

FACTUAL HISTORY

The Office accepted that on July 13, 2006 appellant, then a 40-year-old federal air marshal, sustained a right hip strain and sprain while participating in a fitness assessment at work. The Office paid appellant appropriate compensation for periods of disability. On October 10, 2006 appellant underwent right hip surgery which was authorized by the Office.

In a December 8, 2006 notice, the Office advised appellant of its preliminary determination that he received a \$2,390.90 overpayment of compensation for the period October 1 to 14, 2006. The Office indicated that on October 10, 2006 appellant received a \$2,390.90 compensation check for the period October 1 to 14, 2006 and that on October 27, 2006 he received a \$2,389.40 compensation check for the period October 1 to 14, 2006. The Office stated that the \$2,390.90 overpayment occurred because appellant was only entitled to receive \$2,389.40 in compensation for the period October 1 to 14, 2006.¹

The Office also made a preliminary determination that appellant was not at fault in the creation of the overpayment. It advised appellant that he could submit evidence challenging the fact, amount or finding of fault and request waiver of the overpayment. The Office informed appellant that he could submit additional evidence through various methods including presenting it at a precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that appellant complete and return an enclosed financial information questionnaire within 30 days even if he was not requesting waiver of the overpayment.

Appellant requested a precoupment hearing in a form sent in an envelope postmarked March 5, 2007. He also requested waiver of the overpayment in the same form. Appellant argued that the overpayment should be waived because he had financial difficulties due to the fact that he only received 75 percent of his usual salary. In the financial information questionnaire completed on February 21, 2007, appellant indicated that he had \$4,660.55 in monthly expenses comprised of \$1,500.00 for mortgage and property tax payments, \$400.00 for food, \$1,400.00 for utilities, \$230.55 for second mortgage payments, \$30.00 for credit card payment and \$1,100.00 for payments of his wife's debts.² He stated that he had \$5,983.00 in monthly income but did not detail the source of this income and indicated that he had \$1,100.00 in assets comprised of checking and savings account monies.

In a May 3, 2007 decision, the Office denied appellant's request for a precoupment hearing on the grounds that his March 5, 2007 request was not made within 30 days of the December 8, 2006 preliminary notice of overpayment. The Office informed appellant that he could address his concerns regarding waiver by submitting additional information to the Office.

¹ The Office contains records showing that appellant was only entitled to receive \$2,389.40 in compensation for the period October 1 to 14, 2006 and that he was sent \$2,390.90 and \$2,389.40 compensation checks on October 10 and 27, 2006 respectively. Both checks, which were electronically transferred, specifically indicated that they covered the period October 1 to 14, 2006.

² Appellant indicated that these expenses add up to \$4,930.55 but they actually add up to \$4,660.55.

In a May 15, 2007 decision, the Office determined that appellant received a \$2,390.90 overpayment of compensation. The Office found that appellant was not at fault in the creation of the overpayment, but that the overpayment was not subject to waiver. It determined that recovery of the overpayment would not defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience. The Office indicated that appellant reported that he had \$5,983.00 in monthly income but determined that it appeared he actually had \$5,180.28 in monthly income from his monthly Office compensation payment.³ The Office found that appellant did not need substantially all of his current income to meet ordinary and necessary living expenses because his \$5,180.28 of monthly income exceeded his \$4,660.55 of monthly expenses by \$519.73. The Office indicated that appellant's financial situation showed that it was reasonable to require repayment of the overpayment by deducting \$200.00 from his compensation payments every four weeks.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁴ Section 8129(a) of the 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.”⁵

Section 8116(a) of the Act provides that, while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁶

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received a \$2,390.90 overpayment of compensation. Appellant received \$4,730.30 in compensation for the period October 1 to 14, 2006 despite the fact that he was only entitled to receive \$2,389.40 compensation for this period. The record contains evidence which shows that on October 10, 2006 appellant received a \$2,390.90 compensation check for the period October 1 to 14, 2006 and that on October 27, 2006 he received a \$2,389.40 compensation check for the period October 1 to 14, 2006. The record also contains evidence showing that appellant was only

³ The record contains a document which indicates that appellant received \$5,968.25 in Office compensation for the period August 27 to September 30, 2006.

⁴ 5 U.S.C. § 8102(a).

⁵ 5 U.S.C. § 8129(a).

⁶ 5 U.S.C. § 8116(a).

entitled to receive \$2,389.40 in compensation for the period October 1 to 14, 2006. Therefore, the Office properly determined that appellant received a \$2,390.90 overpayment.

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 These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] 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 this subchapter or would be against equity and good conscience."⁸ Since the Office found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment 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 10.322 and 10.323, respectively, of the Code of Federal Regulations. Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).⁹ Section 10.323 provides, generally, that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with "severe financial hardship" determined by using the same criteria set forth in section 10.322; or (2) the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.¹⁰

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

⁸ 5 U.S.C. § 8129(b).

⁹ 20 C.F.R. § 10.322(a). Section 10.322 defines the terms "income," "expenses" and "assets." 20 C.F.R. § 10.322(b), (c) and (d). For waiver under the "defeat the purpose of the Act" standard, a claimant must show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base. See *George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986). An individual is deemed to need substantially all of his current income to meet ordinary and necessary living expenses if his monthly income does not exceed monthly expenses by more than \$50.00. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1) (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991); 20 C.F.R. § 10.323.

¹⁰ 20 C.F.R. § 10.323.

ANALYSIS -- ISSUE 2

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. The record shows that appellant's monthly expenses were \$4,660.55. Appellant reported that he had \$5,983.00 in monthly income without identifying the source of the income and the Office determined that he had \$5,180.28 in monthly income from his monthly Office compensation payment without explaining this conclusion.¹¹ Regardless of which figure is accepted as appellant's monthly income, it is clear that his current income exceeds his current ordinary and necessary living expenses by far more than \$50.00. Appellant has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses.¹² Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.¹³

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, he has failed to show that the Office abused its discretion by refusing to waive the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to 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 resulting hardship upon such individual.”¹⁴

¹¹ It is undisputed that appellant continued to receive Office compensation during this period.

¹² See *supra* note 9 and accompanying text.

¹³ See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

¹⁴ 20 C.F.R. § 10.321(a). See *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the overpayment by deducting \$200.00 from appellant's compensation payments every four weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.321 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting \$200.00 from appellant's compensation payments every four weeks.

LEGAL PRECEDENT -- ISSUE 4

The Office's procedures on the recovery of overpayments are found in the Code of Federal Regulations at 20 C.F.R. § 10.321. The regulations provide that, before collecting an overpayment, the Office must provide the claimant with written notice of the fact and amount of overpayment, the finding of fault, the right to submit evidence challenging the fact, amount, or finding of fault, and the right to request waiver of the overpayment.¹⁵ The regulations also provide that a claimant is entitled to submit additional evidence in writing or at precoupment hearing, that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment, and that "[f]ailure to request the hearing within this 30-day time period shall constitute a waiver of that right."¹⁶

ANALYSIS -- ISSUE 4

Appellant was notified of the overpayment by written notice dated December 8, 2006. He requested a precoupment hearing in a form sent in an envelope postmarked March 5, 2007, which was more than 30 days after the December 8, 2006 notice of an overpayment. Because appellant's request for a precoupment hearing was untimely, he has waived his right to a precoupment hearing. The Board notes that the Office properly informed appellant that he may address his concerns regarding waiver by submitting any additional information to the Office. Accordingly, the Office properly denied appellant's request for a precoupment hearing.

CONCLUSION

The Board finds that appellant received a \$2,390.90 overpayment of compensation for the period October 1 to 14, 2006 and that the Office did not abuse its discretion by refusing to waive recovery of the overpayment. The Board further finds that the Office properly required repayment of the overpayment by deducting \$200.00 from appellant's compensation payments every four weeks and it properly denied his request for a precoupment hearing.

¹⁵ 20 C.F.R. § 10.431.

¹⁶ 20 C.F.R. § 10.432.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 15 and 3, 2007 decisions are affirmed.

Issued: December 20, 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