

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

R.M., Appellant

and

**DEPARTMENT OF THE AIR FORCE, AIR
NATIONAL GUARD, St. Augustine, FL,
Employer**

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**Docket No. 10-945
Issued: December 1, 2010**

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 24, 2010 appellant filed a timely appeal from an August 28, 2009 merit decision of the Office of Workers' Compensation Programs 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 \$11,947.04 from December 5, 2006 through January 17, 2009 because he received augmented compensation but had no dependents; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly determined that the overpayment should be recovered by withholding \$335.00 from his continuing compensation payments.

FACTUAL HISTORY

The Office accepted that on May 7, 1975 appellant, then a 24-year-old egress technician, sustained back sprain and lumbar discogenic disease in the performance of duty. After sustaining intermittent periods of disability, he returned to work as a management specialist on November 4, 1990.¹ The employing establishment terminated appellant on October 4, 1992 due to lack of funds. The Office paid him compensation for total disability after that date at the augmented rate of 75 percent of his monthly pay applicable to claimants with dependents.

On December 12, 2006 appellant notified the Office that he was no longer married as of December 5, 2006 and that he had no dependents. He asked the Office to change his "benefits to reflect this new marital status." In CA-1032 forms dated 2007 and 2008, appellant indicated that he had no dependents.

On January 9, 2009 the Office advised appellant that it was reducing his compensation effective January 8, 2009 from the augmented rate to the statutory rate of 66 and 2/3 percent of his monthly pay applicable to claimants without dependents.

On January 26, 2009 the Office notified appellant of its preliminary determination that he received an overpayment of \$11,947.04 because he received compensation at the augmented rate from December 5, 2006 through January 17, 2009 even though he did not have a dependent. It calculated the overpayment by subtracting the amount of compensation that he should have received at the 66 percent standard rate for claimants without dependents, \$95,038.96, from the amount he received at the 75 percent rate for claimants with dependents, \$106,966.00, to find an overpayment of \$11,947.04. The Office advised appellant of its preliminary determination that he was at fault in the creation of the overpayment. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, the Office 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 prerecoumpt hearing.

On February 19, 2009 appellant requested a prerecoumpt hearing by teleconference. He asserted that he was not at fault in creating the overpayment and requested waiver. In an attached statement, appellant related that, immediately after his divorce, he notified the Office that he had no dependents. He had many changes at the time of his divorce and did not keep track of the lack of change in the deductions from his compensation.

In an accompanying overpayment recovery questionnaire, appellant listed monthly income of \$3,854.00 and monthly expenses of \$5,088.96. He listed assets of \$500.00 in cash and \$60,000.00 in a checking account. Appellant maintained that the \$60,000.00 was not an actual asset. He explained that the money was the balance on a second mortgage that he was using to try to keep his home until the economy improved and to pay down credit cards.

¹ On July 2, 1991 the Office reduced appellant's compensation based on its finding that his actual earnings as a personnel management specialist beginning November 4, 1990 fairly and reasonably represented his wage-earning capacity.

A telephonic hearing was held on June 9, 2009. Appellant did not challenge that he received an overpayment of compensation but maintained that he was not at fault in its creation. The hearing representative questioned how he lived given that his expenses exceeded his income. Appellant related that when he was divorced he obtained a second mortgage of \$150,000.00. He used part of the second mortgage to buy out his ex-wife's equity in the home and put the rest of it in a checking account. Appellant used the money to make up the difference between his income and expenses.

By decision dated August 28, 2009, the hearing representative determined that appellant received an overpayment of \$11,947.04 because he incorrectly received compensation at the augmented rate from December 5, 2006 to January 17, 2009. She found, however, that he was not at fault in creating the overpayment and thus considered whether the overpayment should be waived. The hearing representative noted that it appeared that appellant's income exceeded his expenses. She found, however, that he had assets greatly exceeding the resource base of \$3,000.00 and thus was not entitled to waiver. The hearing representative determined that the Office should recover the overpayment by withholding \$335.00 from appellant's continuing compensation benefits.

On appeal, appellant contends that he is entitled to waiver of the overpayment. He asserts that his second mortgage loan does not constitute an asset, as it is part of the value of his principal family domicile.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act² 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.³ If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.⁴ Where the employee has one or more dependents as defined in the Act, he or she is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.⁵ A dependent includes a student, which under 5 U.S.C. § 8101 means an individual under 23 years of age who has not completed four years of education beyond high school and is pursuing a full-time course of study.⁶ If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation he was

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8105(a).

⁵ *Id.* at § 8110(b).

⁶ *Id.* at § 8110(a).

entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-quarters rate constitutes an overpayment of compensation.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$11,947.04 for the period December 5, 2006 through January 17, 2009. Appellant advised the Office that he had no dependents beginning December 5, 2006. The Office paid him compensation at the augmented rate of 75 percent of his monthly pay from December 5, 2006 through January 17, 2009 instead of at the 66 and 2/3 rate for employees with no qualifying dependents. Accordingly, appellant received an overpayment of compensation.

The Office paid appellant \$106,986.00 at the augmented rate for the period December 5, 2006 through January 17, 2009. Appellant should have been paid \$95,038.96. He consequently received an overpayment of \$11,947.04, the difference between the compensation to which he was entitled at the 2/3 rate and the augmented compensation he received at the three-quarters rate.⁸ The Board will affirm the fact and amount of the 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 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.

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.⁹ An individual's liquid assets include but are not limited to case, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.¹⁰ Nonliquid assets include but are not limited to the fair market

⁷ *Diana L. Booth*, 52 ECAB 370 (2001).

⁸ *Id.*

⁹ 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).

¹⁰ *Id.*

value of an owner's equity in property such as a camper, boat, second home and furnishings and supplies.¹¹

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.¹² 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.¹³

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. 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.¹⁴

Appellant listed assets of \$500.00 in cash and approximately \$60,000.00 in a checking account from a second mortgage that he obtained on his residence to buy out his former wife's equity and to pay his monthly expenses. On appeal, he contends that this money represents the value of his principal family domicile and should be excluded from consideration as an asset under Office procedures. The hearing representative denied waiver based on her finding that appellant had assets that far exceeded the resource base of \$4,800.00 for an individual. In reaching this determination, she included the second mortgage loan that he obtained on his home as an asset. The Office's procedure manual, however, specifically states that in evaluating assets for purpose of a waiver determination, the value of a principal family home shall not be considered.¹⁵ The second mortgage loan appellant obtained represented the value of his primary home; thus, it should not have been considered as an asset.¹⁶ The Office, consequently, erred in denying waiver on the grounds that his assets exceeded the applicable resource base.

The next issue is whether appellant requires substantially all of his income to meet ordinary and necessary living expenses. The hearing representative generally found that his income exceeded his expenses but did not review the expenses to determine whether they were

¹¹ *Id.*

¹² 20 C.F.R. § 10.436.

¹³ *Id.* at § 10.437(b)(1).

¹⁴ *Id.* at § 10.436.

¹⁵ Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 6.200.6 (June 2009).

¹⁶ *Weldon Roberts*, 40 ECAB 804 (1989).

ordinary and necessary. The case will be remanded for the Office to determine whether appellant needs substantially all of his income for ordinary living expenses. The Office should then make a finding regarding waiver of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of \$11,947.04 from December 5, 2006 through January 17, 2009, because he received augmented compensation but he had no dependents. The Board further finds that the case is not in posture for decision on the issue of waiver of the overpayment. Consequently, it is premature to address the issue of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2009 decision of the Office of Workers' Compensation Programs is affirmed, in part, and set aside, in part. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 1, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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