

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

J.A., Appellant

and

**DEPARTMENT OF THE ARMY,
DEPARTMENT OF TRAINING SUPPORT,
Fort Sam Houston, TX, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 08-1892
Issued: July 16, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 20, 2008 appellant filed a timely appeal from the April 9, 2008 merit decision of the Office of Workers' Compensation Programs, which denied waiver of an overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for waiver of a \$2,632.73 overpayment; and (2) whether the Office properly exercised its discretion in setting the rate of recovery at \$100.00 every four weeks from continuing compensation. On appeal, appellant argues that her monthly expenses are increasing to the point that she cannot pay her bills.

FACTUAL HISTORY

On the prior appeal,¹ the Board found that appellant received a \$5,738.96 overpayment of compensation from January 1, 2005 to August 5, 2006 when she received full compensation benefits together with social security benefits, a prohibited dual benefit.² Although she was without fault in creating this overpayment, appellant was nonetheless responsible for providing the financial information necessary to support her request for waiver. Because appellant failed to submit the requested financial documentation and submitted no further information on her current financial status, the Board found that the Office had no choice but to deny waiver. The Board affirmed the Office hearing representative's March 12, 2007 decision.

The record indicates that the Office recovered the overpayment. But when the Office reinstated her to the periodic rolls, it did not make the social security offset needed to address the dual benefit issue, which caused yet another overpayment.

On March 4, 2008 the Office issued a preliminary determination that appellant received a \$2,632.73 overpayment from June 11, 2007 to February 16, 2008. It found that appellant was without fault in creating this overpayment, making her eligible for waiver. The Office asked appellant to provide information about her income, expenses and assets.

Appellant requested a decision on the written record. She completed an overpayment recovery questionnaire showing her income, expenses and assets.

In a decision dated April 9, 2008, the Office finalized its preliminary determination and found appellant without fault in creating a \$2,632.73 overpayment. It also denied waiver. The Office explained that it did not include the figures appellant reported for health, dental and vision insurance because those premiums were deducted from her workers' compensation payment. Taking all the other figures she provided at face value, the Office noted that appellant's monthly income, \$3,246.62,³ exceeded her reasonable and necessary monthly living expenses, \$2,963.91,⁴ by approximately \$282.00 a month. This meant that she was not deemed to need all of her current income to meet expenses and taking into account the variability of utility and medical expenses, the Office determined that it should collect the overpayment by deducting \$100.00 every four weeks from continuing compensation.

¹ Docket No. 07-1195 (issued February 8, 2008).

² On February 12, 1996 appellant, an instructional systems specialist, filed a claim alleging that she sustained a respiratory condition in the performance of duty. The Office accepted her claim for multiple chemical hypersensitivities with pulmonary obstruction and paid compensation for wage loss on the periodic rolls.

³ Appellant's monthly income consisted of \$2,412.62 in workers' compensation and \$834.00 in social security benefits.

⁴ The Office did not include \$50.00 for prescriptions, \$40.00 for copays, and \$30.00 for eye glasses.

LEGAL PRECEDENT -- ISSUE 1

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.⁵ 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.⁶ 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.⁷

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 his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.⁸

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).⁹

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 his or her position for the worse.¹⁰

ANALYSIS -- ISSUE 1

Appellant does not dispute the fact or amount of the overpayment. She requests waiver. Although the Office found that she was not at fault in creating the overpayment, she must still repay the debt unless: (1) recovery would defeat the purpose of the Act; or (2) recovery would be against equity and good conscience. Appellant does not argue the second point. She does not argue that she relied on the overpayment to give up a valuable right or to change her position for

⁵ 5 U.S.C. § 8129(a).

⁶ 20 C.F.R. § 10.433(a) (1999).

⁷ *Id.* at § 10.434.

⁸ *Id.* at § 10.436.

⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

¹⁰ 20 C.F.R. § 10.437(b) (1999).

the worse. So the question is whether recovery would defeat the purpose of the Act. Because appellant's assets do not exceed the established resource base,¹¹ the answer depends solely on whether appellant needs substantially all of her current income (including compensation benefits) to meet current ordinary and necessary living expenses. If she does, she is entitled to waiver. If she does not, she must repay the debt.

On March 4, 2008 the Office advised appellant that her net compensation every four weeks, less premiums for health, dental and vision benefits and including the social security offset, would be \$2,097.97. Multiplying by 13 to get 52 weeks' compensation, then dividing by 12 to get monthly compensation, yields a figure of \$2,272.80. The Office used a higher monthly figure, \$2,412.62. It is not clear from the record where this figure comes from; the Office did not explain. The Board will therefore use the accounting the Office provided appellant on March 4, 2008. Adding \$834.00 in social security benefits to her \$2,272.80 in compensation, appellant's monthly income is \$3,106.80.

The Office properly excluded the premiums for health, dental and vision insurance because those premiums were being deducted from her workers' compensation payment and did not represent a further expense to appellant. It stated that it was accepting the remainder of appellant's figures at face value. But upon review, the Board notes that the Office did not include all the remaining expenses listed. The Office did not include \$50.00 for prescriptions, \$40.00 for co-pays or \$30.00 for eye glasses. It offered no explanation for excluding them. The Board will therefore add this \$120.00 in apparent unreimbursed medical expenses to the accepted \$2,933.91 in household expenses, for total monthly expenses of \$3,053.91.

This leaves appellant with \$52.89 in excess monthly income, much less than the \$282.00 the Office calculated, but still sufficient disposable income to establish, under Office guidelines, that appellant does not need substantially all her current income to meet current ordinary and necessary living expenses. She must therefore repay the debt, as recovery will not defeat the purpose of the Act or be against equity and good conscience. The Board will affirm the Office's April 9, 2008 decision on the issue of waiver.

LEGAL PRECEDENT -- ISSUE 2

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or her attention is called to same. If 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 any hardship.¹²

¹¹ See *supra* note 9.

¹² 20 C.F.R. § 10.441(a) (1999).

ANALYSIS -- ISSUE 2

The Office determined that it should recover the overpayment by decreasing appellant's continuing compensation by \$100.00 every four weeks or \$108.33 per month. It knew the probable extent of future payments and the rate of appellant's compensation, and it took into account her financial circumstances. The Office calculated that appellant's monthly income exceeded her ordinary and necessary monthly living expenses by approximately \$282.00 a month, and also took into account the variability of utility and medical expenses.

The problem is that appellant appears to have much less than \$282.00 in excess monthly income. As the Board explained earlier, the figure appears to be only \$52.89, using the Office's net compensation figure from March 4, 2008 and accepting, as the Office did, appellant's expenses at face value less premiums for health, dental and vision benefits. The Office has administratively determined that 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).¹³ This means the amount of monthly funds appellant has available for debt repayment is only \$2.89 or \$2.67 every four weeks.

The Office exercises its discretion in setting the rate of recovery by taking into account various factors, including the financial circumstances of the individual. Given the disparity between the \$282.00 in excess monthly income the Office considered when it exercised its discretion and the \$52.89 the Board has calculated, the Board finds that the case should be remanded for a proper exercise of discretion based on an accurate assessment of appellant's financial circumstances. The Board will set aside the Office's April 9, 2008 decision on the issue of rate of recovery. The Board will remand the case to the Office for such further development of the financial evidence as may be necessary, for a proper exercise of discretion, and for an appropriate final decision.

CONCLUSION

The Board finds that the Office properly denied appellant's request for waiver of the \$2,632.73 overpayment. The evidence does not show that recovery would defeat the purpose of the Act or be against equity and good conscience. The Board also finds that further action is warranted on the issue of rate of recovery. The amount of monthly funds appellant has available for debt repayment appears to be significantly less than the Office considered when it exercised its discretion.¹⁴

¹³ See note 9.

¹⁴ As appellant now argues that her monthly expenses are increasing to the point that she cannot pay her bills, the Office may want to consider whether she has made a request for waiver based on changed financial circumstances.

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2008 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this opinion.

Issued: July 16, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board