

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

K.D., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
COMMAND CONTROL & OCEAN
SURVEILLANCE CENTER, San Diego, CA,
Employer**

**Docket No. 07-794
Issued: January 22, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 30, 2007 appellant filed a timely appeal of the November 1 and 8, 2006 merit decisions of the Office of Workers' Compensation Programs finding an overpayment in the amount of \$7,253.50 for which he was not at fault and deducting \$150.00 from his continuing compensation to recover the overpayment. In a December 22, 2006 nonmerit decision, the Office denied his requests for reconsideration. 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 \$7,253.50 during the period November 1, 2003 to October 31, 2004 when he received compensation benefits that were not offset by his Social Security Administration (SSA) benefits; (2) whether the Office properly denied waiver of the overpayment; (3) whether it properly determined that the overpayment would be collected by deducting \$150.00 from his continuing

compensation; and (4) whether the Office properly denied appellant's requests for reconsideration following the November 1 and 8, 2006 decisions finalizing the overpayment.

FACTUAL HISTORY

On March 29 and April 10, 1995 appellant, then a 56-year-old electronics engineer, filed claims for depression and anxiety caused by harassment and discrimination of the employing establishment. On March 15, 2002 the Office accepted appellant's claim for major depressive disorder. The Office paid appropriate compensation for temporary total disability effective February 13, 2003, the date he elected compensation benefits under the Federal Employees' Compensation Act in lieu of benefits from the Office of Personnel Management (OPM).

On November 2, 2004 the Office made a preliminary determination that appellant received an overpayment in the amount of \$7,253.50, during the period November 1, 2003 to October 31, 2004 because his compensation benefits under the Act were not reduced by the amount of his SSA benefits attributable to his employment under the Federal Employees' Retirement System (FERS). The Office found that appellant's compensation should have been reduced by \$593.00 effective November 1, 2003 and by \$605.50 effective December 1, 2003 for 11 months through October 31, 2004.¹ It determined that he was not at fault in the creation of the overpayment. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. The Office requested that he complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On April 11, 2005 appellant requested a prerecoupmment hearing. At the July 31, 2006 hearing, he agreed with the amount of the overpayment but disagreed with the period of the stated overpayment. Appellant stated that he began to receive compensation in February 2003 and that he did not receive any compensation from 1995 to 2003, to which he believed he was entitled. He did not receive augmented compensation but supported his daughter who was a full-time college student. Appellant's daughter, Shiren Delalat, testified that she attended San Diego State University and stated that she would provide verification of her school enrollment.

Following the hearing, appellant submitted an August 22, 2006 letter from San Diego State University which noted that his daughter was either a half-time student or did not attend school at all during the period August 30, 1999 to May 19, 2005. In a September 1, 2006 letter, appellant stated that his daughter was not a full-time student for several semesters because her classes were routinely canceled and closed due to budget cuts at her school. Appellant's daughter attended the University of Kansas, but appellant stated that he could not afford this

¹ On September 1, 2004 the SSA advised the Office that appellant's SSA benefits with FERS during the period November 1 through 30, 2003 was \$1,210.80 and without FERS it would have been \$617.80. The Office determined that this resulted in a difference of \$593.00. The SSA further advised the Office that appellant's SSA benefits with FERS during the period December 1, 2003 to September 30, 2004 was \$1,236.20 and without FERS it would have been \$630.70. The Office determined that this resulted in a difference of \$605.50 for 11 months, totaling \$6,660.50. It added \$593.00 and \$6,660.50 to calculate an overpayment of \$7,253.50.

school. A May 11, 2006 collection letter revealed that appellant was indebted to the Department of Defense (DOD). In an OWCP-20 form dated August 30, 2006, appellant listed his daughter as a dependent. He reported his monthly income and expenses. Appellant's income included \$1,233.00 in SSA benefits and \$1,844.96 in benefits under the Act which correlated to \$2,004.19, totaling \$3,237.19. His expenses included: \$2,050.00 for rent or mortgage, \$1,100.00 for food, \$200.00 for clothing, \$300.00 for utilities and \$320.00 for miscellaneous expenses, totaling \$3,970.00. Appellant indicated that the DOD debt was \$7,924.94. His assets included: \$19.00 cash on hand, \$9.00 in a checking account and \$10.00 in a savings account, totaling \$38.00. Appellant did not submit any financial records in support of the stated expenses.

By decision dated November 1, 2006, the hearing representative found that appellant received an overpayment in the amount of \$7,253.50 during the period November 1, 2003 to October 31, 2004 because his compensation benefits were not offset by his SSA benefits attributable to his employment under FERS. Appellant's contention that the Office should have considered all compensation due to him from the date of injury, March 28, 1995, before calculating an overpayment was without merit. The hearing representative stated that appellant had not filed a claim for compensation dating back to March 28, 1995. She determined that he was without fault in the creation of the overpayment, but denied waiver of the overpayment. The hearing representative stated that appellant failed to submit documentation to verify his monthly expenses. Therefore, she utilized the Bureau of Labor Statistics (BLS) Consumer Expenditure Survey for California to determine the ordinary and necessary living expenses for appellant's household of two. The hearing representative allowed \$2,050.00 for mortgage or rent because appellant lived in southern California, and deducted \$758.17 from his food expense to reflect \$341.83 and \$110.59 and from his clothing expense to reflect \$89.41. She deducted \$270.00 from appellant's miscellaneous expenses to reflect \$50.00 because he did not identify any specific expenses or submit documentation or verification of them. The hearing representative disallowed the expense for repayment of the DOD salary overpayment because appellant stated that he had not begun to repay the debt as he did not have any money to do so and he failed to explain how he was going to repay it. She found that he failed to provide documentation to support payment of his daughter's college tuition. The hearing representative determined that appellant's monthly expenses totaled \$2,831.24 which left excess income in the amount of \$400.47. She directed recovery of the overpayment by deducting \$150.00 per month from his continuing compensation benefits. The hearing representative advised appellant that, if he disagreed with the decision, the only right of appeal was to the Board pursuant to 20 C.F.R. § 10.440(b).

On November 8, 2006 the Office issued a decision which again denied waiver of the \$7,253.50 overpayment and directed recovery of the overpayment by deducting \$150.00 per month from appellant's continuing compensation benefits. The Office informed him that, if he disagreed with the decision, the only right of appeal was to the Board.

The Office received an October 6, 2006 medical report of Dr. Samuel H. Albert, a Board-certified psychiatrist, who advised that appellant sustained emotional and physical conditions and that he was totally disabled for work from March 28, 1995 through October 6, 2006.

By letters dated November 30 and December 1, 14 and 15, 2006, appellant requested reconsideration of the Office's November 1 and 8, 2006 decisions.

In a decision dated December 22, 2006, the Office denied appellant's requests for reconsideration on the grounds that they neither raised substantive legal questions nor included new and relevant evidence and thus, they were insufficient to warrant a merit review of its prior decisions.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(d) of the Act² requires that:

“compensation benefits be reduced by the portion of SSA benefits based on age or death that are attributable to [f]ederal [s]ervice. [If you receive] SSA benefits based on the [f]ederal service of an employee, your compensation benefits are reduced by the amount of SSA benefits attributable to [the employee's] [f]ederal service.”³

The Office's procedure manual provides:

“SSA benefits are payable concurrently with [the Act] benefits, but the following restrictions apply:

(2) In disability cases, [the Act's] benefits will be reduced by the SSA benefits paid on the basis of age and attributable to the employee's federal service.”⁴

The offset of compensation benefits under the Act by SSA benefits attributable to employment under FERS is calculated as follows:

“Where a claimant has received SSA benefits, [the Office] will obtain information from SSA on the amount of the claimant's SSA benefits beginning with the date of eligibility to [the Act] benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiaries. SSA will also provide a hypothetical SSA benefit computed without the FERS covered earnings. [The Office] will then deduct the hypothetical benefit from the actual benefit to determine the amount of benefits which are “attributable to [f]ederal [s]ervice.” That amount is deducted from the [Act] benefit to obtain the amount of compensation payable.”⁵

² 5 U.S.C. § 8116(d).

³ *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(e) (January 1997), Chapter 2.1000.11(a)-(b) (February 1995).

⁵ FECA Bulletin 97-09 (issued February 3, 1997).

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for major depressive disorder on March 15, 2002. The record established that he received benefits from the SSA during the period November 1, 2003 to October 31, 2004 with FERS. However, on November 2, 2004 the Office found that appellant's compensation benefits under the Act were not offset by the amount of his SSA benefits attributable to his employment under FERS. The SSA paid appellant compensation in the amount of \$1,210.80 with FERS when the amount would have been \$617.80 without FERS, resulting in a difference of \$593.00. For the period December 1, 2003 through September 30, 2004, the SSA paid appellant compensation in the amount of \$1,236.20 with FERS when it would have been \$630.70 without FERS, resulting in a difference of \$605.50. The Board finds that, during the period November 1, 2003 to October 31, 2004, appellant received an overpayment of \$7,253.50, (\$593 + \$605.50 x 11 months), due to his receipt of compensation benefits without an offset for his SSA benefits attributable to his federal employment under FERS.

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.⁶ As noted, the statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment 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."⁷

Section 10.436 of the implementing regulations⁸ 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 BLS.⁹ 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 \$50.00.¹⁰

⁶ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁷ See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

⁸ 20 C.F.R. § 10.436.

⁹ 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 2004).

¹⁰ See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

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.¹¹

ANALYSIS -- ISSUE 2

In determining that appellant was not entitled to a waiver of the overpayment, the Office reviewed his income, expenses and assets as listed in his August 30, 2006 OWCP-20 form. The overpayment questionnaire indicates that he had a monthly income of \$3,237.19. Appellant did not submit any documents to verify his monthly expenses. Thus, the Board finds that the Office hearing representative properly utilized BLS data in lowering his monthly expenses for food and clothing. It was also permissible for the Office to lower appellant's miscellaneous expenses as such expenses are not to exceed \$50.00 per month.¹² The Office properly disallowed the DOD debt and college tuition expense for appellant's daughter as he did not specifically identify the monthly payment for these expenses. Appellant listed no significant assets. The Board finds that it was reasonable for the Office to allow ordinary and necessary living expenses of \$2,831.24. Appellant's income of \$3,237.19 per month exceeded his allowable monthly expenses of \$2,831.24 by \$405.95 per month. He has not demonstrated that he needs substantially all of his current monthly income to meet living expenses. Therefore, appellant does not qualify for waiver under the defeat the purpose of the Act standard.¹³

Further, there is no evidence in this case, and appellant did not allege, that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received for the period November 1, 2003 to October 31, 2004. Pursuant to its regulations, the Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion in denying a waiver of recovery of the overpayment of \$7,253.50.

LEGAL PRECEDENT -- ISSUE 3

The amount of adjustment of continuing compensation to recover an overpayment lies within the Office's discretion. The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.¹⁴ With regard to the amount withheld

¹¹ 20 C.F.R. § 10.437.

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6(3)(e) (October 2004).

¹³ See *Nina D. Newborn*, 47 ECAB 132 (1995).

¹⁴ *Howard R. Nahikian*, 53 ECAB 406 (2002).

from appellant's continuing compensation payments to recover the amount of the overpayment, section 10.441(a) of Office regulations 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.”¹⁵

ANALYSIS -- ISSUE 3

After determining that appellant was not entitled to waiver, the Office found that he could repay the overpayment by withholding \$150.00 every 28 days from his continuing compensation. The record indicates that, after \$150.00 is added to his ordinary and necessary monthly expenses, his current monthly income still exceeds expenses by more than \$50.00. The Board finds that the Office gave due regard to appellant's financial circumstances and did not abuse its discretion in determining the rate of repayment in this case in finding that repayment of the overpayment could be accomplished by withholding \$150.00 every 28 days from appellant's compensation.

LEGAL PRECEDENT -- ISSUE 4

Section 10.440(b) of the Office's regulations provides that “[t]he only review of a final decision concerning an overpayment is to the Employees' Compensation Appeals Board. The provisions of 5 U.S.C. § 8124(b) (concerning hearings) and 5 U.S.C. § 8128(a) (concerning reconsiderations) do not apply to such a decision.”¹⁶ The Board has found that the implementation of this regulation is a proper exercise of the Director's discretion and that a claimant has no further right to review by the Office once a final decision on the issue of overpayment has been issued.¹⁷

ANALYSIS -- ISSUE 4

In the November 1 and 8, 2006 final overpayment decisions, the Office properly informed appellant that he only had the right to appeal to the Board. However, the Office adjudicated appellant's November 30 and December 1, 14 and 15, 2006 requests for reconsideration by decision dated December 22, 2006. The Office's regulation at section 10.440(b) provides that the only review of a final decision concerning an overpayment is by the Board.¹⁸ The regulations further provides that the reconsideration provision of section 8128(a)

¹⁵ 20 C.F.R. § 10.441(a).

¹⁶ 20 C.F.R. § 10.440(b); *see also Jan K. Fitzgerald*, 51 ECAB 659 (2000).

¹⁷ *Charles E. Nance*, 54 ECAB 447 (2003); *Philip G. Feland*, 48 ECAB 485 (1997).

¹⁸ 20 C.F.R. § 10.440(b).

does not apply to an overpayment decision.¹⁹ In view of the limitations on review rights set forth in section 10.440(b), the Board finds that the Office improperly adjudicated the reconsideration request after issuance of the final overpayment decision. Accordingly, the Board finds that the Office's December 22, 2006 decision is null and void.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$7,253.50, during the period November 1, 2003 to October 31, 2004, due to receipt of compensation benefits that were not offset by his SSA benefits attributable to his employment under the FERS. The Board further finds that the Office properly denied waiver of the overpayment. It also finds that the Office properly directed recovery of the overpayment by deducting \$150.00 from appellant's continuing compensation. Lastly, the Board finds that the Office improperly denied appellant's requests for reconsideration following the November 1 and 8, 2006 decisions finalizing the overpayment as it had no authority to exercise jurisdiction, thereby, rendering the December 22, 2006 decision null and void.

ORDER

IT IS HEREBY ORDERED THAT the November 8, 2006 decision of the Office of Workers' Compensation Programs is affirmed. The decision of the Office dated December 22, 2006 is null and void.

Issued: January 22, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹⁹ *Id.*