

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

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**D.Y., Appellant**

**and**

**DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION AGENCY, Aurora, IL,  
Employer**

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**Docket No. 06-1684  
Issued: February 27, 2007**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 17, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decision dated June 13, 2006 denying waiver of an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the decision denying waiver.

**ISSUE**

The issue is whether the Office properly determined that appellant was not entitled to waiver of an overpayment of compensation.

**FACTUAL HISTORY**

On May 13, 1970 appellant, then a 32-year-old air traffic controller, filed an occupational disease claim alleging that he developed shoulder and stomach pain due to his employment duties. The Office accepted his claim for duodenal ulcer and temporary aggravation of left shoulder bursitis on September 28, 1970 and authorized appropriate compensation benefits.

Appellant returned to work on August 22, 2005. On September 3, 2005 the Office made a direct deposit in appellant's bank account of compensation for total disability from August 21 to September 3, 2005 in the amount of \$2,477.94. The Office issued a decision on November 2, 2005 finding that appellant had received an overpayment in the amount of \$2,477.94 and that he was at fault in the creation of this overpayment. Appellant requested review by the Board. In its May 8, 2006 decision,<sup>1</sup> the Board reversed the Office's finding of fault and remanded the case for the Office to determine whether appellant was entitled to waiver of the overpayment. The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

On May 23, 2006 the Office requested that appellant complete an overpayment recovery questionnaire and provide documentation supporting his expenses. The Office allowed appellant 15 days to submit the form and supporting documentation. On June 5, 2006 appellant submitted a completed overpayment recovery questionnaire with no further evidence. He indicated that he and his wife had monthly income in the amount of \$4,400.00. Appellant alleged monthly expenses including: mortgage or rent of \$1,100.00; food, \$800.00; clothing, \$200.00; and utilities of \$100.00. He indicated that his other expenses included a monthly car payment of \$579.00. Appellant stated that he had \$150.00 in cash, \$7,000.00 in his checking account, and other personal property and funds of \$10,000.00.<sup>2</sup>

By decision dated June 13, 2006, the Office denied waiver of the overpayment of \$2,477.94. The Office noted that appellant's monthly income exceeded his expenses by \$1,621.00 and concluded that he did not need substantially all of his current income to meet his ordinary and necessary living expenses. The Office further found that appellant's current assets exceeded the allowed resource base as his total assets were \$17,150.00.<sup>3</sup> The Office found that recovery of the overpayment from appellant would not defeat the purpose of the Federal Employees' Compensation Act<sup>4</sup> and that it would not be against equity and good conscience.

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<sup>1</sup> Docket No. 06-492 (issued May 8, 2006).

<sup>2</sup> On appeal appellant alleged that the Office failed to consider that he was required to provide his ex-wife with half of his monthly gross pay. Appellant did not raise this argument before the Office and did not provide the Office with evidence regarding this additional monthly expense prior to the June 13, 2006 decision. As the Office has not issued a final decision considering this allegation of an additional expense, the Board may not consider it for the first time on appeal. 20 C.F.R. § 501.2(c).

<sup>3</sup> The Board notes that the Office did not utilize the correct resource base. The Office only allocated a resource base on \$5,000.00 for appellant and his spouse. Office procedures provide that the 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). However, as appellant's assets exceeded the \$8,000.00 resource base properly allotted for an individual with a spouse, this is harmless error.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

## LEGAL PRECEDENT

Section 8129(b) of the Act<sup>5</sup> provides: “Adjustment 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>6</sup> If a claimant is without fault in the creation of an overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 through 10.437 of the Office’s regulations.

According to section 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 or her current income (including compensation benefits) to meet current, ordinary and necessary living 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>7</sup> For waiver under the defeat the purpose of the Act standard, a claimant must meet the two pronged test and show that he both needs substantially all of his current income to meet current ordinary and necessary living expenses,<sup>8</sup> and that his assets do not exceed the resource base.<sup>9</sup>

In order to establish that recovery of an overpayment would be against equity and good conscience, an overpaid individual must either establish that he would experience a severe financial hardship in attempting to repay the debt<sup>10</sup> or the overpaid individual could also establish that in reliance on such payment or on notice that such payments would be made, he gave up a valuable right or changed his position for the worse.<sup>11</sup> If the claimant is not entitled to waiver under the “defeat the purpose of the Act” clause the “against equity and good conscience” clause must be considered by the Office in the written decision.<sup>12</sup>

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<sup>5</sup> 5 U.S.C. § 8129(b).

<sup>6</sup> 5 U.S.C. § 8129(b).

<sup>7</sup> Office procedures provide that the 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>8</sup> An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

<sup>9</sup> *W.F.*, 57 ECAB \_\_\_ (Docket No. 06-769, issued August 11, 2006).

<sup>10</sup> 20 C.F.R. § 10.437(a).

<sup>11</sup> 20 C.F.R. § 10.437(b).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b) (May 2004).

### ANALYSIS

In order to establish that repayment of the overpayment would defeat the purpose of the Act, appellant must prove that he requires substantially all his income to meet current ordinary and necessary living expenses. Appellant must also establish that his assets are less than the \$8,000.00 allocated for a claimant and spouse. Both of these facts are necessary before waiver of the overpayment is appropriate. Appellant completed an overpayment recovery questionnaire and indicated that his income of \$4,400.00 exceeded his reported expenses of \$2,779.00 by \$1,621.00. In order to prevent hardship, the Board has found that income must exceed expenses by \$50.00 per month. Appellant's income is in excess of this surplus by \$1,571.00 and establishes that appellant does not need substantially all his income to meet current ordinary and necessary living expenses. Therefore appellant does not meet the first prong of the "defeat the purpose" of the Act test. Appellant also fails the second prong of this test as he reported assets of more than \$8,000.00. Appellant listed assets in the amount \$17,150.00. The Office properly found that appellant was not entitled to waiver of the overpayment based on his income and assets.

The Office further properly considered that there was no evidence that requiring repayment of the overpayment would be against equity and good conscience. Appellant submitted no evidence that he relied on the incorrect payments to his detriment nor that repaying the \$2,477.94 overpayment would result in a severe financial hardship. As appellant has submitted no evidence establishing that he is entitled to waiver, the Office properly requested repayment of the overpayment.<sup>13</sup>

### CONCLUSION

The Board finds that the Office properly denied waiver of recovery of the \$2,477.94 overpayment.

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<sup>13</sup> With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases whether the Office seeks recovery from continuing compensation benefits under the Act. *Desiderio Martinez, supra* note 8.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 13, 2006 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: February 27, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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