

left hand sprain, left carpal tunnel syndrome and articular cartilage disorder of his left hand when he grabbed a door jamb while falling. He underwent a left bicep tendon repair on July 9, 2004 and left wrist arthroscopic surgery on February 23, 2005. In early 2005 he was receiving total disability compensation from the Office.

Appellant took early retirement from the employing establishment effective March 19, 2005. A March 19, 2005 notification of personnel action form (Form 50-B) shows that for taking early retirement he received a \$25,000.00 buyout payment on March 19, 2005 known as a voluntary separation incentive payment (VSIP).¹ Appellant continued to receive total disability compensation.

In an October 19, 2007 notice, the Office advised appellant of its preliminary determination that he received a \$17,964.13 overpayment of compensation because he received \$25,000.00 in VSIP while receiving total disability compensation. It also determined that appellant was not at fault in the creation of the overpayment and provided him with an opportunity to request waiver of the overpayment and submit financial information.²

In an accompanying October 19, 2007 memorandum, the Office detailed how the overpayment was calculated:

“Calculation of period of overpayment -- The [Form 50-B] dated March 19, 2005 indicates that the claimant’s hourly salary on that date was \$35.14. $\$35.14 \times 2,087$ hours in a work year/52 weeks = \$1,410.33 weekly salary. $\$25,000$ total VSIP payout/ $\$1,410.33$ [weekly salary] = 17.726 weeks of salary for the period during which the payout ran.

“17.726 weeks x 7 days in a week = 124.08 days. March 19, 2005 (the start date of the VSIP) + 124 days (rounded down) = an ending date of July 20, 2005 for the payout. The total period of time during which the separation incentive pay ran was therefore March 19, 2005 to July 20, 2005.

“The Office should have suspended the claimant’s entitlement to all compensation payments for this entire period by a 100 percent offset for the number of weeks that the separation pay represented. This was not done, as the Office was not made aware that the claimant had received the separation incentive until February 2006, well after the period to be offset had ended.”³

¹ The form shows that appellant was making \$35.14 per hour on March 19, 2005. Appellant did not advise the Office about this buyout until he sent it a letter dated February 22, 2006

² The Office requested that appellant complete an overpayment questionnaire Form OWCP-20 even if he did not request waiver of the overpayment.

³ The Office submitted payment records showing that appellant received \$17,964.13 in Office compensation between March 19 and July 20, 2005.

In an October 26, 2007 letter, appellant requested waiver of the \$17,964.13 overpayment. He asserted that he was not aware that he could not receive Office payments and VSIP monies at the same time. Appellant submitted a Form OWCP-20 completed on October 27, 2007 in which he listed monthly household income totaling \$7,960.00 and monthly expenses totaling \$8,533.00. He indicated that he had about \$35,000.00 in assets including a mountain cabin worth about \$20,000.00, three motorcycles and a trailer worth about \$7,800.00, a checking account balance of \$6,200.00 and a savings account balance of \$1,841.00.⁴

In a March 5, 2008 decision, the Office made a final determination that appellant received a \$17,964.13 overpayment of compensation and that the overpayment was not subject to waiver. It determined that he was not entitled to waiver because appellant's monthly income exceeded his monthly expenses by more than \$50.00. The Office was also found that the overpayment would be recovered by deducting \$325.00 from appellant's compensation payments every four weeks. It indicated that a telephone conference was held with him on February 27, 2008 and the decision contains a detailed summary indicating that appellant and his wife had \$7,780.00 in monthly income and \$7,353.00 in monthly expenses.⁵ The Office determined that several claimed expenses, including \$235.00 for a cell phone, \$100.00 for storage and \$273.00 for medical expenses for appellant's 22-year-old son, could not be included in the monthly expenses tally because they were not ordinary and necessary expenses.⁶

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁷ Section 8116, however, limits the right of an employee to receive compensation. While an employee is receiving compensation he may not receive salary, pay, or remuneration of any type from the United States.⁸ More specifically, section 10.421 of the implementing regulation provides that an employee may not receive compensation for total disability concurrently with separation pay.⁹ When the Office discovers concurrent receipt, it must declare an overpayment of compensation and give the usual due

⁴ Appellant indicated that he used the saving account monies to pay taxes, insurance and "budgeted yearly expenses." He noted that he had a wife as well as a 16-year-old son and a 22-year-old son who lived at home. Appellant submitted numerous financial documents including bill statements showing amounts due.

⁵ The listing of monthly expenses was far more detailed than that provided in the Form OWCP-20 completed on October 27, 2007.

⁶ The Office indicated that, although appellant asserted that his 22-year-son had attention deficit disorder and was unable to hold a job for more that six months at a time, there was no evidence that he was a full-time college student or was incapable of supporting himself. For these reasons, the expenses relating to the son could not be included in his monthly expenses.

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8116(a) (with specified exceptions).

⁹ 20 C.F.R. § 10.421(c) (1999).

process rights.¹⁰ The Board has held that where separation pay is based an amount of money, the Office should suspend compensation payments for the period in question, effective the date of separation, by a 100 percent offset for the number of weeks (not the amount of money) that the separation pay represents.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$17,964.13 overpayment of compensation. The evidence establishes that he received \$25,000.00 for electing early retirement effective March 19, 2005 under the VSIP program while receiving total disability compensation from the Office.¹² It properly calculated that this dual payment meant that appellant received a \$17,964.13 overpayment. Applying the relevant standards, the Office first correctly calculated his weekly pay based on the pay he was receiving on March 19, 2005.¹³ It then calculated the number of weeks (based on this weekly pay rate) that the \$25,000.00 separation pay represented. The Office found that the separation pay represented the period March 19 to July 20, 2005 and presented documents showing that appellant received \$17,964.13 in disability compensation during this period. Therefore, it properly determined that he received a \$17,964.13 overpayment. The fact and amount of the overpayment are affirmed.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within its discretion pursuant to statutory guidelines.¹⁴ 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 incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."¹⁵ Since the Office found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), it

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.d(4) (April 1996).

¹¹ See *Lynee M. Schaak*, Docket No. 05-695 (issued November 9, 2005). Similarly, where separation pay is based on weeks of pay, the Office should suspend compensation payments for the period in question, effective the date of separation, by a 100 percent offset for the designated number of weeks of pay. The Board has noted that the dual payment calculation method detailed in the Office procedure manual, which uses different calculations depending on whether separation pay is based on weeks of pay or on amount of pay, would lead to unfairly disparate results. *Id.*

¹² See *supra* notes 9 and 10 and accompanying text.

¹³ See *supra* note 11 and accompanying text.

¹⁴ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁵ 5 U.S.C. § 8129(b).

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.¹⁶

The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.322 and 10.323, respectively, of the Code of Federal Regulations. Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).¹⁷ Section 10.323 provides, generally, that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with "severe financial hardship" determined by using the same criteria set forth in section 10.322; or (2) the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment. Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. The record reveals that his assets exceed the allowable resource base. Appellant's asset base would be \$6,200.00 in that he has a wife as a dependent as well as a 16-year-old son as a dependent. However, the record reveals that he has substantial assets of about \$35,000.00.¹⁹ Because appellant has not met the second prong of the two-prong test of

¹⁶ Appellant argued that the overpayment should be waived because he was not found to be at fault in its creation but he would only be entitled to such waiver if it were shown, under the standards described below, that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

¹⁷ 20 C.F.R. § 10.322(a). Section 10.322 defines the terms "income," "expenses" and "assets." 20 C.F.R. § 10.322(b), (c) and (d). For waiver under the "defeat the purpose of the Act" standard, a claimant must show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base. See *George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986). An individual is deemed to need substantially all of his current income to meet ordinary and necessary living expenses if his monthly income does not exceed monthly expenses by more than \$50.00. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1) (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991); 20 C.F.R. § 10.323.

¹⁸ 20 C.F.R. § 10.323.

¹⁹ Appellant listed assets including a mountain cabin worth about \$20,000.00, three motorcycles and a trailer worth about \$7,800.00, a checking account balance of \$6,200.00 and a savings account balance of \$1,841.00. He indicated that he used the savings account monies to pay taxes, insurance and "budgeted yearly expenses," but even if the savings account monies were not considered to be assets appellant would still have assets which well exceeded his resource base.

whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the first prong of the test, *i.e.*, whether his current income exceeds his current ordinary and necessary living expenses by more than \$50.00.²⁰

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.²¹

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, he has failed to show that the Office abused its discretion by refusing to waive the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to 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 resulting hardship upon such individual.”²²

ANALYSIS -- ISSUE 3

The Board further finds that the Office properly required repayment of the overpayment by deducting \$325.00 from appellant’s compensation payments every four weeks. The record supports that, in requiring repayment of the overpayment by deducting \$325.00 from his compensation payments every four weeks, it took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.321 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting \$325.00 from appellant’s compensation payments every four weeks.

²⁰ The Board notes that the Office chose to evaluate whether appellant met the first prong of 20 C.F.R. § 10.322(a) but this would not preclude the Board from evaluating whether appellant meet the second prong of 20 C.F.R. § 10.322(a).

²¹ See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

²² 20 C.F.R. § 10.321(a). See *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

CONCLUSION

The Board finds that appellant received a \$17,964.13 overpayment of compensation and that the Office did not abuse its discretion by refusing to waive recovery of the overpayment. The Board further finds that the Office properly required repayment of the overpayment by deducting \$325.00 from appellant's compensation payments every four weeks.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 5, 2008 decision is affirmed.

Issued: October 21, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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