ordering her to repay the overpayment in the amount of \$100.00 per month. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$2,246.35; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On January 17, 2003 appellant, then a 56-year-old licensed nurse practitioner, filed an occupational disease claim. She alleged that, on December 16, 2002, she first realized that her left wrist ligament strain was caused by her federal employment. Appellant stated that she

worked at a computer station for several weeks with a computer that was not aligned properly, which caused a strain on her left outer wrist and hand. By letter dated April 22, 2003, the Office accepted appellant's claim for left wrist sprain. The Office paid her appropriate compensation.

On May 6, 2003 appellant filed a claim for compensation (Form CA-7) to buy back leave for the period March 5 through April 10, 2003. She indicated that she used 6 hours of sick leave and 2.75 hours of annual leave during the claimed period to attend medical appointments and physical therapy.

By letter dated June 27, 2003, the Office approved appellant's claim. It advised her that the amount of compensation paid to her was originally \$93.96 and subsequently changed to \$97.96. The Office further advised appellant that the full payment had been made to the employing establishment and that, if she had not already done so, she should make arrangements with the employing establishment to repay the balance for the repurchase of her leave.

On July 4, 2003 the Office issued a check in the amount of \$2,246.35 to appellant for her leave buyback claim and a check in the amount of \$93.96 to the employing establishment.

In a June 28, 2004 letter, the employing establishment stated that on July 8, 2004¹ it immediately informed the Office that a mistake had been made in issuing the \$2,246.35 check to appellant. It also contacted appellant to advise her about the mistake.

On May 20, 2005 the Office made a preliminary determination that appellant received an overpayment in the amount of \$2,246.35 because she received a check for leave buyback compensation for the period March 5 through April 10, 2003 that should have been issued to the employing establishment. The Office noted that the employing establishment received a check in the amount of \$93.96, which was owed to appellant. It determined that appellant was at fault in the creation of the overpayment because she should have been aware that she was not entitled to compensation for the stated period as the employing establishment had already paid her for this period in the form of personal leave. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if she disagreed that the overpayment occurred, with the amount of the overpayment or if she believed that recovery of the overpayment should be waived. The Office requested that she complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On June 16, 2005 appellant requested a hearing. She submitted an OWCP-20 form dated June 16, 2005 with no further evidence. Appellant indicated that she had a monthly income in the amount of \$2,280.00. She alleged monthly expenses including \$850.00 for rent; \$120.00 for food; \$30.00 for clothing; \$160.00 for utilities; \$440.00 for other expenses; \$120.85 and \$308.00 for credit union loans; and \$130.00, \$45.00 and \$20.00 for credit card bills, totaling \$2,213.85. Appellant stated that she had \$10.00 cash in hand and \$30.00 each in her checking and savings accounts, totaling \$70.00. She indicated that when she received the check in question, she was

¹ It appears that the employing establishment inadvertently stated that on July 8, 2004, rather than on July 8, 2003, it immediately informed the Office of its mistake in issuing appellant a check in the amount of \$2,246.35 on July 4, 2003.

not sure about its purpose. Appellant telephoned the Office and inquired about the amount and purpose of the check. The Office informed her that it was her leave buyback compensation and not to worry about it. Appellant stated that she again questioned whether the Office was sure she was supposed to receive the check. The Office told her that it was fine and not to worry. Appellant stated that she did not know the check was not hers and that she would not have kept it. She noted that she was eligible for a schedule award and that if she were found to be at fault in the creation of the overpayment, which she did not believe was so then, possibly some of the money could be recovered from her schedule award.

At the hearing held on July 17, 2006, appellant testified that she called the Office after receiving the \$2,246.35 check and asked about its purpose and her entitlement to it. She was advised that it was for her leave buyback request and that she could cash it. Appellant further testified that she cashed the check and was later advised by the Office that it had been issued in error. She stated that she did not recall receiving a telephone call from the employing establishment about the Office's mistake in issuing the check to her. The Office hearing representative left the record open for 30 days so that appellant could submit copies of all monthly bills and expenses for review.

By letter dated August 7, 2006, the employing establishment stated that neither it nor appellant was entitled to the check in question. It noted that appellant's CA-7 form and leave buyback worksheet for the time period March 5 through April 10, 2003 requested 8.75 hours of leave buyback. This leave was for medical appointments prior to appellant's surgery on June 24, 2003. The employing establishment further noted that appellant submitted a CA-7 form on July 30, 2003 for compensation and received \$1,154.92 for her leave without pay hours. The employing establishment reiterated its previous statement that it had notified the Office and appellant that her leave buyback request had been incorrectly processed before the check was cashed.

By letter dated August 23, 2006, appellant reiterated that she did not recall the employing establishment calling her about the Office's incorrect payment and advising her not to cash the check in question. She stated that although, she did not have a record of the call, she knew that the employing establishment had a record of it and did not question the validity of its contention. Appellant indicated that if she did receive this call, then she must have done so after she spoke to the Office and was advised by it to cash the check.

By decision dated October 26, 2006, the hearing representative found that appellant was without fault in the creation of the overpayment in the amount of \$2,246.35 but denied waiver. The hearing representative found that her monthly income in the amount of \$2,300.00² exceeded her monthly expenses of \$1,554.85³ and concluded that she did not need substantially all of her current income to meet her ordinary and necessary living expenses. The hearing representative

² Appellant testified at the July 17, 2006 hearing that her monthly income was approximately \$2,300.00.

³ The hearing representative stated that, since appellant did not submit copies of any bills to verify her claimed expenses, he credited the lower amount claimed for her expenses and disallowed other claimed expenses.

ordered appellant to repay the overpayment in the amount of \$100.00 per month because she failed to submit adequate financial documents to determine her financial status.⁴

LEGAL PRECEDENT -- ISSUE 1

Section 10.425 of Title 20 of the Code of Federal Regulations, titled “May compensation be claimed for periods of restorable leave?” provides:

“The employee may claim compensation for periods of annual and sick leave which are restorable in accordance with the rules of the employing establishment. Forms CA-7 and CA-7b are used for this purpose.”⁵

In a leave buyback case, an injured employee uses sick or annual leave to prevent wage loss after an employment injury. If a claim is accepted and the work absences would otherwise be compensable under the Federal Employees’ Compensation Act, the employee may wish to buy back this leave from the employing establishment. An employee may decide to take sick and/or annual leave in order to avoid possible interruption of income. If such employee does so decide and his or her claim for compensation is subsequently approved, such employee may arrange with his or her employing establishment to “buy back” the leave used and have it reinstated to such employee’s account. The compensation, to which the employee is entitled, may be used to pay a part of the “back” cost and the employee shall be obligated to pay the balance. No compensation payments shall be paid, however, while the employee is still in leave status. Arrangements to “buy back” leave, shall be made with the employing establishment.⁶

ANALYSIS -- ISSUE 1

The record shows that the Office incorrectly issued a check in the amount of \$2,246.35 for leave buyback compensation covering the period March 5 through April 10, 2003 and that appellant acknowledged receiving and cashing this check. During the stated time period appellant had already received sick and annual leave pay from the employing establishment for her medical appointments. The Board, therefore, finds that an overpayment occurred in the amount of \$2,246.35.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office’s discretion pursuant to statutory guidelines.⁷ The statutory guidelines are found in section 8129(b) of the Act which states: “Adjustment recovery [of an

⁴ The Board notes that on February 5, 2007, the Office granted a schedule award to appellant for a seven percent impairment of the left upper extremity.

⁵ 20 C.F.R. § 10.425.

⁶ *James R. Rowell*, 39 ECAB 869 (1988); *see also Louis H. Campbell*, Docket No. 01-587 (issued December 26, 2001).

⁷ *See Robert Atchison*, 41 ECAB 83, 87 (1989).

overpayment] by the United States may not be made when [an] 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.”⁸

Section 10.436 of the implementing regulation⁹ provides that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship in a currently or formerly entitled beneficiary because: 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.¹⁰ An individual is deemed to need substantially 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 \$50.00.¹¹

Section 10.437 provides that recovery of an overpayment is considered 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.¹²

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.¹³

ANALYSIS -- ISSUE 2

Appellant submitted her overpayment recovery questionnaire which listed her expenses and income. However, she did not provide sufficient support for her expenses. No copies of bills and expenses were submitted, information that had been specifically requested by the Office hearing representative. As appellant failed to provide sufficient documentation supporting her

⁸ See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

⁹ 20 C.F.R. § 10.436.

¹⁰ An individual’s assets must exceed a resource based on \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This includes all of the individual’s assets not exempt from recoupment. See Federal (FECA) Procedure Manual, Part 6 -- *Debt Management*, Initial Overpayment Actions, Chapter 6.6(a)(1)(b) (December 23, 2004).

¹¹ See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹² 20 C.F.R. § 10.437.

¹³ *Id.* at § 10.438.

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.¹⁴

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.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,246.35. The Board further finds that the Office properly denied waiver of the overpayment.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 19, 2007
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

¹⁴ See *id.* (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

¹⁵ 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. *Terry A. Keister*, 56 ECAB ___ (Docket No. 04-1136, issued May 23, 2005); see also *Albert Pineiro*, 51 ECAB 310 (2000). As appellant was no longer receiving compensation benefits at the time of the Office's October 26, 2006 decision, the Board lacks jurisdiction to review the recovery of the overpayment.