

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

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<b>W.T., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 08-1656</b>
	)	<b>Issued: March 17, 2009</b>
<b>DEPARTMENT OF THE NAVY, SEA</b>	)	
<b>SYSTEMS COMMAND, Long Beach, CA,</b>	)	
<b>Employer</b>	)	
_____	)	

*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  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On May 23, 2008 appellant filed a timely appeal from a March 12, 2008 decision of the Office of Workers' Compensation Programs that found that he received an overpayment of compensation and a May 6, 2008 decision that denied his request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

**ISSUES**

The issues are: (1) whether appellant received an overpayment in compensation in the amount of \$23,716.42; (2) whether the Office properly denied waiver of the overpayment; (3) whether the Office properly required repayment of the overpayment by deducting \$300.00 every 28 days from appellant's continuing compensation; and (4) whether the Office properly denied appellant's request for a review of the written record.

**FACTUAL HISTORY**

This case has previously been before the Board. By decision dated February 1, 1999, the Board found that appellant was not entitled to receive wage-loss compensation for the period

February 3 to September 6, 1994 while he was receiving separation incentive pay for the same period.<sup>1</sup> The law and the facts of the previous Board decision are incorporated herein by reference.

By letter dated December 20, 2004, appellant informed the Office that he was receiving social security retirement benefits. On February 17, 2005 the Office requested that social security provide information regarding his retirement benefits, specifically asking if his social security benefits included federal retirement benefits. It noted that appellant became eligible for benefits under the Federal Employees' Compensation Act<sup>2</sup> (FECA) on March 1, 1994. In a reply dated September 17, 2005, social security notified the Office that appellant received benefits including federal retirement (FERS) benefits and provided a breakdown of social security benefits he had received since September 6, 1994. The Office thereafter reduced appellant's FECA benefits to reflect the contribution to his social security benefits, effective October 2, 2005. On December 6, 2005 it determined that appellant had a zero percent wage-earning capacity due to his accepted permanent aggravation of osteoarthritis of the right knee, his age, degenerative disc disease of the lumbar spine and prostate cancer.

On February 21, 2007 the Office issued a preliminary finding that an overpayment in compensation in the amount of \$29,043.52 had been created. It explained that the overpayment occurred because a portion of appellant's social security benefits, that he began receiving in January 1994, was based on credits earned while working in the Federal Government, and that this portion of his social security benefit was a prohibited dual benefit. The Office noted that appellant's FECA benefits were adjusted effective October 1, 2005 but that he had been overpaid from January 1, 1994 to October 1, 2005. It found appellant without fault. On February 27, 2007 appellant requested a telephone conference, stating that recouping the overpayment would cause a hardship on his family, and submitted an overpayment questionnaire. On an Office EN1032 form, dated September 17, 2007, he acknowledged that he received social security benefits as part of an annuity for federal service.

A telephone conference was held on February 26, 2008. Appellant's wife participated because appellant is hard of hearing. The Office noted that the amount of the overpayment was revised downward to \$23,716.42 because appellant was in receipt of a schedule award for the period March 17, 1995 to December 18, 1997. Appellant's wife reviewed their expenses and discussed how they had changed since submission of the overpayment questionnaire in February 2007. An itemized report of income and expenses contained in the memorandum of conference showed that appellant had assets of \$834.84, a monthly income of \$4,749.74, and monthly household expenses of \$4,133.10, yielding a difference between income and expenses of \$616.64. By letter dated February 27, 2008, the Office enclosed the memorandum of conference and allowed appellant 15 days to provide comments or corrections. Worksheets contained in the record describe the offset calculation used in determining the amount of the overpayment.

On March 12, 2008 the Office finalized the overpayment decision. It found that appellant was not at fault in the creation of the overpayment but that he was not entitled to waiver. The

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<sup>1</sup> Docket No. 97-1540 (issued February 1, 1999).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

Office ordered repayment by deducting \$500.00 every four weeks from his continuing compensation. By letter dated March 18, 2008, it modified the deduction to \$300.00 every four weeks. On March 24, 2008 appellant requested a review of the written record. In a May 6, 2008 decision, the Office denied the request, noting that appellant did not request a hearing of the preliminary overpayment determination, and that the final overpayment was not subject to the hearing provision found in section 8124(b) of the Act.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of the Act 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.<sup>3</sup> Section 8116 limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States.<sup>4</sup> Section 10.421 of the implementing regulations provides that an employee may not receive compensation for total disability concurrently with separation pay.<sup>5</sup> FECA Bulletin No. 97-9 states that FECA benefits have to be adjusted for the FERS portion of social security benefits because the portion of the social security benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>6</sup> When the Office discovers concurrent receipt of benefits, it must declare an overpayment in compensation and give the usual due process rights.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The record supports that, with the exception of a schedule award period, March 17, 1995 to December 18, 1997, appellant received full FECA compensation benefits and social security benefits from September 16, 1994 to October 1, 2005. The portion of the social security benefits appellant earned as a federal employee was part of his FERS retirement package, and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.<sup>8</sup> Social security notified the Office of the applicable social security rates for appellant and their effective dates. Based on these rates, the Office was able to calculate the dual benefits appellant received from September 16, 1994 to October 1, 2005. The Board has reviewed these calculations and finds that the Office properly determined that appellant received dual benefits totaling \$23,716.42 for this period, thus creating an overpayment in compensation in that amount.

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> 5 U.S.C. § 8116(a).

<sup>5</sup> 20 C.F.R. § 10.421(c); *see L.J.*, 59 ECAB \_\_\_\_ (Docket No. 07-1844 (issued December 11, 2007)).

<sup>6</sup> FECA Bulletin No. 97-9 (issued February 3, 1997).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.d(4) (April 1996).

<sup>8</sup> FECA Bulletin No. 97-9, *supra* note 6.

## LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office 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.”<sup>9</sup> Section 10.438 of Office regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery on an overpayment would defeat the purpose of the Act or be against equity and good conscience.<sup>10</sup> Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>11</sup>

## ANALYSIS -- ISSUE 2

As the Office found appellant without fault in the creation of the overpayment in compensation, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.<sup>12</sup>

Appellant furnished the Office with an overpayment questionnaire on February 27, 2007 and at a prerecoupment telephone conference held on February 26, 2008 appellant’s representative, his wife, updated the financial information to show monthly expenses totaling \$4,133.10. Monthly income included \$2,652.67 in FECA benefits, \$1,161.00 in a military pension, and \$936.07 from social security, for a total monthly income of \$4,749.74.

Office procedures provide that 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 this case, the difference between current income and household living expenses is \$616.64. The Board therefore finds that the Office properly concluded that recovery of the overpayment would not cause financial hardship to appellant and thus defeat the purpose of the Act. Furthermore, as appellant made no argument that he gave up a valuable right or changed his position for the worse in reliance on the overpaid compensation, the Office properly determined that recovery would not be against equity and good conscience. The Board therefore finds that the Office properly denied waiver of the

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<sup>9</sup> 5 U.S.C. § 8129.

<sup>10</sup> 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 or 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. 20 C.F.R. § 10.436. 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. *Id.* at § 10.437.

<sup>11</sup> 20 C.F.R. § 10.438.

<sup>12</sup> 20 C.F.R. §§ 10.436, 10.437.

overpayment and is required by law to recover the debt by decreasing later payments to which appellant is entitled.<sup>13</sup>

**LEGAL PRECEDENT -- ISSUE 3**

The Office's implementing regulations provide 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 any hardship.<sup>14</sup>

**ANALYSIS -- ISSUE 3**

The Board finds that the Office gave due regard to the relevant factors noted above in setting a rate of recovery of \$300.00 per compensation period. The record indicates that appellant had discretionary income of \$616.64 per month. The Office therefore did not abuse its discretion in finding that appellant should repay her overpayment at the rate of \$300.00 per compensation period.

**LEGAL PRECEDENT -- ISSUE 4**

Office regulations provide that a claimant may request a precoupment hearing with respect to an overpayment.<sup>15</sup> Failure to request the precoupment hearing within 30 days shall constitute a waiver of the right to a hearing.<sup>16</sup> The only right to a review of a final overpayment decision is with the Board.<sup>17</sup> The hearing provisions of section 8124(b) of the Act do not apply to final overpayment decisions.<sup>18</sup>

**ANALYSIS -- ISSUE 4**

The February 21, 2007 preliminary determination of overpayment provided appellant with a right to request a precoupment hearing within 30 days. As noted above, if a claimant does not request a hearing within 30 days, it is considered a waiver of the right to a hearing.<sup>19</sup> When the final overpayment decision is issued, there is no right to a hearing or a review of the written record, and the Office does not have discretion to grant such a request. The only right to appeal is with the Board.<sup>20</sup> In this case, appellant requested a precoupment telephone

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<sup>13</sup> 5 U.S.C. § 8129(a).

<sup>14</sup> 20 C.F.R. § 10.441(a).

<sup>15</sup> *Id.* at § 10.432.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at § 10.440(b).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at § 10.432.

<sup>20</sup> *Id.* at § 10.440(b).

conference that was held on February 26, 2008. He did not request a prerecoupment hearing. Once the Office issued the March 12, 2008 final overpayment decision, appellant's only appeal right was with the Board. The Board therefore finds appellant's March 24, 2008 request for a review of the written record by an Office hearing representative was properly denied as appellant is not entitled to a review of the written record with respect to a final overpayment decision.<sup>21</sup>

**CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$23,716.42, that the Office properly denied waiver and required recovery of the overpayment by deducting \$300.00 every 28 days from his continuing compensation payments and properly denied his request for a review of the written record.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated May 6 and March 12, 2008, modified on March 18, 2008, be affirmed.

Issued: March 17, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>21</sup> *Id.*