

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

C.M., Appellant)

and)

DEPARTMENT OF THE NAVY, NAVAL)
AVIATION DEPOT, NAVAL AIR STATION,)
Alameda, CA, Employer)

**Docket No. 07-1780
Issued: January 23, 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 June 7, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 25, 2007 finding an overpayment of compensation and denying waiver of the recovery of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the overpayment decision in this case.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of \$1,333.65 was created because she incorrectly received compensation at the augmented rate; and (2) whether the Office properly denied waiver of the recovery of the overpayment.

FACTUAL HISTORY

On September 7, 1994 appellant, then a 44-year-old personnel clerk, filed an occupational disease claim alleging a low back condition, as a result of lifting boxes on a project

for about two to three weeks. She experienced pain in her back accompanied by heat and tightness which spread to her hip. Appellant's claim was accepted for a low back strain. Medical and compensation benefits were paid.

On March 5, 2007 the Office issued a preliminary determination that appellant received an overpayment in the amount of \$1,333.65 because it paid her at the augmented compensation rate of three-fourths. As she had no dependents, she should have been compensated at the statutory two-thirds rate.¹ A preliminary determination was also made that appellant was without fault in the creation of the overpayment. The Office sent her forms to complete if she wished to request a waiver of the recovery of the overpayment.

On March 17, 2004 appellant requested waiver of the overpayment due to the fact that the overpayment occurred through no fault of her own. She noted that she never claimed that she had any dependents and was not familiar with how compensation was calculated. Appellant listed her monthly income as her "pay from work" and noted her total monthly income as "small [approximately] \$42,500[.00] per year." She listed her monthly expenses as \$1,225.00 for rent or mortgage, \$400.00 for food, \$150.00 for clothing and \$300.00 for utilities. Appellant listed her assets as \$100.00 cash on hand, \$150.00 in checking account and \$33,000.00 as the current value of her stocks or bonds. She listed no miscellaneous expenses.

In a decision dated April 25, 2007, the Office finalized its determination that appellant received an overpayment in the amount of \$1,333.65 and that she was not at fault in the creation of the overpayment. It found that waiver was not warranted as there was no evidence that recovery of the overpayment would be against equity and good conscience or defeat the purpose of the Act. The Office found that appellant's monthly income exceeded her monthly expenses by approximately \$1,084.40, noting that appellant had net earnings of \$3,159.40 and monthly expense of \$2,075.00.

LEGAL PRECEDENT -- ISSUE 1

Section 8110 of the Act² provides that a disabled employee with one or more dependents is entitled to have his or her basic compensation for disability augmented by eight and one-third percent. If a claimant receives augmented compensation during a period where she has no

¹ The Office noted that for the period November 8 through 19, 2004 appellant was paid \$994.12 whereas she should have been paid \$883.67 resulting in an overpayment of \$110.45. For the period November 20 to December 18, 2004, the Office noted that appellant was paid \$1,802.32 when she should have been paid \$1,767.33 for an overpayment of \$34.99. For the period December 19, 2004 through January 3, 2005, appellant was paid \$1,093.53 whereas she should have been paid \$972.30 resulting in an overpayment of \$121.23. For the period November 28, 2005 through January 21, 2006, appellant was paid \$4,438.08 whereas she should have been paid \$3,944.96 which resulted in an overpayment of \$493.12. For the period January 22 through February 4, 2006, appellant was paid \$1,109.52 whereas she should have been paid \$986.24 which resulted in an overpayment of \$123.28. For the period February 5 through 18, 2006, appellant was paid \$1,109.52 whereas she should have been paid \$986.24 resulting in an overpayment of \$123.28. Finally for the period March 1 through October 25, 2006, appellant was paid \$2,947.13 whereas she should have been paid \$2,619.67 for an overpayment in the amount of \$327.46. The Office then added the total amount of the overpayments together and concluded that appellant received an overpayment in the amount of \$1,333.65.

² 5 U.S.C. § 8110.

eligible dependents, the difference between the compensation she 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.

ANALYSIS -- ISSUE 1

The evidence establishes that appellant has no dependents and, in fact, never claimed any dependents. However, she received compensation at the augmented rate. Appellant received gross pay at the augmented rate from November 8, 2004 through January 3, 2005 in the amount of \$3,889.97. She should have been paid \$3,623.30 at the statutory rate. This resulted in an overpayment of \$266.67. For the period November 28, 2005 through February 18, 2006, appellant was paid at the augmented rate in the amount of \$6,657.12 whereas she should have received \$5,917.44, resulting in an overpayment in the amount of \$739.68. Appellant received payment for the period March 1 through October 25, 2006 in the augmented amount of \$2,947.13 whereas she should have been paid \$2,619.67 resulting in an overpayment of \$327.46. The total amount of these overpayments equals \$1,333.65.³ Accordingly, the Office properly found that appellant received an overpayment in that amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁴ provides: Adjustment or recovery 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 the Act or would be against equity and good conscience.⁵ Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of any overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of her income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.⁶ An individual's liquid assets include but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds

³ The Board notes that actually, the total amount of these overpayments is \$1,333.81.

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ 5 U.S.C. § 8129(B).

⁶ 20 C.F.R. § 10.436. Office procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

and certificate of deposits.⁷ Nonliquid assets include but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings, supplies.⁸

Section 10.437 of the Office's regulations provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; or (b) the 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. To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.⁹

ANALYSIS -- ISSUE 2

The Office hearing representative found that appellant was not at fault in creating the overpayment of compensation. The overpayment cannot be waived, however, unless recovery would defeat the purpose of the Act or would be against equity and good conscience.

As to whether recovery would defeat the purpose of the Act in this case, appellant contends that the Office must have used her gross earnings in determining that her expenses exceeded her income by \$1,084.40 per month and did not account for taxes, social security and other deductions. It is not clear how the Office determined that appellant had net earnings of \$3,159.40 per month. The Board notes that appellant failed to fully complete the financial forms. Nonetheless, when asked for her monthly income, appellant indicated that it was "pay from work" and that her total monthly income was \$42,500.00 per year. Accordingly, any confusion as to appellant's monthly income could have been prevented had she properly completed her financial form.¹⁰ However, any argument as to whether the Office improperly determined whether appellant's monthly income exceeded her monthly expenses is moot as appellant listed on her financial form \$33,000.00 as the current value of stocks and bonds. Since these assets exceed the resource base of \$4,800.00 for an individual with no dependents, under 20 C.F.R. § 10.436 recovery of the overpayment would not defeat the purpose of the Act. Furthermore, the Board finds that appellant did not establish that recovery would be against equity and good conscience. The Board notes that appellant has not given up any right or relinquished a valuable right in reliance on the overpayments.

The Board finds that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience. Pursuant to 5 U.S.C. § 8129(b), the Office properly declined to waive the overpayment.

⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (May 2004).

⁸ *Id.*

⁹ 20 C.F.R. § 10.437(b)(1) (1999).

¹⁰ The overpaid individual has the responsibility to provide financial information used to determine any repayment schedule. *See* 20 C.F.R. § 10.438.

CONCLUSION

The Board finds that the Office properly determined that an overpayment of \$1,333.65 was created and that the Office properly denied waiver of the recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 25, 2007 is affirmed.

Issued: January 23, 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