

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOSEPH RICCI and DEPARTMENT OF THE NAVY,  
NORTH ISLAND NAVAL AIR STATION, San Diego, CA

*Docket No. 00-515; Submitted on the Record;  
Issued February 2, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$876.61 occurred; (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; and (3) whether the Office abused its discretion in denying waiver of recovery of the overpayment.

The Office accepted appellant's claim for bilateral carpal tunnel syndrome and subsequently found that appellant was entitled to a schedule award for a 37 percent right upper extremity impairment. The award ran from April 3, 1996 to June 20, 1998. On August 14, 1996 the Office awarded appellant a lump sum of \$57,241.21.

By memorandum dated September 10, 1997, the Office determined that appellant was entitled to a schedule award for an additional 23 percent impairment for the left arm and noted that the period of award ran from June 21, 1998 to November 4, 1999.

In an internal memorandum dated September 18, 1997, the Office used a commutation date of August 18, 1996 and an expiration date of November 14, 1999 to determine appellant's total lump sum award. The Office noted that the total dollar amount payable would be \$97,182.22 and since \$57,241.21 had been paid, the balance payable for the lump sum schedule award was \$39,941.01. The memorandum included a handwritten annotation stating that the lump sum period was June 21, 1998 to November 14, 1999.

By letter dated October 17, 1997, the Office stated that it had processed a lump sum settlement for \$39,941.01 and that the check would be issued on October 24, 1997.

By letter dated September 23, 1997, appellant agreed to a lump sum payment payable for June 21, 1998 to November 4, 1999.

By decision dated October 20, 1997, the Office awarded appellant an additional 23 percent impairment award for the left upper extremity, noting that the entire period of award for

a 37 percent right upper extremity impairment and a 23 percent left upper extremity impairment covered April 3, 1996 to November 4, 1999 and that an additional lump sum of \$39,941.01 was paid covering June 21, 1998 to November 4, 1999.

In an internal memorandum dated February 20, 1998, the Office noted that it had originally calculated appellant's commuted value of schedule award from August 18, 1996 to November 14, 1999, but acknowledged that this was in error and recalculated the period of award from August 18, 1996 to November 4, 1999, a reduction of approximately 10.68 days in appellant's entitlement period. The initial number of entitlement days was 1,184, while the subsequent and correct number of entitlement days was 1,173.32 days.<sup>1</sup> Further, the Office noted that, since the combined entitlement period was more than 3 years but fewer than 4 years, it used the reduction factor of 4 years to arrive at a total compensation amount of \$96,305.61. The Office then subtracted the amount previously awarded, \$57,241.21, to arrive at the balance payable, \$39,064.40.

By a preliminary determination letter dated February 26, 1998, the Office notified appellant that an overpayment of compensation had been made in his case. The Office noted that appellant was overpaid by \$876.61, which was the difference between \$39,941.01, the amount paid and \$39,064.40, which is what he should have been paid. The Office noted that the incorrect calculation was based on entitlement period ending November 14, 1999 and that the correct date for the end of appellant's entitlement period was November 4, 1999. The Office noted that appellant was without fault and advised him that recovery of the overpayment "may not be made if it can be shown that such recovery would defeat the purposes of the law or would be against equity and good conscience."

In a letter dated March 24, 1998, appellant requested that the Office waive his overpayment and submitted a CA-1032 questionnaire, an OWCP-20 overpayment recovery questionnaire, several copies of personal invoices and copies of recent income tax submissions in support of his request.

In a decision letter dated June 28, 1999, the Office determined that the circumstances in appellant's case did not warrant a waiver of overpayment and that he would be required to repay \$876.61. In an attached memorandum, the Office noted that a waiver would be granted if appellant established that his income did not exceed monthly living expenses by more than \$50.00 and if appellant's resources did not exceed a base of \$5,000.00 for an individual and a spouse. The Office then noted that, based on appellant's submissions, it determined that appellant did not use substantially all his monthly income, \$3,480.42, to offset his living expenses, \$1,344.65 and that he had "about \$2,135.77 in discretionary income each month," and that, therefore, waiver of the recovery of the overpayment was denied. The Office advised appellant to notify it within 30 days to arrange for repayment.

The Board finds that the Office properly determined that appellant received an overpayment of compensation benefits in the amount of \$876.61. The Office determined that it had erroneously paid appellant an additional amount on his schedule award based on the Office's incorrect reliance on November 14, 1999 as the end of appellant's entitlement period rather than

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<sup>1</sup> The number of days that appellant was entitled to the award was 1,173.32, the fraction of the day (.32) is used in the final award calculation.

November 4, 1999, which resulted in an overpayment of \$876.61. The Office, therefore, properly determined the amount of the overpayment.

The Board also finds that the Office properly determined that appellant was without fault in the creation of the overpayment as the Office conceded that it erroneously paid appellant the additional \$876.61 based on an incorrect entitlement time period.

Further, the Board finds that the Office properly denied appellant's request for a waiver of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act<sup>2</sup> provides that, where an overpayment of compensation has been made "because of an error of fact or law" adjustments shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustments or recovery by the United States may not be made when 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>3</sup>

With respect to whether recovery of the overpayment would be against equity and good conscience, the Federal (FECA) Procedure Manual<sup>4</sup> provides that recovery of an overpayment would be against equity and good conscience when any individual who received by the Office an overpayment would experience severe financial hardship in attempting to repay the debt, when recovery of an overpayment derived no personal gain from the incorrect payments and had no knowledge of the compensation benefits that were paid to him, or 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. In making such a decision, the Office does not consider the individual's current ability to repay the overpayment.<sup>5</sup>

In this case, the evidence does not show that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpayment. Further, regulations provide that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving a currently or formerly entitled beneficiary because the beneficiary needs substantially all his income to meet current ordinary and necessary expenses or if his assets do not exceed a specified amount of income.<sup>6</sup> The Federal (FECA) Procedure Manual provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 or \$5,000.00 if the individual has a spouse or one dependent. An individual is deemed to need substantially all of his current

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<sup>2</sup> 5 U.S.C. § 8129(a).

<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6. (September 1994); 20 C.F.R. § 10.434; 436.

<sup>5</sup> *Id.*, Chapter 6.200.6b(3).

<sup>6</sup> 20 C.F.R. § 10.436.

income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>7</sup>

In the February 26, 1998 preliminary determination, the Office advised appellant that he should submit the appropriate financial information to establish whether he was eligible for a waiver. Subsequent to that determination, appellant submitted the overpayment recovery questionnaire, in which he provided some financial information by listing his monthly expenses and noted his employment history.<sup>8</sup> The Office analyzed appellant's finances and determined that appellant was not eligible to have recovery waived. The Office found that appellant's net income in 1997 was \$47,765.00, or \$3,480.42 per month, that his expenses totaled \$1,344.65 per month, leaving about \$2,135.77 in discretionary income each month, far in excess of the \$50.00 minimum surplus in income when subtracted from current ordinary and necessary expenses. Since appellant did not establish that recovery would defeat the purposes of the Act, or be against equity and good conscience, he failed to establish that he was entitled to waiver of recovery of the overpayment.

The June 28, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.<sup>9</sup>

Dated, Washington, DC  
February 2, 2001

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member

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<sup>7</sup> Federal (FECA) Procedure Manual, *supra* note 4, Chapter 6.200.6a(1).

<sup>8</sup> Appellant stated that he worked until June 1, 1997 with the employing establishment and that since that time he had received retirement checks.

<sup>9</sup> The Board notes that this case record contains evidence which was submitted subsequent to the Office's June 28, 1999 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).