

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

S.B., Appellant

and

**DEPARTMENT OF LABOR, WAGE & HOUR
BUREAU, Phoenix, AZ, Employer**

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**Docket No. 07-554
Issued: September 4, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 20, 2006 appellant filed a timely appeal of a July 26, 2006 decision of the Office of Workers' Compensation Programs, which denied appellant's claim for augmented compensation effective August 6, 2006, a December 7, 2006 decision which affirmed an overpayment of compensation and an October 4, 2006 decision which denied his subpoena requests. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether the Office properly determined that appellant was not entitled to augmented compensation for a dependent child after August 6, 2006; (2) whether the Office properly determined that appellant received an overpayment of \$6,264.75 from June 12, 2005 to August 6, 2006; (3) whether the Office properly denied waiver of the overpayment; (4) whether the Office properly required repayment of the overpayment by withholding \$250.00 from appellant's continuing compensation every four weeks; and (5) whether the Office properly denied appellant's request to subpoena witnesses and documents.

FACTUAL HISTORY

On December 2, 2002 appellant, then a 48-year-old wage and hour compliance specialist, sustained an emotional condition after a personal threat was made against him while in the performance of duty. The Office accepted appellant's claim for major depression. He stopped work on March 20, 2003 and received compensation for total disability.¹ Appellant was paid at the augmented rate as he claimed his daughter, Jessica L. Barnes, born October 7, 1983, as a dependent on a CA-7 claim for compensation dated May 8, 2003.

In a June 17, 2004 letter (Form CA-1615), the Office advised appellant that augmented compensation for Joshua Barnes and Jessica was scheduled to stop because they were about to become 18 years of age. The Office informed appellant that compensation at the augmented rate could continue after the 18th birthday only if the dependent was unmarried and either incapable of self-support or a student. It indicated that a full-time student, enrolled in an approved post-secondary program, could qualify as a dependent from age 18 until the end of the semester in which he or she turned 23 or completed four years of education beyond high school. The Office requested that he submit proof of any qualifying enrollment.

In a June 21, 2004 letter, appellant advised that he never received compensation for his son Joshua and that his daughter was a full-time college student. The record reflects that she began college at Cuesta College in September 2001 and attended full time from the period August 18, 2001 to May 23, 2003. He attached an unofficial student academic record for his daughter from California State University dated June 21, 2004 noting that his daughter was a full-time student from the fall of 2003 through the fall of 2004. In affidavits of earnings and employment (Form EN1032), dated June 22, 2004, June 6, 2005 and June 5, 2006, appellant noted that his daughter was a full-time student. In June 5, 2006 correspondence, appellant indicated that he also provided support for his elderly mother each month.

In a June 14, 2006 letter, the Office advised appellant that augmented compensation for Jessica had stopped because the Office was not furnished with proof of full-time school attendance since June 2004. In order for appellant to claim dependency benefits for his mother he would have to submit Internal Revenue Service documentation showing that he was claiming his mother as a dependent at the time he was originally injured on March 1, 2000.

In letters dated June 19 and 21, 2006, appellant indicated that his daughter remained enrolled in college full time pursuing educational requirements to be a teacher. He attached an unofficial student academic record from California State University in Fresno which noted that his daughter was a full-time student from the fall of 2003 to the spring of 2006. Also submitted was an enrollment verification from California State University in Fresno dated June 21, 2006 which indicated that appellant's daughter was an undergraduate student who attended school full time in the spring and fall of 2005.

¹ Appellant filed another claim for a back injury sustained on December 6, 2002 which was accepted by the Office for lumbar strain, file number 11-2012154. This claim was later expanded to include aggravated displacement of lumbar intervertebral disc with myelopathy, aggravated degeneration of lumbar or lumbosacral intervertebral disc and aggravated degeneration of cervical intervertebral disc.

On June 22, 2006 the Office provided appellant an additional 30 days to submit documentation to support his claim for augmented compensation. The Office advised that failure to furnish the requested documentation would result in the termination of his augmented compensation and an assessment of a possible overpayment.

In a June 30, 2006 letter, appellant indicated that he had been notified by the Office of Management and Budget (OMB) that the Form EN1615 was not a valid form and that he was not required to respond to the Office unless the correspondence contained a valid OMB number. He advised that his daughter was still completing her bachelor's degree and would graduate on July 7, 2006 from Fresno State University and would be transferring to Fresno Pacific University to obtain her teaching credential.

In a July 21, 2006 letter, the Office informed appellant that the documentation in his case indicated that his daughter completed 4 years of college education at the end of the 2005 spring semester and that there was no documentation to support his mother's status as a dependent. The Office noted that, pursuant to 5 U.S.C. § 8110 and 20 C.F.R. § 10.405, to be entitled to the three-quarters compensation rate based upon his daughter's student status, the evidence must support that she continued to pursue a full-time course of study, did not marry and did not exceed the age of 23. However, in no event could augmented compensation be paid beyond the end of the semester or enrollment period in which the dependent reached the age of 23 or completed four years of education beyond the high school level, whichever came first.

By decision dated July 26, 2006, the Office denied appellant's claim for augmented compensation effective August 6, 2006. The Office noted that the evidence submitted supported that appellant's dependent completed four years of education beyond high school in the spring semester of 2005. The Office further determined that appellant failed to submit the necessary information to establish his mother as a dependent.

Appellant submitted a July 18, 2006 correspondence from Fresno Pacific University noting that Jessica was admitted to the graduate division of the teacher education program. On July 29, 2006 appellant requested an oral hearing before an Office hearing representative. In a letter dated August 15, 2006, appellant's mother indicated that she was a 73-year-old widow and was caring for her developmentally disabled daughter and received financial support from appellant. She also indicated that she was in receipt of Social Security from her late husband.

In an overpayment worksheet dated August 4, 2006, the claims examiner noted that appellant's dependent completed four years of post-high education as of May 19, 2005 and augmented compensation was not payable from June 12, 2005 to August 5, 2006. The worksheet indicated that from June 12, 2005 to August 5, 2006 appellant was paid \$56,309.50 in compensation; however, he was only entitled to \$50,044.75, which created an overpayment of \$6,264.75.

On August 28, 2006 the Office issued a preliminary determination that appellant received a \$6,264.75 overpayment of compensation. The Office advised that for the period June 12, 2005 to August 5, 2006 appellant was overpaid compensation in the amount of \$6,264.75 because appellant did not have a qualified dependent for the purposes of receiving augmented compensation. Appellant should have been paid at the statutory two-thirds rate, with no

dependents from June 12, 2005 to August 5, 2006. The Office determined that appellant was at fault in the creation of the overpayment because he was aware or should have reasonable been aware that he was accepting augmented compensation to which he was not entitled. The Office allotted appellant 30 days to request a prerecoument hearing and to submit financial information, by completing an overpayment recovery questionnaire (Form OWCP-20), to allow the Office to determine if it should waive recovery of the overpayment.

Appellant requested a hearing regarding the augmented compensation and overpayment issues. In letters dated September 11 to 26, 2006, he disputed that an overpayment existed. On September 12, 2006 he requested subpoenas for 10 Office personnel. On September 13, 2006 he requested the issuance of subpoenas on all records from all employees both current and former who had anything to do with his claim. On September 19, 2006 appellant requested a complete copy of all government records relating to his overpayment. On September 20, 2006 he requested the Office provide all documents generated as part of his claim.

Appellant submitted a statement from California State University Fresno dated June 20, 2006 which noted that Jessica was a student for consecutive academic semesters from the fall of 2003 to the spring of 2006 which ended on May 18, 2006. He submitted a class schedule for graduate school for the fall of 2006 which noted that she was taking 16 credits. Appellant also submitted an unofficial student academic record from California State University Fresno which noted that his daughter was a full-time student from the spring of 2005 to the spring of 2006. An enrollment verification form dated September 11, 2006 noted that she was enrolled in a graduate program full time from August 28 to December 15, 2006. On September 26, 2006 Cuesta College noted that appellant's daughter had attended school full time from the fall of 2001 to the spring of 2003, for the period August 18, 2001 to May 23, 2003.

In an October 4, 2006 decision, the hearing representative denied appellant's subpoena requests, finding that he had failed to explain why a subpoena was the best way to obtain such evidence and that there was no other means to obtain the documents or testimony. He noted that a copy of the claim file was provided to appellant on April 25, 2003, September 26 and October 4, 2006. The hearing representative further advised that his request for subpoenas for Office employees acting in their official capacity would be denied pursuant to the implementing federal regulations.

The hearing was held on October 27, 2006. Appellant contended that his daughter was a full-time student and had not completed four years of college. He submitted exhibits relating to the yearly calendar.

By decision dated December 7, 2006, the hearing representative found that appellant was overpaid compensation in the amount of \$6,264.75 as he received augmented compensation from June 12, 2005 to August 6, 2006, when he had no qualifying dependents. The Office determined that appellant's daughter was a qualified student dependent from June 2001 through June 2005, at which time she had completed four 12-month periods of education beyond high school level. The Office found appellant to be without fault in the matter but denied waiver of recovery of the overpayment on the basis that appellant did not respond to the preliminary overpayment notice and failed to provide any additional documents or financial information in support of waiver.

The Office stated that the overpayment of compensation would be recovered by withholding \$250.00 per month from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation 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 his duty.² If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.³ Under section 8110⁴ of the Act, an employee is entitled to compensation at the augmented rate of three-quarters of his weekly pay if he has one or more dependents. A child is considered a dependent if he or she is under 18 years of age, is over 18 but is unmarried and incapable of self-support because of a physical or mental disability or is an unmarried student under 23 years of age who has not completed four years of education beyond the high school level and is currently pursuing a full-time course of study at a qualifying college, university or training program.⁵

The Office's procedures provide:

"Dependents. Augmented compensation is paid to a claimant with at least one dependent, including a spouse. Where only one dependent is claimed, and that person is a student, a child whose marriage has ended, a child incapable of self-support, or a parent, the [claims examiner] must ensure that entitlement exists.

a. *Student Status.* Compensation paid on behalf of an unmarried child which would otherwise be terminated at age 18 may continue if the child is a student pursuing a full-time course of study or training at an accredited institution. Such benefits may be paid for four years of education beyond the high school level, or until the beneficiary reaches age 23, whichever comes first.

(1) A 'year of education beyond the high school level' is defined as:

(a) The 12-month period beginning the month after the child graduates from high school, if the child has indicated an intention to continue in school during the next regular session, and each

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8105(a).

⁴ 5 U.S.C. § 8110.

⁵ 5 U.S.C. § 8110(a)(1) and 8101(17); 20 C.F.R. § 10.405 (2003). See *Leon J. Mormann*, 51 ECAB 680 (2000). See also Federal Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.5(a) (December 1995).

successive 12-month period, provided that school attendance continues.”⁶

Under section 8110(a)(4) of the Act a parent is considered a dependent if wholly dependent on and supported by the employee.⁷ The Office regulations provide that a “wholly dependent parent” is a dependent for compensation purposes; however, a parent who has income apart from assistance provided by the injured employee is not considered “wholly dependent.”⁸ The Board has held that a parent who received Social Security benefits was not wholly dependent upon assistance from an injured worker.⁹

ANALYSIS -- ISSUE 1

In its July 26, 2006 decision, the Office denied augmented compensation on the grounds that appellant did not have a qualified dependent for the purposes of receiving augmented compensation. The record supports the Office’s decision.

Appellant’s daughter, born October 7, 1983, attained age 18 on October 7, 2001, graduated from high school in June 2001 and began college at Cuesta College in September 2001 and attended school full time from the period August 18, 2001 to May 23, 2003. Therefore, she was enrolled at California State University, Fresno from the fall of 2003 semester to the spring of 2006 semester. Jessica was then admitted to the teacher education program of the graduate division of Fresno Pacific University. She attended college for five years through December 2006.

For the purposes of augmented compensation for dependents, section 8110 of the Act¹⁰ states that “notwithstanding paragraph (3) of this subsection, compensation payable for a child that would otherwise end because the child has reached 18 years of age shall continue if he is a student as defined by section 8101 of this title at the time he reaches 18 years of age for so long as he continues to be such a student or until he marries.” Section 8101(17) of the Act¹¹ defines a “student” as an individual under 23 years of age who has not completed four years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at the institutions so defined. The regulations refer to a “student as being an individual as defined in 5 U.S.C. § 8101(17), and further define the term “year beyond the high school level” to mean the 12-month period beginning the month after the individual graduates from high school, provided he or she had indicated an intention to continue schooling within four months of high school graduation, and each successive 12-month period in which there is school attendance

⁶ Federal Procedure Manual, Part 2 -- Claims, *Early Management of Disability Claims*, Chapter 2.811.10 (February 2002).

⁷ 5 U.S.C. § 8110(a)(4).

⁸ 20 C.F.R. § 10.405(a).

⁹ *John P. Gass*, 40 ECAB 394 (1988).

¹⁰ 5 U.S.C. § 8110(a).

¹¹ 5 U.S.C. § 8101(17).

or the payment of compensation based on such attendance.¹² Because benefits were payable for only the first four years of attendance, appellant's entitlement to compensation for his daughter ceased effective June 12, 2005, when the fourth year of school ended. Appellant's daughter was a qualified student dependent only from June 2001, the summer after she graduated from high school, through June 2005, at which time she completed four 12-month periods of education beyond the high school level.

With regard to appellant's mother, the Act¹³ provides that a parent is considered a dependent if wholly dependent on and supported by the employee. Office regulations¹⁴ provide that a "wholly dependent parent" is a dependent for compensation purposes; however, a parent who has income apart from assistance provided by the injured employee is not considered "wholly dependent." In this case, the record reveals that appellant's mother by her own account receives Social Security benefits as well as assistance from appellant. Because appellant's mother has income apart from assistance provided by appellant, she is not deemed "wholly dependent" under the Act.¹⁵ Therefore the Board finds that the Office properly denied appellant's claim for augmented compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8110 of the Act¹⁶ provides that a disabled employee with one or more dependents is entitled to have his or her basic compensation for disability augmented by 8 1/3 percent, and defines "dependent" to include an unmarried child over 18 years of age who is a student. If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation he was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-quarters rate constitutes an overpayment of compensation.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of \$6,264.75 for the period June 12, 2005 to August 6, 2006. In a series of EN1615 forms sent to appellant on an annual basis from June 2004 to June 2006, the Office sought information necessary for the proper calculation of his benefits with respect to his claiming dependents for

¹² 20 C.F.R. § 10.5(aa)(2)(i).

¹³ 5 U.S.C. § 8110(a)(4).

¹⁴ 20 C.F.R. § 10.405(a).

¹⁵ *Id.*; see also *Josephine Bellardita*, 48 ECAB 362 (1997) (where the Board found that receipt of Social Security benefits by appellant's mother was not inconsequential); *John P. Gass*, *supra* note 9.

¹⁶ 5 U.S.C. § 8110.

¹⁷ *Diana L. Booth*, 52 ECAB 370 (2001) (the Board held that as the claimant received compensation at the augmented rate for certain periods, even though she had no dependents, she received an overpayment of compensation).

the period in question. The cover letter attached with each questionnaire (Form CA-1615) specifically advised:

“The compensation law prohibits the acceptance of compensation to which a beneficiary is not entitled. You are required to notify this Office immediately if Jessica Barnes (child’s name) dies, stops attending school, completes four years of education beyond the high school level, or changes from full-time to part-time student status. Any check received after such change in status of the dependent must be returned to the Office.”

The record shows that appellant’s daughter attained age 18 on October 7, 2001, graduated from high school in June 2001 and began college at Cuesta College in September 2001 and attended school full time from the period August 18, 2001 to May 23, 2003. Subsequently, she was enrolled at California State University, Fresno from the fall of 2003 semester to the spring of 2006 semester. She attended college for five years through December 2006. As noted above, appellant’s daughter was a qualified student dependent only from June 2001, the summer after she graduated from high school, through June 2005, at which time she completed four 12-month periods of education beyond the high school level. Accordingly, an overpayment existed from June 12, 2005, until compensation ceased August 6, 2006. Appellant should have been paid at the basic two-thirds rate, with no dependents from June 12, 2005 to August 5, 2006.

The Office explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. The overpayment worksheet indicated that from June 12, 2005 to August 5, 2006 appellant was paid \$56,309.50 in compensation; however, was only entitled to \$50,044.75. The record supports that the overpayment occurred because appellant was incorrectly paid at the augmented three-fourths rate for the period June 12, 2005 to August 6, 2006 and, therefore, received an overpayment of \$6,264.75. The Board finds that the Office’s determination of the amount of the overpayment is proper and is supported by the evidence of record.

LEGAL PRECEDENT -- ISSUE 3

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.¹⁸ 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 [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.”¹⁹ Since the Office found appellant to be without fault in the creation 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.

¹⁸ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁹ See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

Section 10.436 of the implementing regulation²⁰ 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.²¹ 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 \$50.00.²²

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.²³

Section 10.438 of the regulations provides that “[t]he 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 on 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 denial of waiver.²⁴

ANALYSIS -- ISSUE 3

On September 5, 2006 the Office requested that appellant provide necessary financial information by completing an overpayment recovery questionnaire, OWCP-20, if he desired waiver of the overpayment in question. Appellant did not submit a completed OWCP-20 form or otherwise submit financial information supporting his income and expenses. As a result, 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.²⁵

²⁰ 20 C.F.R. § 10.436.

²¹ 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 of the individual's assets not exempt from recoupment. *See Robert F. Kenney*, 42 ECAB 297 (1991).

²² *See Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

²³ 20 C.F.R. § 10.437.

²⁴ 20 C.F.R. § 10.438.

²⁵ *See* 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

Consequently, as appellant did not submit the financial information required by section 10.438 of the Office's regulations,²⁶ 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 the 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 recovery of the overpayment of compensation in the amount of \$6,264.75.

On appeal appellant asserts that the recovery of the overpayment would be inequitable and against good conscience because he has no assets and has multiple health issues and is currently unable to afford his medications. However, appellant failed to submit a completed overpayment questionnaire, therefore there was no basis for finding that the overpayment would constitute a financial hardship or that he relinquished a valuable right or detrimentally relied on the payments in question.

LEGAL PRECEDENT -- ISSUE 4

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.²⁷ Section 10.441(a) of the regulation²⁸ provides:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If 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.”²⁹

ANALYSIS -- ISSUE 4

The record reflects that appellant continues to receive wage-loss compensation under the Act. When, as in this case, an individual fails to provide requested information on income,³⁰ expenses and assets, the Office should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.³¹ Appellant, as noted, did not provide any information for the Office to consider in determining the amount to be

²⁶ 20 C.F.R. § 10.438.

²⁷ *Lorenzo Rodriguez* 51 ECAB 295 (2000); *Albert Pineiro*, 51 ECAB 310 (2000).

²⁸ 20 C.F.R. § 10.441(a).

²⁹ *Id.*

³⁰ See 20 C.F.R. § 10.438(a) (notes that the overpaid individual has the responsibility to provide financial information used to determine any repayment schedule).

³¹ *Gail M. Roe*, 47 ECAB 268 (1995); *Robin D. Calhoun*, Docket No. 00-1756 (issued May 21, 2001).

withheld from his continuing compensation and the Board finds that the Office did not abuse its discretion in determining that the overpayment sum of \$6,264.75 would be recovered by deducting \$250.00 from appellant's continuing compensation benefits every month.

LEGAL PRECEDENT -- ISSUE 5

Section 8126³² of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.³³

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method to obtain such evidence because there is no other means, by which the testimony could have been obtained.³⁴ Additionally, no subpoena will be issued for attendance of employees of the Office acting in their official capacities as decision-makers or policy administrators.³⁵

The Office hearing representative retains discretion on whether to issue subpoenas. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonably exercise of judgment, or action taken, which is clearly contrary to logic and probable deductions from established facts.³⁶

ANALYSIS -- ISSUE 5

By letters dated September 12 and 13, 2006, appellant requested subpoenas for 10 Office personnel, all facts, documents, memorandums, tapes, records, statements regarding the overpayment and all records from all employees both current and former, who ever had any connection with his claim. In a October 4, 2006 decision, the hearing representative denied the subpoena request finding that appellant had failed to explain why the documents, or person, requested were directly related to the issue at hand or that a subpoena was the best method for obtaining the requested information.

To establish that the Office abused its discretion, appellant must show manifest error, prejudice, partiality, intentional wrong, an unreasonable exercise of judgment, illogical action or action that would not be taken by a conscientious person acting intelligently. The mere showing

³² 5 U.S.C. § 8126.

³³ See 20 C.F.R. § 10.619.

³⁴ *Id.*

³⁵ 20 C.F.R. § 10.619(b).

³⁶ *Dorothy Bernard*, 37 ECAB 124 (1985).

that the evidence would support a contrary conclusion is insufficient to prove an abuse of discretion.

In the present case, appellant has not met his burden to show abuse of discretion. He failed to provide an explanation of why the testimony of the persons or the documents requested would be relevant to the issue in his claim or why a subpoena was the best method or opportunity to obtain such evidence. Appellant did not provide any evidence to support that any additional probative information would be elicited by compelling the attendance of the persons requested. Additionally, the record reflects that the Office provided appellant with a copy of his claim file on April 25, September 26 and October 4, 2006. Finally, with regard to appellant's request to subpoena Office employees, the hearing representative properly noted that Office regulations provide that no subpoenas will be issued for attendance of employees of the Office acting in their official capacities as decision-makers or policy administrators.³⁷ Therefore, the Board finds that the hearing representative did not abuse his discretion in denying subpoenas, as he found that the testimony could be obtained by other means.

CONCLUSION

The Board finds that the Office properly determined that appellant was not entitled to augmented compensation. The Board further finds that the Office properly found that appellant received an overpayment of compensation, that he was not entitled to waiver of the overpayment, required repayment from appellant's continuing monthly compensation payments and denied appellant's request for subpoenas.³⁸

³⁷ *Supra* note 35.

³⁸ With his appeal appellant submitted financial information. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the December 7, October 4 and July 26, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 4, 2007
Washington, DC

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

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

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