

FACTUAL HISTORY

Appellant received compensation payments from the Office for a traumatic injury he sustained during the course of his federal employment on April 8, 1987.

On February 27, 2007 the Office made a preliminary determination that appellant was overpaid compensation for the period January 1 through November 25, 2006 in the amount of \$2,593.75. The Office noted that appellant was currently receiving augmented compensation at the rate of three-fourths but was only entitled to compensation at the statutory two-thirds rate for this time period as he had been separated from his wife as of January 2006. The Office noted that appellant was paid compensation for the period January 1 through November 25, 2006 in the amount of \$23,276.57 when he should have been paid compensation at the two-thirds rate in the amount of \$20,682.82. Accordingly, the Office found that appellant received an overpayment in the amount of \$2,593.75. The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment because he was aware or should have been reasonably aware that he was not entitled to compensation at the augmented rate as he was separated from his wife and not making regular court ordered payments.

There is evidence in the record that appellant separated from his wife as of January 2006. A record from a June 15, 2006 telephone call between appellant and the Office indicated that he stated that he was not divorced but was still married, although he did indicate that he had changed his address. In a form completed on August 29, 2006, appellant indicated that he was married but was not living with his wife or making direct payments to her support. Finally, there is a notation of another telephone call with an Office official dated February 14, 2007. At that time appellant advised the Office that he could not remember the date that he separated from his wife but that it was as of January 2006. He did not provide any additional information or financial data.

By decision dated March 30, 2007, the Office issued a decision finalizing the preliminary overpayment determination, finding that an overpayment was created in the amount of \$2,593.75, that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver of the recovery of the overpayment and that the sum of \$153.00 would be withheld from appellant's continuing compensation payments until the overpayment was paid in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation Act provides that, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Office by decreasing later payments to which the individual is entitled.¹

The Act provides that the United States shall pay compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.² If the

¹ 5 U.S.C. § 8129.

² 5 U.S.C. § 8102(a).

disability is total, the United States shall pay the employee monthly monetary compensation for total disability.³ Under section 8110 of the Act, an employee is entitled to compensation at the augmented rate of three-fourths of his or her weekly pay if he or she has one or more dependants.⁴ If a claimant receives augmented compensation during a period when he or she has no eligible dependents, the difference between the compensation he or she was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-fourths rates constitutes an overpayment of compensation.⁵

ANALYSIS

The Board finds that the Office correctly determined that appellant received an overpayment from January 1 through November 25, 2006. The record shows that he received wage-loss compensation from the Office at the augmented rate of three-fourths for employees with dependents in the amount of \$23,276.57 during that time period. However, the evidence of record reflects that appellant separated from his wife as of January 2006. Because appellant was separated in January 2006, he no longer had a dependent, and was not entitled to receive wage-loss compensation at the augmented rate after January 1, 2006. Thus he received \$23,276.57 based on an incorrect rate. The Office properly determined that appellant should have received \$20,682.82 for this time period. Accordingly, the Office properly determined that appellant received an overpayment in the amount of \$2,593.75.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and implementing regulations, an overpayment must be recovered unless 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.⁶ Section 10.433 of the implementing regulations specifically provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁷ The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from the Office are proper.⁸ Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.⁹ Whether or not the Office determines that an individual was at fault with

³ 5 U.S.C. § 8105(a); *see also* *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

⁴ 5 U.S.C. § 8110.

⁵ *See Diana L. Booth*, 52 ECAB 370 (2001) (the Board held that the claimant received an overpayment of because she received compensation at the augmented rate during a period when she had no dependents following her divorce).

⁶ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.*

⁹ 20 C.F.R. § 10.433(a)(3).

respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹⁰

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that he accepted payments which he knew or should have known to be incorrect. In order for the Office to establish that appellant was at fault in creating the overpayment, the Office must show that, at the time he received the compensation checks in question, appellant knew or should have known that the payment was incorrect.¹¹ With respect to whether an individual is with fault, section 10.433(b) of the Office's regulations provide that whether or not the Office determines that an individual was with fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹²

The record in this case establishes that appellant received wage-loss compensation from the Office at the three-fourths compensation rate for employees with dependants from January 1 through November 25, 2006. As noted, if a claimant receives augmented compensation during a period when he had 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-fourths rate constitutes an overpayment of compensation. The only matter to be determined is whether appellant accepted payments he knew or should have known to be incorrect when he accepted the Office's compensation checks.

The Board finds appellant was at fault in creating the overpayment from January 1 through November 25, 2006. The evidence establishes that he had separated from his wife and knew or reasonably should have known that the compensation he was receiving was incorrect as of January 1, 2006, when he separated from his wife. Appellant knew that he was to report any change in his marital status to the Office. As he is not without fault in the creation of the overpayment, he is not eligible for waiver of the recovery of the overpayment. The Office is required by law to recover this overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 provides that, if an overpayment of compensation has been made to an individual entitled to further payments and 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 hardship.¹³

¹⁰ 20 C.F.R. § 10.433(b).

¹¹ See *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

¹² 20 C.F.R. § 10.433(b).

¹³ 20 C.F.R. § 10.441

ANALYSIS -- ISSUE 3

The Office directed recovery of the overpayment by deducting \$153.00 every four weeks from appellant's continuing compensation. The Board finds that such a repayment schedule is in accordance with section 10.441(a). In exercising its authority under section 10.441(a), the Office must take 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.¹⁴ Appellant did not provide detailed information regarding his current financial circumstances. It is his responsibility to provide information about income, expenses and assets.¹⁵ Accordingly, the Board finds that the Office properly directed recovery from continuing compensation at the rate of \$153.00 every four weeks pursuant to its procedures.¹⁶

CONCLUSION

The Office properly determined that appellant received an overpayment of \$2,593.75, that he was at fault in the creation of the overpayment and therefore not entitled to waiver; and that the Office properly deducted \$153.000 from each of his continuing compensation checks until the amount was paid in full.

¹⁴ *Id.*

¹⁵ 20 C.F.R. § 10.438.

¹⁶ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.8 (May 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 30 2007 is affirmed.

Issued: May 14, 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