

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

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L.H., Appellant	)	
	)	
and	)	
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DEPARTMENT OF VETERANS AFFAIRS,	)	<b>Docket No. 10-1316</b>
G.V. (SONNY) MONTGOMERY VETERANS	)	<b>Issued: December 16, 2010</b>
ADMINISTRATION MEDICAL CENTER,	)	
Jackson, MS, Employer	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 10, 2010 appellant filed a timely appeal from an April 1, 2010 decision of the Office of Workers' Compensation Programs that found an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, 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 \$926.39; and (2) whether the Office properly denied waiver of the overpayment.

On appeal appellant asserts that the income figures used to determine waiver were incorrect because her husband would not begin receiving social security benefits until May 26, 2010.

## **FACTUAL HISTORY**

On May 21, 2009 appellant, then a 58-year-old licensed practical nurse, sustained an employment-related right shoulder rotator cuff tear while assisting a paralyzed patient. She continued to work at modified duty until December 3, 2009, when Dr. William B. Geissler, a Board-certified orthopedic surgeon, performed arthroscopic debridement and decompression of a partial rotator cuff tear on the right. Appellant was placed on the periodic compensation rolls. She returned to modified duty on February 2, 2010. Appellant received wage-loss compensation through February 13, 2010.<sup>1</sup>

By letter dated March 1, 2010, the Office issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$926.39 because she received wage-loss compensation after her return to work. It explained the calculation of the overpayment and found her not at fault in its creation. Appellant was provided an overpayment action request form and an overpayment questionnaire. An overpayment worksheet indicates that she received net compensation of \$2,161.58 for the period January 17 to February 13, 2010 when she should have received \$1,235.19 from January 17 to February 1, 2010. Appellant received credits for health benefits and basic and optional life insurance, yielding an overpayment in compensation of \$926.39.

Appellant submitted the overpayment questionnaire on March 4, 2010, listing income of \$3,200.00 and expenses of \$3,218.24. She stated that she supported a granddaughter, grandson and great-granddaughter. A telephone conference was held on April 1, 2010. The memorandum of conference noted that appellant's monthly income was \$3,200.00, and her husband's monthly income was \$982.00, for a total monthly income of \$4,182.00. The monthly expenses were reduced by \$160.00 for child care for grandchildren, which were disallowed, yielding monthly expenses of \$3,058.24 and a residual income of \$1,123.76. The claims examiner advised appellant that a decision would be issued after a review of the conference.

On April 1, 2010 the Office finalized the overpayment decision. It found that appellant was not at fault in the creation of the overpayment but that she was not entitled to waiver as her residual income was \$1,123.76. Appellant did not meet the criteria necessary to waive the overpayment and was directed to repay at the rate of \$200.00 per month.

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

Section 8102(a) of the Federal Employees' Compensation Act<sup>2</sup> provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of her duty.<sup>3</sup> Office

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<sup>1</sup> Appellant received a periodic rolls payment for the period January 17 through February 13, 2010.

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Id.* at § 8102(a).

procedures provide that an overpayment in compensation is created when a claimant returns to work and continues to receive compensation.<sup>4</sup>

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

The Board finds that appellant received an overpayment in compensation in the amount of \$926.39. The record supports that she returned to work on February 2, 2010 and received wage-loss compensation thereafter. A periodic rolls payment for the period January 17 through February 13, 2010 was made in the amount of \$2,161.58. As noted, the Act and implementing regulations of the Office provide that a claimant may not receive wage-loss compensation concurrently with a federal salary.<sup>5</sup> Appellant received compensation of \$2,161.58 but was entitled to \$1,235.19 yielding an overpayment in compensation of \$926.39 for the period in question.

### **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>6</sup> Section 10.438 of Office regulations provide 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>7</sup> Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>8</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

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

<sup>5</sup> 5 U.S.C. § 8116(a); 20 C.F.R. § 10.500.

<sup>6</sup> *Id.* at § 8129.

<sup>7</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>8</sup> 20 C.F.R. § 10.438.

recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.<sup>9</sup>

Appellant furnished the Office with an overpayment questionnaire on March 4, 2010 that listed income of \$3,200.00 and expenses of \$3,218.24. At a prerecoupment telephone conference held on April 1, 2010, appellant updated the financial information, stating that her husband's income was \$982.00 per month, or a total monthly income of \$4,182.00. The claims examiner informed appellant that the monthly expenses would be reduced by \$160.00, as expenses for child care for grandchildren was not an ordinary and necessary monthly expense, leaving total monthly expenses of \$3,058.24.

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, including the income of both appellant and her husband, the difference between current income and household living expenses is \$1,123.76. Appellant asserted on appeal that her husband's income should not be included because his social security benefit did not begin until May 26, 2010. Deducting the allowable monthly expenses of \$3,058.24 from appellant's income of \$3,200.00 leaves a difference of \$141.76. The Board finds that, as appellant's monthly income exceeded her reasonable monthly expenses by \$141.76, she is not entitled to waiver as she does not need substantially all of her income to meet current ordinary and necessary expenses.<sup>10</sup>

The Board finds that the Office properly determined that recovery of the overpayment would not cause financial hardship to appellant or defeat the purpose of the Act. Appellant made no argument that she gave up a valuable right or changed her position for the worse in reliance on the overpaid compensation. The Office properly determined that recovery would not be against equity and good conscience in denying waiver of the overpayment.

With respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.<sup>11</sup> As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.<sup>12</sup>

### **CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$926.39 and that the Office properly denied waiver of the overpayment.

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<sup>9</sup> 20 C.F.R. §§ 10.436, 10.437.

<sup>10</sup> See *R.M.*, 60 ECAB \_\_\_ (Docket No. 07-1066, issued February 6, 2009).

<sup>11</sup> *Cheryl Thomas*, 55 ECAB 610 (2004).

<sup>12</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 1, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: December 16, 2010  
Washington, DC

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

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

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