

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

J.A., Appellant

and

**DEPARTMENT OF THE ARMY,
DEPARTMENT OF TRAINING SUPPORT,
Fort Sam Houston, TX, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 07-1195
Issued: February 8, 2008**

Appearances:
Appellant. Almaguer, 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 March 30, 2007 appellant filed a timely appeal from the March 12, 2007 merit decision of the Office of Workers' Compensation Programs' hearing representative, which denied waiver of an overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUES

The issues are: (1) whether appellant received a \$5,738.96 overpayment of compensation; and if so, (2) whether the Office properly denied waiver.

FACTUAL HISTORY

On February 12, 1996 appellant, then a 56-year-old instructional systems specialist, filed a claim alleging that she developed a respiratory condition in the performance of duty: "Exposed to allergens and toxic chemicals in condemned and contaminated federal buildings at F[or]t Sam

Houston.” The Office accepted her claim for multiple chemical hypersensitivity with pulmonary obstruction. Appellant received compensation for wage loss on the periodic rolls.

In October 2005, appellant notified the Office that she was receiving benefits from the Social Security Administration (SSA), but she did not know whether the benefits were from her private or federal employment. On December 12, 2005 the employing establishment advised: “[Appellant] is now 66 years old. Any SSA that she is receiving must now be considered as being RETIREMENT benefits. Since this claimant is a FERS [Federal Employees’ Retirement System] employee, her compensation payments must now be offset by any part of her SSA benefit that was calculated by using her federal employment earnings.” (Emphasis in the original.)

On August 1, 2006 the SSA notified the Office that effective January 2005, appellant’s SSA rate was \$794.50 a month with FERS and \$500.50 without. Effective December 2005, her SSA rate was \$827.00 a month with FERS and \$521.00 without. The monthly difference was \$294.00 and \$306.00 respectively. Multiplying by 12 and dividing by 13 to convert the monthly difference to a 28-day difference (the Office pays compensation every 28 days), the Office determined that it should have offset appellant’s compensation benefits by \$271.38 every 28 days beginning January 1, 2005 and by \$282.46 every 28 days beginning December 1, 2005. As there were 334 days from January 1 through November 30, 2005, the dual benefit amounted to \$3,237.18 for that period. As there were 248 days from December 1, 2005 through August 5, 2006, the dual benefit amounted to \$2,501.79 for that period. The Office concluded that appellant received a total overpayment of \$5,738.96 from January 1, 2005 through August 5, 2006.

On August 23, 2006 the Office made a preliminary determination that appellant received a \$5,738.96 overpayment of compensation: “You simultaneously received full workers’ compensation and social security benefits from January 1, 2005 to August 5, 2006. Your workers’ compensation benefits should have been reduced by \$271.38 -- 282.46 per month (amount is dependent on cost of living increases).” The Office found that appellant was not at fault in creating this overpayment and asked her, if she was currently unable to repay the full amount, to complete and submit an attached overpayment recovery questionnaire. The Office further informed appellant:

“In order for [the Office] to consider the question of waiver or to determine a reasonable method for collection, you must complete and submit the enclosed Form OWCP-20. Attach supporting documents to Form OWCP-20, including copies of income tax returns, bank account statement, bills and canceled checks, pay slips and any other records which support the income and expenses listed. Under 20 C.F.R. 10.438, failure to submit the requested information within 30 days will result in the denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”

Appellant requested waiver and a prerecoument hearing. She completed the overpayment recovery questionnaire on September 14, 2006. Appellant reported total monthly income of \$2,989.36. She itemized about \$2,000.00 in monthly expenses, noting that monthly amounts varied and \$60.00 in debts paid by monthly installments. Appellant listed assets of

\$11,500.00, though cash on hand and checking account balance also varied. At the January 3, 2007 prerecoupment hearing, an Office hearing representative reviewed the overpayment recovery questionnaire with appellant, who advised that her expenses had changed significantly. The hearing representative stated that she would send appellant a new questionnaire to complete.

In a decision dated March 12, 2007, the Office hearing representative finalized the preliminary finding that appellant received a \$5,738.96 overpayment from January 2005 to August 2006. The hearing representative found that appellant was not at fault in creating this overpayment, making her eligible for waiver. The hearing representative denied waiver, however, on the grounds that appellant did not support her overpayment recovery questionnaire with financial documentation: “As there has been no evidence or documentation provided to consider [appellant’s] current expenses, debts or liabilities, no further consideration can be given to whether collection of the overpayment would deprive her of the resources needed for ordinary and necessary living expenses to collect the overpayment. As there is no evidence to consider [appellant’s] overall financial situation, I find that repayment of the overpayment in full is appropriate in this case.”

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees’ Compensation Act limits the right to receive compensation:

“Notwithstanding the other provisions of this section, an individual receiving benefits for disability or death under this subchapter who is also receiving benefits under subchapter III of chapter 84 of this title or benefits under title II of the Social Security Act shall be entitled to all such benefits, except that --”

* * *

“In the case of benefits received on account of age or death under title II of the Social Security Act, compensation payable under this subchapter based on the federal service of an employee shall be reduced by the amount of any such social security benefits payable that are attributable to [f]ederal service of that employee covered by chapter 84 of this title.”¹

ANALYSIS -- ISSUE 1

The record supports that appellant received full compensation benefits together with SSA benefits from January 1, 2005 through August 5, 2006. The portion of the SSA benefits earned as a federal employee is part of the FERS retirement package and the receipt of benefits under the Federal Employees’ Compensation Act and federal retirement benefits concurrently is a prohibited dual benefit.² The SSA notified the Office of the applicable SSA rates for appellant

¹ 5 U.S.C. § 8116(d)(2); *see also* 20 C.F.R. § 10.421(d) (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4e, 11(a)-(b) (February 1995).

² FECA Bulletin No. 97-9 (issued February 3, 1997).

and their effective dates, so the Office was able to calculate the dual benefit she received from January 1, 2005 through August 5, 2006. The Board has reviewed the math and finds that appellant received a \$5,738.96 overpayment of compensation. The Board will affirm the Office hearing representative's March 12, 2007 decision on the issues of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

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.³ 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 Federal Employees' Compensation Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁴

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 Federal Employees' Compensation Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.⁵

Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.⁶

ANALYSIS -- ISSUE 2

The Office found that appellant was not at fault in creating this overpayment. Although appellant was without fault in creating the overpayment, she nonetheless bears responsibility for providing the financial information necessary to support her request for waiver of the overpayment. She completed an overpayment recovery questionnaire but submitted no financial documentation to support the figures listed.⁷ When the Office issued its preliminary determination on August 23, 2006, it made clear that appellant was to attach supporting financial documents to support the income and expenses listed so that the Office could determine a reasonable method for collection. Because appellant failed to submit the requested financial documentation and submitted no further information on her current financial status, the Office had no choice but to

³ 20 C.F.R. § 10.433(a).

⁴ *Id.* at § 10.434.

⁵ *Id.* at § 10.438(a).

⁶ *Id.* at § 10.438(b).

⁷ The record contains the first page of a rental agreement showing a monthly rental from June 1 to November 30, 2006, but appellant notified the Office on October 11, 2006 that she was temporarily staying at a Motel 6 while looking for an apartment. So this monthly rental expense ended before the Office hearing representative issued her decision on March 30, 2007.

deny her request for waiver. As the regulations provide, failure to submit the requested information within 30 days of the request shall result in denial of waiver. The Board will therefore affirm the Office hearing representative's March 12, 2007 decision on the issue of waiver.⁸

On appeal, appellant argues, among other things, that the Office used two distinct addresses in sending the preliminary determination and the final decision. The Board has reviewed the record and finds that both were sent to the correct address of record. When the Office issued its preliminary determination, appellant was living on Marina Drive in Modesto. In October 2006, appellant notified the Office that she was temporarily living in a motel and had a Post Office box in Ventura. The Office properly sent its March 12, 2007 decision to this last known address.⁹

CONCLUSION

The Board finds that appellant received a \$5,738.96 overpayment of compensation. The Board also finds that the Office properly denied waiver.

⁸ Because the Office is not currently decreasing appellant's compensation to recover the overpayment, the Board has no jurisdiction to review its collection. 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

⁹ The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board therefore has no jurisdiction to review the additional evidence appellant submitted on appeal.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 8, 2008
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