

FACTUAL HISTORY

On March 13, 1995 appellant, then a 48-year-old letter carrier, filed an occupational disease claim alleging stress and depression as a result of her federal employment. The Office accepted her claim for depression and mood disorder and paid compensation for temporary total disability on the periodic rolls. It paid compensation at the augmented rate of 75 percent for dependents with no deduction for basic life insurance.

On August 15, 2008 the Office made a preliminary determination that appellant received a \$15,360.15 overpayment from July 10, 2004 to August 2, 2008 because she had no dependents and was not entitled to augmented compensation during that period.² Also the Office made no deductions from compensation for basic life insurance premiums. It found she was not at fault in the creation of the overpayment.

Appellant requested waiver and a decision on the written evidence. She advised that she spent the funds and would suffer a severe financial hardship in trying to repay the money. Appellant completed an overpayment recovery questionnaire showing \$2,749.28 in monthly income, \$2,970.00 in monthly expenses and \$19,088.09 in assets.

In a decision dated January 12, 2009, the Office found that appellant received a \$15,360.51 overpayment from July 10, 2004 through August 2, 2008 and was not at fault in the matter. It denied waiver on the grounds that her overpayment recovery questionnaire showed \$654.28 in disposable monthly income and assets of \$19,088.09. The Office found it reasonable to deduct \$300.00 from continuing compensation payments to recover the debt, leaving appellant with \$354.00 to meet emergencies in addition to her substantial savings.

Appellant argues on appeal that the Office neglected to include \$875.00 in other monthly expenses when it compared income and expenses. She explained that her actual monthly expenses left her \$220.72 in debt each month, not with disposable monthly income of \$654.28, as was found. In addition, the Office was already reducing her disability checks by \$300.00 a month to correct her compensation, so her monthly debt was approximately \$521.00. On that basis, appellant asked that waiver be granted. She submitted “an itemized list of most necessities, indispensable items, unavoidable needs each month.”

LEGAL PRECEDENT -- ISSUE 1

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ Compensation for total disability is paid at the rate of 66⅔ percent of monthly pay.⁴ A disabled employee with one or more dependents is entitled to have basic compensation for disability augmented to 75 percent.⁵

² Appellant’s youngest child turned 18 on July 10, 2004.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8105.

⁵ *Id.* at § 8110(b).

Section 8706(b)(2) provides that Federal Employees' Government Life Insurance (FEGLI) coverage may continue while a claimant is in receipt of compensation, when the coverage would otherwise cease. Federal employees are automatically enrolled in basic life insurance as of the first day of their employment, unless they specifically waive the coverage. For all claims with a date of injury of January 1, 1990 and later, basic life insurance premiums are deducted from the claimant's compensation payments.⁶

ANALYSIS -- ISSUE 1

There is no dispute about the fact or amount of the overpayment. The Office paid compensation to appellant at the augmented rate for dependents, 75 percent of monthly pay. But beginning July 10, 2004, when her youngest turned 18, she had no eligible dependents. So appellant was no longer entitled to augmented compensation. She should have received compensation at the regular rate, 66⅔ percent of monthly pay. As the Office continued to pay her at the augmented rate, an overpayment of compensation was created.

The Office also failed to deduct premiums for basic life insurance from appellant's compensation payments. In the absence of a specific waiver of coverage, it should have deducted the premiums. This caused an additional overpayment of compensation.

The Office ran worksheets showing the amount of compensation actually paid, at the augmented rate and with no deduction for basic life insurance premiums, and the amount of compensation appellant should have received, at the regular rate and with premiums deducted. The difference, representing the amount of the overpayment, was \$15,360.51. The Board will affirm the Office's January 12, 2009 decision on the issues of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Federal Employees' Compensation Act provides that when an overpayment of compensation has been made 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 may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁸ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁹

⁶ Federal (FECA) Procedure Manual, Part 5 -- Benefit Payments, *Life Insurance*, Chapter 5.401.2.a, 4.a (August 2004).

⁷ 5 U.S.C. § 8129(a).

⁸ 20 C.F.R. § 10.433(a) (1999).

⁹ *Id.* at § 10.434.

Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of her current income, including compensation benefits, to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed the resource base of \$4,800.00 for an individual.¹⁰ The employee's contribution to the Thrift Savings Plan, and the contribution's earnings, are considered assets for purposes of determining waiver.¹¹

An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).¹²

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes her position for the worse.¹³ Conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit, is not to be considered a loss.¹⁴

ANALYSIS -- ISSUE 2

The Office found that appellant was not at fault in the matter of the overpayment, so she was eligible for consideration of waiver. But her overpayment recovery questionnaire showed that she had assets of \$19,088.09, substantially exceeding the specified resource base of \$4,800.00 for an individual. By regulation, then, recovery of the overpayment would not cause hardship and would not defeat the purpose of the Act.

Appellant contends that the Office should grant waiver because she needs all her monthly income to meet monthly expenses. That alone, however, is not enough to establish that recovery would defeat the purpose of the Act. "Defeat the purpose of the Act" has two components, both of which must be met. Appellant would have to establish that she needs substantially all of her current income, including compensation benefits, to meet current ordinary and necessary living expenses. She would also have to establish that her assets, including those in her Thrift Savings Plan, do not exceed \$4,800.00. So even if appellant's expenses did exceed her income, she would not be entitled to waiver on grounds of hardship.

¹⁰ *Id.* at § 10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

¹¹ *Eloise K. Hahn*, Docket No 01-1199 (issued June 25, 2002).

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

¹³ 20 C.F.R. § 10.437(b) (1999).

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.b(3) (October 2004).

Appellant does not argue, and the record does not establish, that recovery of the debt would be against equity and good conscience. She did not show that she gave up a valuable right or changed her position for the worse in reliance on the overpayment.

Because recovery of the overpayment would not defeat the purpose of the Act and would not be against equity and good conscience, the Office properly denied waiver. Appellant must repay the debt. The Board will affirm the Office's January 12, 2009 decision on the denial of waiver.

LEGAL PRECEDENT -- ISSUE 3

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.¹⁵

ANALYSIS -- ISSUE 3

The Office found it reasonable to deduct \$300.00 from continuing compensation payments to recover the debt finding that she had \$654.28 in disposable monthly income. This would leave her \$354.00 each month to meet emergencies or unexpected expenses.

But appellant's overpayment recovery questionnaire did not show \$654.28 in disposable monthly income. It showed \$2,749.28 in monthly income and \$2,970.00 in monthly expenses, or a monthly debt of \$220.72. When the Office made its calculations, it neglected to include \$875.00 appellant listed for "other expenses." It did not disallow this amount for failure to submit financial documentation or for other grounds; it simply overlooked the item when it set out the figures appellant provided. Failure to include "other expenses" caused the Office to observe: "The expenses reported by the claimant were not substantiated mathematically as the expenses did not add up to the amount claimed." But the expenses appellant reported, included "other expenses," did add up and they showed no disposable monthly income.

Because the Office mistakenly assumed that the figures appellant provided showed a disposable monthly income, the Board finds that the Office did not give due regard to appellant's financial circumstances when it set the rate of recovery from continuing compensation payments. The Board will therefore set aside the Office's January 12, 2009 decision on the issue of recovery. The Board will remand the case for further development necessary for a proper consideration of the relevant factors so as to minimize any resulting hardship on appellant, and for an appropriate final decision on the issue of recovery of the overpayment from continuing compensation payments.

¹⁵ 20 C.F.R. § 10.321(a).

CONCLUSION

The Board finds that appellant received a \$15,360.51 overpayment of compensation and that the Office properly denied waiver. The Board also finds that further development is warranted on the issue of recovery.

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2009 decision of the Office of Workers' Compensation Programs is affirmed on the issues of fact and amount of overpayment and on the issue of waiver, but is set aside on the issue of recovery. The case is remanded for further action consistent with this opinion.

Issued: December 28, 2009
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