

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

D.C., Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Boston, MA, Employer**)

**Docket No. 10-512
Issued: January 13, 2011**

Appearances:

*Karl L. Stammen, Jr., Esq., for the appellant
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 December 14, 2009 appellant filed a timely appeal from an August 28, 2009 decision of the Office of Workers' Compensation Programs regarding an overpayment of compensation.¹ 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 the Office properly found that appellant received an overpayment of compensation in the amount of \$75,692.81 for the period September 4, 2005 to September 27, 2008; (2) whether the Office abused its discretion by denying waiver of the overpayment; (3) whether the Office properly required recovery of the overpayment from continuing compensation at the rate of \$461.54 every 28 days.

¹ Counsel did not appeal an August 31, 2009 decision suspending appellant's compensation as she failed to submit an affidavit of earnings and employment (Form CA-1032).

On appeal, counsel did not contest the fact or amount of the overpayment. He contends that the Office wrongly denied waiver of the overpayment based on financial hardship or detrimental reliance.

FACTUAL HISTORY

The Office accepted that on August 23, 1995 appellant, then a 48-year-old full-time registered nurse and clinical trainer, sustained a left arm contusion when she slipped and fell on a wet hallway floor. She underwent left elbow arthroscopy, partial synovectomy and removal of loose bodies, authorized by the Office. On April 18, 2001 the Office accepted right lateral epicondylitis due to repetitive motion.

On November 1, 2001 appellant underwent a right lateral fasciotomy with partial ostectomy, authorized by the Office. She returned to part-time limited duty on January 7, 2002. Appellant underwent additional surgery on March 30, 2004 due to the accepted injuries. She returned to work on March 14, 2005 in a modified-duty position, working six hours a day. The Office paid appellant wage-loss compensation for the remaining two hours a day.

On September 26, 2008 the Office advised appellant that it had mistakenly paid wage-loss compensation based on a loss of six hours a day instead of two hours a day. It noted that she returned to work six hours a day and claimed two hours of wage loss a day, but was compensated for six hours instead of two. The Office reduced appellant's compensation effective September 28, 2008. Based on compensation payment logs, it calculated that, from September 4, 2005 to September 27, 2008, she received \$105,664.86 in compensation, but was only entitled to \$29,972.05, a difference of \$75,692.81.

By notice dated December 22, 2008, the Office advised appellant of its preliminary determination that she was overpaid \$75,692.81 in compensation from September 4, 2005 to September 27, 2008. It found her with fault in creating the overpayment.

Appellant requested a prerecoupment hearing that was held on May 29, 2009. At the hearing, counsel contended that appellant was not at fault in creating the overpayment as she did not know how her benefits were calculated. He asserted that she was entitled to waiver based on detrimental reliance as she needed nearly all of the compensation paid as she neared retirement. Appellant testified that she lived with her husband, a self-employed contractor, and had no additional income. She submitted an overpayment recovery questionnaire (Form OWCP-20) and supporting documentation listing \$4,972.16 in monthly expenses and \$334,500.00 in assets.² After the hearing, appellant submitted documentation of an additional \$1,848.38 in monthly debt repayment and other necessary living expenses and tax returns showing \$7,998.59 in monthly household income.

² Appellant listed the following monthly expenses: \$2,031.16 mortgage; \$800.00 food; \$250.00 clothing; \$979.00 utilities; \$912.00 in car payments and insurance; \$1,000.00 in credit card payments. She listed the following assets: \$200,000.00 in market value for a second home with no mortgage; \$125,000.00 in thrift savings and stocks; \$9,000.00 in bank accounts; \$500.00 cash.

By decision dated and finalized August 28, 2009, an Office hearing representative found that appellant received an overpayment in the amount of \$75,692.81 for the period September 4, 2005 to September 27, 2008, as she received compensation for six hours a day instead of the two to which she was entitled. He further found that she was not at fault in creation of the overpayment, as she did not receive notice of how her benefits were calculated. The hearing representative denied waiver as appellant had \$334,500.00 in assets, exceeding the allowable asset base of \$8,000.00. Also, appellant's monthly household income of \$7,998.59 exceeded her allowable monthly expenses of \$6,820.54 by \$1,178.05. The hearing representative found that she did not establish detrimental reliance as she did not demonstrate that she gave up a valuable right or changed her position for the worse. He directed recovery of the overpayment by deducting \$500.00 a month or \$461.54 every four weeks from continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act³ 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 his duty.⁴ Section 8129(a) of the Act provides in pertinent part, that when "an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."⁵

The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent, or a total of 75 percent of monthly pay.⁶

ANALYSIS -- ISSUE 1

The record supports that, from September 4, 2005 to September 27, 2008, appellant worked six hours a day and claimed wage-loss compensation for the remaining two hours a day; but the Office inadvertently compensated her at six hours a day. While she received \$105,664.86 in wage-loss compensation, she was entitled to only \$29,972.05. The difference of \$75,692.81 constitutes an overpayment of compensation.

The Board finds the Office's calculations were accurate and properly explained in the payment rework. Appellant did not contest the fact or amount of the overpayment. The Office properly determined that she received an overpayment in the amount of \$75,692.81.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8102(a).

⁵ 5 U.S.C. § 8129(a).

⁶ *Id.* at § 8110(b).

LEGAL PRECEDENT -- ISSUE 2

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.⁷ Section 10.433(b) of the Office regulations provide, in relevant part, that the determination of fault “depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”⁸

If the Office 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.⁹ This information will also be used to determine the repayment schedule, if necessary.¹⁰

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office’s discretion pursuant to statutory guidelines.¹¹ 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 individual’s assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Both conditions in (a) and (b) must be met to defeat the purpose of the Act.¹²

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 other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).¹³ When an individual exceeds the limits for either disposable current income or assets, on the face of it this provides a basis for establishing a reasonable repayment schedule over a reasonable, specified period of time.¹⁴

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.* at § 10.433(b).

⁹ *Id.* at § 10.434.

¹⁰ *Id.* at § 10.438(a).

¹¹ *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984) and cases cited therein.

¹² 20 C.F.R. § 10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

¹³ Federal (FECA) Procedure Manual, *supra* note 12.

¹⁴ *Id.* at Chapter 6.200.6.a(1).

Recovery of an overpayment is 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.¹⁵ Conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit, is not to be considered a loss.¹⁶

The individual who received the overpayment is responsible for providing the information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹⁷

ANALYSIS -- ISSUE 2

The Office determined that appellant was without fault in creating the overpayment as she was not advised how her compensation was calculated. It found, however, that the overpayment was not eligible for waiver. Appellant's financial information showed \$7,998.59 in monthly income and \$6,820.54 in allowable monthly expenses, a difference of \$1,178.05. As appellant's monthly income exceeded her expenses by more than \$50.00, she did not need substantially all her income to meet ordinary and necessary living expenses.¹⁸ Also, appellant's \$334,500.00 asset base exceeded the \$8,000.00 asset limit for an individual and one dependent. Therefore, the Office properly determined that recovery of the overpayment would not defeat the purpose of the Act.¹⁹

The Board further finds that the Office properly found that recovery of the overpayment would not be against equity and good conscience. The evidence does not establish that appellant, in reliance overpayment, gave up a valuable right or changed her position for the worse.²⁰ Appellant asserted that she needed all compensation paid as she was nearing retirement. Although she did not specify how she disposed of the overpaid funds, the Board notes that converting the payments into goods from which appellant derived benefit is not considered a loss.²¹

On appeal, counsel contends that the Office wrongly denied waiver of the overpayment based on financial hardship or detrimental reliance. As noted, appellant did not demonstrate detrimental reliance or that recovery would cause financial hardship. The Office properly found

¹⁵ 20 C.F.R. § 10.437(b).

¹⁶ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 6.200.6.b(3) (June 2009).

¹⁷ 20 C.F.R. § 10.438(a).

¹⁸ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 6.200.6.a(1)(b) (June 2009).

¹⁹ 20 C.F.R. § 10.436; Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 6.200.6.a(1)(b) (June 2009).

²⁰ *Id.* at § 10.437(b).

²¹ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 6.200.6.b(3) (June 2009).

that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience. Therefore, the Board will affirm the hearing representative's August 28, 2009 decision to deny waiver.

LEGAL PRECEDENT -- ISSUE 3

Office regulations provide that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment, as soon as the error is discovered or her attention is called to same. If no refund is made, it shall decrease later payments of compensation taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.²²

ANALYSIS -- ISSUE 3

The Board finds that the Office did not abuse its discretion by ordering the deduction of \$461.54 every four weeks from appellant's continuing compensation payments.

Section 10.441(a) of the Office's regulations direct it to take certain matters into consideration in establishing the repayment schedule, including the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.²³ In this case, appellant submitted detailed financial information with supporting documentation. The Office carefully considered this information as well as the factors set forth in section 10.411. It was found appellant had total assets of \$334,500.00, monthly compensation of \$853.67 and joint monthly income of \$7,144.92 or a total of \$7,998.59 as of 2008. After deducting total monthly expenses of \$6,820.54, there was \$1,178.05 remaining from which recovery of the overpayment would be made by deducting \$461.54 every 28 days from appellant's continuing compensation. The hearing representative did not abuse his discretion in setting the rate of recovery.

CONCLUSION

The Board finds that the Office properly found that appellant received an overpayment of compensation in the amount of \$75,692.81. The Board further finds that the Office did not abuse its discretion by denying waiver of the overpayment. The Board further finds that the Office properly required recovery of the overpayment by deducting \$461.54 every 28 days from continuing compensation payments.

²² 20 C.F.R. § 10.441(a).

²³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 28, 2009 is affirmed.

Issued: January 13, 2011
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