

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

J.O., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PROTECTION,
Larado, TX, Employer**

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**Docket No. 09-264
Issued: August 10, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 5, 2008 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated October 2 and 6, 2008 finding that he received an overpayment of compensation and denying waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$61,510.53 for the period March 30, 2006 through September 1, 2007 because he received compensation payments for a schedule award after the expiration of the award; and (2) whether the Office properly denied waiver of the recovery of the overpayment.

FACTUAL HISTORY

On March 16, 2003 appellant, then a 48-year-old canine enforcement officer, injured his left upper arm, neck and spine when his dog pulled suddenly on the leash. He stopped work on

March 16, 2003 and returned to work with no restrictions on May 19, 2003. The Office accepted the claim for a left shoulder and upper arm sprain/strain.

By decision dated April 21, 2006, the Office granted appellant a schedule award for a nine percent permanent impairment of the left upper extremity. The period of the award ran for 28.08 weeks from September 15, 2005 to March 30, 2006. The Office informed appellant that he would receive \$2,328.45 for the period January 31 to March 18, 2006 and then a continuing payment of \$1,394.28 every four weeks until "March 18, 2006." In another decision issued April 21, 2006, it again notified him that he was entitled to a schedule award for a nine percent upper extremity impairment and that the award ran from September 15, 2005 to March 30, 2006. The Office advised that appellant would receive \$20,984.21 for the period September 15, 2005 to March 18, 2006 and then \$3,284.00 every four weeks until the ending date of the award on "March 18, 2006." In both decisions, it noted that after expiration of the schedule award he would be entitled to compensation based on his disability for employment.

The Office paid appellant a supplemental payment of \$20,984.21 for the period of the schedule award from September 15, 2005 to March 18, 2006. It also paid him \$3,284.00 on the periodic rolls for the period September 15, 2005 to March 30, 2006. Compensation payments logs demonstrate that the Office continued to pay him compensation on the periodic rolls from March 30, 2006 to September 1, 2007.¹

On February 27, 2008 the Office notified appellant of its preliminary determination that he received an overpayment of \$61,510.53 because he received compensation under a schedule award after the expiration of the award on March 30, 2006. It calculated the amount overpaid appellant, \$1,876.57, from March 19 to April 15, 2006 by multiplying the daily amount of compensation he received, \$117.28, by the number of days left in the period after March 30, 2006. The Office found that it erroneously made him 12 payments of \$3,284.00, 1 payment of \$3,410.96 and 5 payments of \$3,363.00, or a total overpayment of \$61,510.53. It informed appellant of its preliminary determination that he was at fault in creating the overpayment because he knew or should have known that he was not entitled to receive compensation for a schedule award after March 30, 2006. The Office requested that he complete an enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On March 18, 2008 appellant requested a prerecoupment hearing. He asserted that he was without fault in creating the overpayment and requested waiver of the recovery of the overpayment. Appellant submitted an incomplete overpayment recovery questionnaire. At a telephonic hearing, held on July 8, 2008, he contended that he did not know the total amount that he was supposed to receive under the schedule award. Appellant maintained that he was unable to repay the overpayment without severe hardship. The hearing representative explained that he needed to provide all income and expenses with corroborating documentation to support his waiver request.

¹ On September 6, 2007 a claims examiner noted that appellant received \$3,363.00 every 28 days for a schedule award. She determined that he should have received compensation only until March 30, 2006 and terminated schedule award payments.

On July 21, 2008 appellant asserted that he believed that all the money that he received was for the schedule award. He submitted pay stubs showing that he and his wife earned \$8,216.84 in net income monthly. Appellant listed monthly expenses of approximately \$6,000.00.²

By decision dated October 2, 2008, the hearing representative finalized the finding that appellant received a \$61,510.53 overpayment of compensation because he received compensation after the expiration of his schedule award. He found, however, that appellant was without fault in creating the overpayment. The hearing representative noted that both schedule award decisions indicated an ending date of the schedule award of either March 18 or 30, 2006 and provided that appellant would be entitled to continuing compensation payments. He found that as the decisions were confusing appellant was not at fault in creating the overpayment.³ The hearing representative determined, however, that waiver of recovery of the overpayment was not possible as his monthly income of \$8,901.00 exceeded his monthly expenses of \$6,263.89.⁴ He noted that, while appellant argued that his salary included overtime, which was not guaranteed, his salary was reasonably available for his use and thus included in determining his monthly income. The hearing representative determined that the overpayment was due and payable.

In a decision dated October 6, 2008, the Office found that appellant was without fault in creating the overpayment and denied waiver of the recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁵ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁶ Section 8129(a) of the Act provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁷ The Office's

² Appellant provided monthly expenses as follows: \$877.58 for a Texas State Bank Loan, \$495.19 for loans from Citi Bank, \$156.00 for a Discover card payment, \$460.33 for electricity, \$130.74 for water, \$111.60 for cable, \$34.67 for trash pickup, \$80.34 to AT&T, \$112.11 to Sprint, \$246.00 for furniture, \$15.00 to Dell, \$99.00 to Comp USA, \$100.00 for installment payments on a piano, \$33.00 to Kohl's, \$269.70 in medical expenses, \$68.80 for yearly vehicle registration, \$54.79 to Pennzoil, \$584.08 to AmeriCredit, \$658.22 to a credit union, \$571.00 per year for a homeowner's policy, \$232.50 for a vehicle and \$362.91 in property taxes.

³ See *R. W.*, 60 ECAB ____ (Docket No. 08-2098, issued July 24, 2009).

⁴ The hearing representative determined appellant's net monthly income by multiplying the salary he and his wife received each pay period by 26 and then dividing by 12.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8102(a).

⁷ 5 U.S.C. § 8129(a).

procedure manual identifies various situations when overpayments of compensation may occur, including when a schedule award expires but compensation continues to be paid.⁸

ANALYSIS -- ISSUE 1

The Office granted appellant a schedule award for a nine percent permanent impairment of the upper extremity. The period of the award ran for 28.08 weeks from September 15, 2005 to March 30, 2006. The Office advised that appellant would receive \$20,984.21 for the period September 15, 2005 to March 18, 2006 and then \$3,284.00 every four weeks until the ending date of the award. Instead of stopping his compensation at the expiration of the schedule award on March 30, 2006, however, the Office continued to issue him schedule award payments every four weeks through September 1, 2007. Consequently, appellant received an overpayment of compensation.

The Office calculated that it paid appellant \$61,510.53 in compensation after the expiration of his schedule award. The record supports the Office's determination of the amount of the overpayment and it is not challenged by appellant. The Board will thus affirm the amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that 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." Thus, a finding that appellant was without fault does not automatically result in waiver of the recovery of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience. Section 10.434 of the implementing regulations provide that, if the Office finds the recipient of the overpayment was not at fault, repayment will be required unless adjustment would defeat the purpose of the Act or be against equity and good conscience.⁹

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 his 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.¹⁰ An individual's liquid assets include but are not limited to case, the value of stocks, bonds, savings accounts, mutual funds

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2 (May 2004).

⁹ 20 C.F.R. § 10.434.

¹⁰ 20 C.F.R. § 10.436. Office procedures provide that 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 certificates of deposits.¹¹ 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 and supplies.¹²

Section 10.437 provides that recovery of an overpayment is considered to be 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.¹³ 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.¹⁴

ANALYSIS -- ISSUE 2

The Office 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.¹⁵ In order to establish that repayment of the overpayment would defeat the purpose of the Act, appellant must show that he requires substantially all of his income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base as determined by the Office's procedures.¹⁶

The Office determined that appellant did not require substantially all of his income to meet ordinary and normal living expenses. He provided documentation establishing that he and his wife earned approximately \$8,901.00 per month and had monthly expenses of approximately \$5,500.00 to \$6,000.00 per month. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁷ Even without considering whether the listed expenses were ordinary and necessary within the meaning of the regulations, appellant's current income clearly exceeds his current expenses by more than \$50.00. Consequently, appellant does not need substantially all of his income for ordinary and necessary living expenses.

Additionally, the evidence does not demonstrate that recovery of the overpayment would be against equity and good conscience. Appellant submitted no evidence that he relied upon the

¹¹ *Id.*

¹² *Id.*

¹³ 20 C.F.R. § 10.436.

¹⁴ *Id.* at § 10.437(b)(1).

¹⁵ See *Madelyn Y. Grant*, 57 ECAB 533 (2006).

¹⁶ See *supra* note 13; see also *W.F.*, 57 ECAB 705 (2006).

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (October 2004); *Desiderio Martinez*, 55 ECAB 336 (2004).

incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt. Consequently, the Office properly denied waiver of the recovery of the overpayment.

On appeal, appellant notes that he was without fault in creating the overpayment. Section 10.435(a) provides, however, that an error by a government entity, including the Office, which resulted in an overpayment does not relieve a claimant from liability for repayment.¹⁸ Appellant further argues that he is unable to repay the overpayment. Under the provisions of the statute and regulations, however, he does not meet the criteria for waiver of the recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$61,510.53 for the period March 30, 2006 through September 1, 2007 because he received payments under a schedule award after the expiration of the award. The Board further finds that the Office properly denied waiver of the recovery of the overpayment.¹⁹

¹⁸ 20 C.F.R. § 10.435(a); *Lawrence J. Dubuque*, 55 ECAB 667 (2004).

¹⁹ Recovery of the overpayment is not an issue in this case as appellant is not in receipt of continuing compensation. With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. 20 C.F.R. § 10.441; *see Miguel A. Muniz*, 54 ECAB 217 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 6 and 2, 2008 are affirmed.

Issued: August 10, 2009
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