

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

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**F.B., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE,  
LUKE AIR FORCE BASE, AZ, Employer**

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**Docket No. 09-1945  
Issued: September 10, 2010**

*Appearances:*  
*Sidney F. Wolitzky, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 27, 2009 appellant, through his attorney, filed a timely appeal from a May 1, 2009 merit decision of the Office of Workers' Compensation Programs and a June 12, 2009 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether the Office properly denied waiver of \$5,847.00 of appellant's overpayment; (2) whether it properly determined that it would recover the overpayment by deducting \$100.00 from continuing compensation; and (3) whether the Office properly denied appellant's request for further review of the merits of the claim under 5 U.S.C. § 8128.

On appeal his attorney asserts that the remaining amount of the overpayment should be waived.

## **FACTUAL HISTORY**

On June 6, 1992 appellant, then a 53-year-old firefighter, filed a claim alleging that on June 2, 1992 he sustained an injury to his left knee in the performance of duty. The Office accepted the claim for left knee strain and authorized a left knee arthroscopy and partial meniscectomy.

By letter dated February 20, 2007, the Office notified appellant of its preliminary determination that he received an overpayment of \$11,694.37 because it did not reduce his disability compensation by the amount of the retirement benefits he received from the Social Security Administration (SSA) based on his federal service. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment. The Office requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified him 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 precoupment hearing.

Appellant requested a telephone conference, which was held on June 13, 2007. He challenged the existence of the overpayment and argued that he did not receive retirement benefits. Appellant also maintained that he was unable to repay the overpayment.

By decision dated February 5, 2008, the Office found that appellant received an overpayment of \$11,694.37 and that he was without fault in its creation. It denied waiver as he had not submitted any financial information. The Office determined that it would recover the overpayment by withholding \$200.00 per month from appellant's continuing compensation.

On April 10, 2008 appellant, through his attorney, requested a telephone conference. On January 28, 2009 he requested reconsideration. Appellant's attorney argued that he did not receive civil service retirements benefits, but rather benefits from SSA based on his age.

On February 3, 2009 appellant completed an overpayment recovery questionnaire. He provided his monthly income as \$3,650.22, which included his wife's earnings of \$1,666.48, \$908.00 in SSA benefits, \$411.74 in military retirement and \$664.00 from his stepson's SSA benefits. Appellant listed total expenses of \$4,116.58 and assets of \$133.00. He disputed fact and amount of overpayment.

In a memorandum of conference, the Office obtained clarification of appellant's income and expenses. It noted that his stepson received \$664.00 from SSA which would stop after his graduation in July 2009.

By decision dated May 1, 2009, the Office modified its February 5, 2008 decision to reflect partial waiver of the overpayment. It determined that he received an overpayment of \$11,694.37 for which he was without fault. The Office found that appellant had total expenses of \$3,868.00 and a total monthly income of \$4,112.00, including the income from his SSA benefits, FECA benefits and retirement, as well as his spouse's earnings and his stepson's SSA benefits. It reduced his expenses claimed to \$3,868.00 after finding certain expenses either not adequately documented or not ordinary and necessary. The Office subtracted the total expenses of \$3,868.00 from appellant's monthly income of \$4,112.00 to find a difference of \$244.00. It concluded that the evidence did not support waiver of the overpayment as his monthly income exceeded his expenses by \$244.00. The Office, however, waived half of the overpayment to find a new overpayment total of \$5,747.00. It further reduced recovery of the overpayment to \$100.00 per month from continuing compensation payments.

On June 2, 2009 appellant, through his attorney, requested reconsideration. Counsel disputed that appellant received any benefits under the Federal Employees' Retirement System (FERS) or that SSA paid him any FERS benefits. He enclosed a letter from the Office of Personnel Management (OPM) indicating that appellant had not received OPM benefits since his June 2001 retirement.

By decision dated June 12, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was immaterial or repetitious and thus insufficient to warrant reopening the case for further merit review. It found that his argument that he had not received retirement benefits from SSA or FERS was previously considered. The Office further determined that the fact that appellant was not receiving benefits from OPM was not relevant to the issue of whether a portion of the SSA benefits he received due to his age was based in part on his federal service under FERS.

On appeal appellant no longer disputes fact or amount of overpayment. He instead argues that he is unable to repay the overpayment due to his financial and health situation.

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

Section 8129 of the Act<sup>1</sup> 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." (Emphasis added.) 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.<sup>2</sup>

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

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<sup>1</sup> 5 U.S.C. § 8129.

<sup>2</sup> 20 C.F.R. §§ 10.436, 10.437.

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.<sup>3</sup> An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.<sup>4</sup> Nonliquid assets include, but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings and supplies.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

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

The Office determined that appellant had an overpayment of \$11,694.37 because he received compensation for disability with no reduction for the amount of his retirement benefits from SSA based on his federal service. On appeal he does not challenge fact or amount of overpayment, but instead argues that he is entitled to waiver of the entire amount of the overpayment.

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.<sup>8</sup>

The Office determined that appellant did not require substantially all of his income to meet ordinary and normal living expenses. In finding that he was not entitled to waiver of all of the overpayment, the Office reviewed the overpayment questionnaire and the information

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<sup>3</sup> 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).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> 20 C.F.R. § 10.436.

<sup>7</sup> *Id.* at § 10.437(b)(1).

<sup>8</sup> *Id.* at § 10.436.

provided at the telephone conference. It determined that appellant had a monthly income of \$4,112.00. His monthly income consisted of his SSA benefits, his FECA benefits, his military retirement, his spouse's income and \$664.00 from his stepson's SSA benefits. The Office, after reducing various expenses as either undocumented or not ordinary and necessary, found that he had total monthly expenses of \$3,868.00. As appellant's income exceeded his expenses by \$244.00, it found that he was not entitled to waiver.

The Board notes that without the stepson's monthly income of \$664.00, appellant's income would not exceed his expenses. It is critical, therefore, to determine whether the Office properly included the stepson's income for purposes of determining his total income. The Office's regulations provide that total income includes "any funds which may be reasonably considered available for his or her use, regardless of source."<sup>9</sup> It failed to develop the record or make any factual findings as to whether the stepson's income "may be reasonably considered available" to appellant. The Office did not ask either him or his stepson to provide information regarding the availability of the stepson's earnings. The Board is thus unable to determine if the stepson's earnings or a portion thereof, were reasonably available to appellant.<sup>10</sup> Accordingly, the case must be remanded to the Office for further development on the issue of waiver of the overpayment.

### **CONCLUSION**

The Board finds that the case is not in posture for decision regarding whether the Office properly denied waiver of \$5,847.00 of appellant's overpayment.<sup>11</sup>

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<sup>9</sup> *Id.* at § 10.322(b).

<sup>10</sup> See *Adolphus Bennett*, 49 ECAB 595 (1998); *Thomas Lee Jones*, 48 ECAB 666 (1997).

<sup>11</sup> In view of the Board's disposition of waiver, the issues of whether the Office properly determined the rate of recovery and whether it properly denied appellant's request for reconsideration are moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 12 and May 1, 2009 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 10, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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