

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

H.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Baltimore, MD, Employer**

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**Docket No. 09-1747
Issued: July 7, 2010**

Appearances:
Sondra Colvin, for the appellant
Hans K. Wild, Esq., for the Director

Oral Argument January 7, 2010

DECISION AND ORDER

Before:

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

JURISDICTION

On June 30, 2009 appellant filed a timely appeal from a June 5, 2009 overpayment decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merit issues of this case.

ISSUE

The issue is whether the Office properly denied waiver of \$23,800.00 recovered from appellant's continuing compensation payments from June 21, 2002 to December 23, 2006.

On appeal appellant contends that he is entitled to waiver and should be refunded the amount deducted from his monetary compensation. The Director argued that the Office did not abuse its discretion in denying waiver because recovery of the overpayment would not defeat the purpose of the Act and was not against equity and good conscience.

The Director noted that the financial information submitted was not relevant to the period in question, when the overpayment was deducted from appellant's monetary compensation and that appellant's bankruptcy filing was for credit card debt but there was no record establishing if this debt was for "ordinary and necessary living expenses" to justify waiver. The Director also

noted that appellant failed to submit evidence regarding the status of the monetary compensation improperly paid to him while he was incarcerated and his income and expenses at that time.

FACTUAL HISTORY

This case has previously been before the Board. Appellant sustained injury on December 17, 1984 and received compensation for wage loss at the augmented rate.¹ His spouse died on March 7, 1993 and he received compensation at the augmented rate to September 29, 1994 in the amount of \$5,223.93. Appellant was incarcerated as of March 4, 1994 for reasons unrelated to his receipt of compensation. Although notified of his incarceration in January 1996, the Office paid compensation in the amount of \$54,304.93 from September 30, 1994 to March 1, 1997. The Office found overpayments in the above amounts and determined that appellant was at fault in the creation of each overpayment.

In a May 1, 2001 decision, an Office hearing representative found that appellant was not at fault with regard to either overpayment as he had reported that his wife was deceased and had not been advised of a change in the law which prohibited compensation payments to incarcerated payees. He considered appellant's financial information and denied waiver of the overpayments. The Office hearing representative affirmed the combined overpayments in the amount of \$59,528.86 and directed recovery from appellant's monthly Office of Personnel Management (OPM) benefits of \$350.00. As the applicable interest rate of 5 percent would increase the period of indebtedness by more than 35 percent, the debt principal was compromised by \$7,862.11 resulting in an outstanding balance of \$51,666.75. The record reflects that, when the case was returned from the Branch of Hearings and Review in May 2001, no action was taken to recover the overpayment through the OPM benefit offset.

On October 5, 2001 appellant was released from prison and reinstated on compensation for wage loss. The Office began collection efforts by reducing his periodic compensation benefits.² Following development of the claim, on November 10, 2005 it denied appellant's request for waiver of the overpayment. The Office noted that appellant's financial situation in 2001 had been considered in the May 1, 2001 decision. The claims examiner noted that an analysis of appellant's income and resources was completed based on the very limited information of record and that additional evidence concerning his finances was not received. The Office denied modification of the May 1, 2001 overpayment decision.

On March 29, 2006 appellant filed an appeal to the Board in Docket No. 06-986. The Director submitted a motion on October 18, 2006 requesting that the November 10, 2005 decision be set aside and the case remanded to the Office for further development. The Director noted that appellant had filed for bankruptcy in 1995 and that the Office needed to determine whether any amount of the overpayment had been discharged. Following development of the

¹ Appellant's claim was accepted for a left great toe fracture, lumbar sprain and depressive disorder.

² The Office noted that appellant was in receipt of compensation in the amount of \$1,462.36 every 28 days and also received \$149.00 in social security. A September 12, 2006 letter requested that appellant confirm his monthly income and provide documentation concerning his claimed expenses.

issue, the Office would issue a new preliminary overpayment determination and determine whether waiver was appropriate.³ In a November 3, 2006 order, the Board granted the motion.

Following additional development, the Office issued a January 31, 2007 preliminary overpayment determination finding an overpayment of \$36,716.35 as appellant received compensation during the period of his incarceration. It noted that it confirmed that appellant filed for bankruptcy on July 18, 1995, therefore that portion of the \$54,304.93 overpayment that occurred prior to that date (\$17,588.56) was not collectible and the remaining amount represented the overpayment from July 19, 1995 through March 1, 1997. To this, the Office noted that it would not pursue collection of the \$5,223.93 overpayment that also occurred prior to the bankruptcy filing due to the receipt of compensation at the augmented rate. This reduced the amount of the outstanding debt by \$22,812.49. The Office noted that following appellant's release from prison it had recovered \$25,550.00, leaving an outstanding balance of \$11,166.35. Appellant was found to be without fault in the creation of the overpayment. The Office noted that it had deducted \$350.00 from appellant's compensation and that he could submit evidence to support any request to reduce the deductions to a smaller amount.

On March 5, 2007 the Office finalized the overpayment in the amount of \$11,166.35 and determined that the circumstances of his case did not warrant waiver of recovery. It advised that \$250.00 would be deducted from his ongoing periodic compensation beginning March 18, 2007 such that the overpayment would be absorbed by September 26, 2010.⁴

Appellant requested a hearing which was held on July 16, 2007 at which he appeared and contended that he was not financially able to repay the debt. He submitted a February 27, 2007 overpayment questionnaire listing monthly income of \$2,311.90 that included social security and monthly expenses of \$2,864.98 and stated that he used his credit cards to cover expenses. Appellant also requested that the \$350.00 periodic deductions previously recovered from his compensation be refunded. Following the hearing, he submitted additional information regarding his utility bills.

In a January 28, 2008 decision, an Office hearing representative found that waiver of the overpayment was justified on the basis that recovery would defeat the purpose of the Act. She noted that the financial information submitted by appellant was reliable and reasonable and established that he did not have sufficient monthly income to meet ordinary and necessary living expenses or have sufficient assets to enable him to make repayment without causing undue hardship. The case was returned to the district Office for removal of the overpayment from accounts receivable and that any money deducted from appellant's benefits as a result of the March 5, 2007 decision should be refunded to him.⁵

³ The Director noted that the Office would cease making deductions from appellant's continuing compensation and would take into account the amount that had been recovered.

⁴ The Office noted that appellant did not respond to the preliminary overpayment determination and no financial information was submitted to consider waiver. *See* 20 C.F.R. § 10.438(b).

⁵ On February 5, 2008 the Office noted that no deductions had been made from his compensation under the March 5, 2007 overpayment decision; therefore he was not due any refund.

Appellant filed an appeal with the Board on March 4, 2008 in Docket No. 08-1094. In a November 21, 2008 decision, the Board affirmed the matter of the overpayment of \$36,716.35 received by appellant during his incarceration and after his bankruptcy filing. With regard to the issue of waiver, the Board noted that the Office hearing representative waived the uncollected \$11,166.35 amount of overpayment. With regard to the \$25,550.00 which had been recovered from appellant's periodic compensation payments, the case was found not in posture for decision as to whether he was entitled to waiver of this amount.⁶ The case was remanded to the Office to obtain updated financial information to determine whether waiver of the \$25,550.00 previously repaid was warranted.

On January 20, 2009 the Office requested that appellant furnish financial information for the years 2002 to 2008. The claims examiner documented a conversation with appellant, who indicated that he no longer had financial records for the year 2002. Appellant was requested to submit additional information concerning his taxes, W2 earnings and copies of any bank accounts and bills. He was also provided an overpayment recovery questionnaire to complete.

In a January 23, 2009 letter, appellant requested waiver and submitted the overpayment questionnaire signed on February 2, 2009 showing current FECA benefits of \$1,976.00 monthly and \$558.00 monthly from the Social Security Administration (SSA), or total monthly income of \$2,534.00. He listed his monthly household expenses as \$2,598.99 per month. Appellant also submitted financial information dating from August 5, 2008, including dental and car insurance expenses, electric, gas, and water bills, and mortgage and car payments. He noted that he did not file tax returns from 2002 to 2008 as he only had nontaxable income. There were no W2 statements as he had not worked since his injury. Appellant contended that he should be refunded the monies recovered from his compensation. By letter dated April 4, 2009, he explained that he no longer had financial records for the years 2002 to 2006 and used credit cards to cover his living expenses. On April 13, 2009 appellant submitted information indicating that he filed for Chapter 7 bankruptcy on May 23, 2008, and submitted an order dated August 27, 2008 in which the U.S. Bankruptcy Court for the District of Maryland found that he was entitled to the discharge of debts.⁷

A June 9, 2009 memorandum to file noted that the correct amount of the monies recovered by the Office totaled \$23,800.00.⁸ A computer print-out noted that on June 25, 2002 payments were deducted from appellant's monetary compensation with the last payment made on December 28, 2006.

In a June 5, 2009 decision, the Office denied modification of a January 28, 2008 overpayment decision. The claims examiner noted that the information pertaining to appellant's

⁶ The Board noted that, upon appellant's release from prison and reinstatement to the compensation rolls in 2002, his financial circumstances had changed such that he should have been provided the opportunity to submit updated financial information in order that the Office could consider whether waiver was warranted.

⁷ The creditors listed were American Express, Barclays Bank, Citi-citgo, Juniper Card Services, Monogram Bank, NCO Financial Services, Sears, Target and Washington Mutual.

⁸ The Office documented 59 payments of \$350.00 (\$20,650.00) and one payment of \$3,150.00, a total of \$23,800.00.

credit cards and bankruptcy documented accounts opened from October 31, 2001 through June 26, 2007 and totaled \$31,752.00. Six of the credit cards were opened between 2002 and 2006, the period in which the Office made recovery of the overpayment from appellant's compensation payments. The claims examiner noted that appellant did not submit information from 2002 or document his monthly ordinary and necessary living expenses following his release from prison in October 2001. She reviewed certain documented monthly expenses from 2005, noting payment of loans from CitiFinancial; a car payment to CarMax Auto Finance; monthly car insurance, water and gas utility bills; monthly prescription expenses and certain minimum credit card payments totaling \$972.32. The claims examiner noted that appellant listed mortgage expenses of \$642.00 a month, a yearly home warranty payment of \$456.00, \$775.00 for replacement of a fence and \$273.85 for eyeglass examination and glasses. These expenses were found to be either nondocumented or not ordinary and necessary. Appellant's listing of \$75.00 a month for automobile maintenance was found excessive and she allowed \$36.42 a month. It was noted that he did not specify amounts spent for food and gas each month and that the Bureau of Labor Statistics expenditure table for 2005 indicated the average one person household spent \$137.00 a month for food and \$86.00 a month for gas. Based on this, she determined that appellant had monthly ordinary and necessary living expenses of \$1,231.74 for September 2005. As appellant's monthly income was \$1,880.36 a month, his income exceeded expenses by \$648.62 a month. The claims examiner noted that, although appellant submitted information concerning his monthly expenses between March 27, 2005 and February 6, 2009, the only documentation concerning his assets was a December 15, 2008 checking account statement and that the bankruptcy documents did not provide any information concerning his assets.

LEGAL PRECEDENT

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.⁹ If it 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.¹⁰

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. A higher amount is specified for a beneficiary with one or more dependents.¹¹ Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.¹² Recovery of an overpayment is also

⁹ 20 C.F.R. § 10.433(a); *see Steven R. Cofrancesco*, 57 ECAB 662 (2006).

¹⁰ 20 C.F.R. § 10.434; *see Madelyn Y. Grant*, 57 E3CAB 533 (2006).

¹¹ *Id.*

¹² *Id.*

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.¹³

Office procedures note that the Act is social legislation intended to benefit entitled employees and that every effort should be made to accommodate the claimant's best interests and to ensure that all due process actions are completed in a timely and fair manner when specific collection actions must be enforced.¹⁴

ANALYSIS

The Board finds that the Office abused its discretion in adjudicating appellant's request for waiver of the amount recovered from his compensation for the overpayment in this case. The case will be remanded for further proceedings.

At the July 16, 2007 hearing, appellant appeared and presented financial information including a February 29, 2007 listing of his monthly expenses. It is noted that he did not document all his expenses. Among them were a monthly mortgage of \$1,113.00 to Nationwide, insurance, car payment, utility and medical expenses and credit card obligations. In a January 28, 2008 decision, the Office hearing representative noted that appellant had monthly income of \$2,311.90 and monthly expenses of \$2,864.98. In considering the issue of waiver and whether recovery of the overpayment would defeat the purposes of the Act under the implementing federal regulations, she found that recovery of the overpayment would deprive appellant of the income and resources needed for his ordinary and necessary living expenses and that his assets did not exceed the applicable resource base. The hearing representative determined that the financial information provided the Office was "reliable and reasonable, establishing that the claimant does not have sufficient monthly income to meet his ordinary and necessary living expenses without causing hardship." For this reason, she waived the outstanding uncollected overpayment amount of \$11,166.35.

In contrast, the June 5, 2009 decision on appeal reviewed essentially the same financial information submitted by appellant to find that he had total monthly income of \$1,880.36 a month and total monthly expenses of \$1,231.74. The expenses allowed consisted of "documented" expenses for automobile insurance, some utility bills, prescription expenses and several credit card payments in the amount of \$972.32. The claims examiner also allowed specific amounts from the 2005 Bureau of Labor Statistics for gas, food and car maintenance of \$259.42. She disallowed certain monthly expenses listed by appellant, including a home mortgage expense of \$642.00 as it was not documented. As appellant's total monthly income was found to exceed his expenses by \$648.62 a month, he was found not to need substantially all his current income to meet ordinary and necessary living expenses. It was noted that on August 27, 2008 the U.S. Bankruptcy Court discharged some \$31,752.00 in debt, primarily

¹³ *Id.*

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.1 (May 2004); see *A.G.*, 58 ECAB 625 (2007).

consisting of credit card charges incurred from 2002 to 2006, following appellant's release from prison.

It is not readily apparent to the Board how appellant's listing of monthly expenses in 2007 could be found reliable and reasonable by the Office hearing representative while in 2009, certain monthly expenses were excluded from consideration due to inadequate documentation. Specifically, it was not reasonable for the claims examiner to allow certain expenses for appellant's monthly utilities (water and gas) and insurance while excluding the \$642.00 mortgage expense. Certainly, there was no reference to the prior decision in which the listed amount for this home expense was allowed. It is well established that recovery would defeat the purposes of the Act if the beneficiary needs substantially all his or her current income to meet ordinary and necessary living expenses.¹⁵ An individual is deemed to need substantially all of his income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. The claims examiner determined that appellant's monthly income exceeded his expenses by \$648.62 a month; however, when the \$642.00 mortgage expense is added to the other accepted expenses, appellant's monthly income does not exceed his expenses by more than \$50.00.

At the hearing held on July 16, 2007, appellant and his representative testified about his income and expenses, stating that he had a monthly shortfall of \$600.00 and had to use credit cards to meet monthly expenses. After the hearing he submitted additional financial information. In the January 28, 2008 decision, the Office hearing representative noted that appellant had repaid \$25,500.00 of the overpayment in compensation, leaving a balance of \$11,166.35. As noted, she determined that the financial information appellant had provided was reliable and reasonable and established that he did not have sufficient monthly income to meet his ordinary and necessary living expenses or the assets to enable him to make repayment without causing hardship. While the hearing representative did not address waiver of the compensation recovered by deduction from appellant's continuing compensation, the Board finds her analysis regarding waiver persuasive in that she considered financial information relevant to the period when the Office deducted \$350.00 a month from his compensation benefits. Abuse of discretion may be established through proof of manifest error, clearly unreasonable exercise of judgment, or action that is arbitrary, capricious or unreasonable.¹⁶ It was arbitrary for the Office to allow for certain listed but undocumented monthly expenses in 2007 and then reject such listed expenses in 2009. The Board will remand the case to the Office for further action consistent with this decision.

CONCLUSION

The Board finds that the Office abused its discretion in consideration of appellant's financial information with regard the \$23,800.00 previously recovered by deduction from his compensation.

¹⁵ See *Otto A. Fernandez*, 55 ECAB 558 (2004).

¹⁶ See *William B. Webb*, 56 ECAB 156 (2004); *Annette Louise*, 54 ECAB 783 (2003).

ORDER

IT IS HEREBY ORDERED THAT the June 5, 2009 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for proceedings consistent with this decision of the Board.

Issued: July 7, 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