

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

L.J., Appellant)	
)	
and)	Docket No. 08-1958
)	Issued: September 3, 2009
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, New Orleans, LA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 7, 2008 appellant filed a timely appeal from a May 9, 2008 decision of the Office of Workers' Compensation Programs that found that she received an overpayment of compensation. 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 the amount of an overpayment in compensation received by appellant was \$20,312.64; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment in full. On appeal appellant argues that the amount of the overpayment is \$16,760.01 and that she used a Voluntary Separation Incentive Payment (VSIP) to rebuild her home destroyed by Hurricane Katrina.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated December 11, 2007, the Board found that appellant received an overpayment in compensation because she concurrently received a VSIP from the employing establishment and compensation for total

disability. The Board found the case not in posture for decision regarding the amount of the overpayment because the Office did not support its use of the dollar-for-dollar offset method in calculating the overpayment. The case was remanded to the Office to apply the offset method based on weeks of pay to determine the amount of the overpayment. The Board also found the case not in posture as to whether appellant was at fault in the creation of the overpayment and therefore eligible for waiver.¹ The law and the facts of the previous Board decision are incorporated herein by reference.

By letter dated December 21, 2007, the Office requested that the employing establishment provide clarification regarding how the incentive payment was calculated. On January 31, 2008 the employing establishment informed the Office that appellant was approved for a VSIP and received a lump-sum payment of \$16,760.01, based on her years of service and salary. On March 12, 2008 the employing establishment advised that she was awarded the maximum benefit of \$25,000.00 and the sum she actually received was minus taxes and any monies she owed the employing establishment. The employing establishment verified that appellant's annual salary was \$70,557.75.

On March 19, 2008 appellant stated that she had retired, spent the buyout funds and had no desire to return to work. On April 9, 2008 the Office issued a preliminary finding that an overpayment in compensation in the amount of \$20,312.64 had been created. It explained that the overpayment resulted because appellant was paid a VSIP buyout and concurrently received wage-loss compensation. The Office noted that her annual salary was \$70,558.00 or \$1,356.88 per week and that the \$25,000.00 VSIP she received was the equivalent of 18.42 weeks or 128 days of pay. It then found that appellant's daily compensation rate was \$158.69. The Office determined that, for the period from June 30, 2006, the date appellant retired, to November 4, 2006, a period of 128 days, she received gross compensation totaling \$20,312.64 and thus an overpayment in compensation in that amount was created. Appellant was found to be without fault and was provided an overpayment questionnaire and instructed regarding appropriate responses to the preliminary finding. She was given 30 days to respond. Computer printouts and Office worksheets confirm that appellant received gross compensation of \$20,312.64 for the period June 30 to November 4, 2006. Appellant did not respond to the preliminary overpayment finding.

By decision dated May 9, 2008, the Office finalized the overpayment decision. It found that appellant was not at fault in the creation of the overpayment and that she was not entitled to waiver. It ordered repayment in full.

LEGAL PRECEDENT -- ISSUE 1

Employing establishments may offer separation pay or buyouts to encourage employees to leave federal employment voluntarily. Office procedures provide that compensation for temporary total disability may not be paid for the period covered by separation pay.² Some separation payments are based on a specific number of weeks of pay while others are capped at a specified amount of money. In order to apply uniform standards to all claimants, however,

¹ *L.J.*, 59 ECAB ____ (Docket No. 07-1844, issued December 11, 2007).

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.c(1).

offsets for both types of payments should be computed in the same manner regardless of the way an employing establishment has offered separation pay.³ Whether separation pay is based on weeks of pay or a specified dollar amount, compensation should be suspended for the number of weeks of salary that the separation pay represents.⁴

ANALYSIS -- ISSUE 1

The Board finds this case is not in posture for decision regarding the amount of overpayment received by appellant. By decision dated December 11, 2007, the Board set aside a May 18, 2007 Office decision in which an overpayment totaling \$16,760.01 was calculated using the “dollar-for-dollar” method when appellant concurrently received wage-loss compensation and a VSIP buyout. The Board instructed the Office to apply the method of offset used when a buyout is based on weeks of pay in calculating the overpayment.

Following the Board’s remand, the Office obtained information regarding the VSIP buyout appellant received. The employing establishment informed the Office that appellant’s annual salary was \$70,557.75, that she was awarded the maximum benefit of \$25,000.00 and a net sum of \$16,760.01, which was minus taxes and any monies she owed the employing establishment. The Office calculated the amount of the overpayment, applying the method of offset based on weeks of pay, concluding that an overpayment in compensation in the amount of \$20,312.64 was created.

While a \$25,000.00 incentive would be the equivalent of 18.42 weeks or 128 days of pay in appellant’s case and the record supports that, from June 30, 2006, the date of her retirement, to November 4, 2006, a period of 128 days, she received gross compensation totaling \$20,312.64, the Office did not explain why it chose to base the overpayment calculation on the gross amount of the VSIP buyout, \$25,000.00, which yielded an overpayment of \$20,312.64, when the record supports that she received a net buyout of \$16,760.01 and the latter figure was used in the Office’s initial calculation of the overpayment on May 18, 2007. This difference between gross and net amounts requires further explanation.

It is well established that the Office, as part of its adjudicatory function, must make findings of fact and provide a statement of reasons for the decision reached.⁵ In an overpayment situation, it must explain the basis for its finding of overpayment and a clear statement indicating how the overpayment was calculated.⁶ The case will therefore be remanded to the Office for

³ See *Lynne M. Schaack*, Docket No. 05-695 (issued November 9, 2005).

⁴ The Board notes that the Office’s Federal (FECA) Procedure Manual, *supra* note 2 at Chapter 2.1000.17 (April 1996) provided that separation pay could be offset by either a dollar-for-dollar amount or based on the period of weeks’ salary the payment represented. Following the Board’s decisions in *Schaack*, *supra* note 3 and *L.J.*, *supra* note 1, the Office revised this section of the procedure manual in FECA Transmittal No. 09-05 (issued June 1, 2009). Where severance or separation pay is based on weeks of pay, compensation should be suspended for the period in question effective the date of retirement or separation. Where the payment is based on an amount of money, the claims examiner is to calculate the number of weeks’ worth of salary that the separation pay represents and suspend compensation for the number of weeks calculated. See *R.H.*, 60 ECAB ____ (Docket No. 08-2025, issued July 20, 2009).

⁵ See *Robert N. Johnson*, 51 ECAB 480 (2000); see also 20 C.F.R. § 10.126.

⁶ See *Jenny M. Drost*, 56 ECAB 587 (2005).

proper findings as to the amount of the overpayment in compensation. After such further development as it deems necessary, the Office shall issue an appropriate decision.⁷

CONCLUSION

The Board finds that this case is not in posture for decision regarding the amount of the overpayment in compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 9, 2008 is set aside and the case remanded to the Office on the issues of amount, waiver and recovery of the overpayment in compensation.

Issued: September 3, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁷ Based on this decision, a determination of whether to Office properly denied waiver of the recovery of the overpayment and whether the Office properly required repayment of the overpayment in full is premature. The Board, however, notes that appellant, who was found without fault, did not respond to the preliminary overpayment finding or provide any financial documentation to support her argument that she had spent the VSIP incentive to repair her home destroyed by Hurricane Katrina. *See John Skarbek*, 53 ECAB 630 (2002).