

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

D.L., Appellant)
)
)
and)
) **Docket No. 07-2016**
) **Issued: April 21, 2008**
ENVIRONMENTAL PROTECTION AGENCY,)
NATIONAL ENFORCEMENT INVESTIGATIONS)
CENTER, Denver, CO, Employer)
)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 31, 2007 appellant filed a timely appeal from an April 3, 2007 decision by a hearing representative of the Office of Workers' Compensation Programs that affirmed a \$19,759.33 overpayment of compensation and denied her request for a waiver of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issue.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$19,759.33 for the period May 7, 2000 to October 5, 2002 and November 3, 2002 to August 7, 2004; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On November 3, 1999 appellant, then a 44-year-old visual information specialist, filed an occupational disease claim stating that she developed pain in her arms, wrists, fingers, elbows, shoulders and legs bilaterally, as well as in her hips and her back. She stopped work on July 30, 2000 and did not return. The Office accepted appellant's claim for left shoulder tendinitis. Appellant was placed on the periodic compensation rolls in receipt of wage-loss compensation at the basic compensation rate of 66 2/3 percent, effective August 31, 2000.

On October 31, 2000 appellant informed the Office that she had one dependent, a minor niece, for whom she was legal guardian. She stated: "However, this information was not included when compensation was calculated. Would you please make sure whatever corrections are necessary to rectify this situation to include payments already made to me as well as any future payments?" On November 8, 2000 the Office informed appellant that she was not eligible for compensation at the augmented rate of 75 percent unless she had adopted her niece and that she should submit proof of adoption if this was the case. On December 11, 2000 the Office advised appellant to provide substantiation of dependent status by submitting birth certificates, adoption records, or other documentation.

On December 27, 2000 appellant submitted a questionnaire to the Office, again claiming her niece as a dependent and noting that she was her niece's legal guardian. She provided a February 14, 1994 court order granting her legal custody of her niece. On February 14, 2001 appellant noted that she had submitted the court order as documentation to prove her niece was her legal dependent.

On October 26, 2002 a periodic rolls payment was entered for appellant at the augmented compensation rate of 75 percent. On November 1, 2002¹ the Office informed appellant that she was entitled to compensation at the augmented rate of 75 percent because "you have one child living with you." On November 12, 2002 the Office informed appellant that it had received supporting documents concerning her guardianship of her niece and had adjusted her compensation to the augmented rate. The Office determined that appellant was underpaid compensation from May 7, 2000 to October 10, 2002 at the basic rate. It calculated an underpayment in the amount of \$10,999.97.

On August 11, 2004 the Office proposed to terminate appellant's compensation on the grounds that the medical evidence established that she no longer had residuals of her work-related condition.

On August 17, 2004 the Office issued a notice of reduction of compensation, informing appellant that it was reducing her compensation from the augmented rate of 75 percent to the basic rate of 66 2/3 percent. The Office explained: "Legal guardianship of your minor niece does not qualify her as your dependent for the purpose of augmented compensation under the [Federal Employees' Compensation Act]. The only qualifying relationship in this circumstance is legal adoption." The Office noted it had erroneously paid compensation at the augmented rate since November 2002. On August 18, 2004 appellant received her periodic rolls payment at the

¹ The Board notes that the letter referenced was mistakenly dated March 25, 1998.

basic rate. A compensation payment history produced on August 17, 2004 showed that appellant was paid at the augmented rate beginning on November 3, 2002. An overpayment calculation form dated August 21, 2004 noted that appellant was not entitled to augmented compensation for legal guardianship of her minor niece and concluded that the Office erroneously paid appellant at the augmented rate beginning November 3, 2002 to August 7, 2004 and for the issued back pay, in the amount of \$10,997.97, for the period May 7, 2000 through October 5, 2002.

By decision dated September 23, 2004, the Office finalized its termination of appellant's compensation benefits effective October 3, 2004. Appellant requested an oral hearing, which was held on June 21, 2005. By decision dated August 24, 2005, an Office hearing representative affirmed the termination of appellant's compensation benefits.

In an October 1, 2004 memorandum, the Office advised that appellant was without fault in creating the overpayment as a claims examiner provided incorrect information regarding the augmented compensation rate.

On September 21, 2005 the Office made a preliminary determination that she had been overpaid in the amount of \$19,759.33: \$10,999.97 in back pay at the augmented compensation rate and \$8,759.36 in compensation at the augmented rate beginning on November 3, 2002, when she had no qualified dependent for augmented compensation. The overpayment covered the periods May 7, 2000 to October 5, 2002 and November 3, 2002 to August 7, 2004. The Office found that appellant was without fault in creating the overpayment.

On October 13, 2005 appellant requested waiver of the overpayment and a prerecoumment hearing. She stated that she was the sole source of support for her minor niece and that her expenses exceeded her income. Appellant also provided an overpayment recovery questionnaire with financial information. She reported \$1,965.00 in disability retirement income and \$675.00 in supplemental security income payments to her niece, for a total of \$2,630.00 in monthly income. Appellant reported that she had \$2,781.00 in monthly expenses and a total of \$2,672.00 in available funds, which included \$40.00 in cash on hand, \$641.00 in her checking account, \$712.00 in her savings account, and \$1,279.00 in stocks and bonds. She explained: "Someone at [the employing establishment] said that I should check into receiving benefits for my dependent niece (I am her legal guardian). So I did. I assumed no benefits would be paid if not allowed by regulation. I sent in documentation to show I was guardian of my dependent niece and started receiving additional benefits." Appellant noted that the incorrect payments were used, in part, to support her and her niece.

A prerecoumment hearing was held on August 23, 2006. Appellant testified about her available income and monthly expenses as well as her niece's present living and schooling situation. She testified that she received \$1,965.84 in monthly disability retirement payments. Appellant explained that she had withdrawn \$600.00 monthly from her thrift savings account to meet expenses, but that the account was "pretty much depleted" and would likely not last a year. She also noted that her small mutual fund was depleted, and that her credit card payments had increased as she had been relying more on credit to meet her expenses. Appellant stated that her niece no longer received supplemental security income checks, but anticipated the resumption of her payments when she started school "next month." She used the compensation to purchase a house and currently paid a \$1,076.00 monthly mortgage payment. Appellant testified that she

was unemployed but she had taken classes at a vocational school and hoped to get a job by the end of the year. She explained that her monthly expenses and resources had changed since she filled out the overpayment recovery questionnaire because her expenses fluctuated, particularly in light of the payments she made for medical treatment and therapy for herself and her niece.

On October 1, 2006 appellant provided an updated copy of the overpayment recovery questionnaire, reporting that monthly income had increased to \$2,645.00, including \$680.00 a month from her Thrift Savings Plan, and her monthly expenses had increased to \$3,000.00. She stated that her expenditures were “conservative estimates.” Appellant reported having \$40.00 in cash on hand, \$197.00 in her checking account, \$830.00 in her savings account, and \$300.00 in stocks and bonds, for a total asset base of \$1,367.00, with no other significant assets reported. She added: “These amounts change daily based on what a person is doing. I just had to pay \$149.00 for computer repairs. If I buy groceries or stop for gas, these amounts will change again. So no matter what I put, it’s going to be different tomorrow.” In a posthearing statement dated October 1, 2006, appellant noted that her niece had become pregnant and moved back home with her and stated: “I’m not sure how all of this will affect my new career, as my plans were to have a home office as a natural health practitioner next year. Everything is up in the air at the moment.” She asserted that it would be unconscionable to require her to repay the money she was erroneously issued due to the Office’s mistake.

By decision dated April 3, 2007, the hearing representative finalized the Office’s overpayment determination, finding that appellant was without fault in creating the overpayment but denied waiver and required that appellant repay the overpayment at the rate of \$150.00 per month. She found that appellant’s current expenses exceeded her current income, but asserted that appellant would become successfully reemployed in the near future and that her niece would contribute income of her own, as well as her social security payments. The hearing representative found that appellant’s disability retirements would increase by approximately \$41.00 per month. She asserted that appellant’s total income would increase by \$600.00 per month but adjusted her income figure from \$2,686.00 per month to \$3,468.00 per month, an increase of \$782.00 per month. The hearing representative concluded that this anticipated future income figure exceeded appellant’s current monthly expenses. She also found that appellant’s asset base exceeded the allowable amount. The hearing representative noted that appellant had a mutual fund from which she received \$600.00 per month for approximately one year and concluded, by multiplying \$600.00 by 12, that appellant had approximately \$7,200.00 in the account. She also noted that appellant used part of the \$10,000.00 payment she received from the Office in 2002 as a down payment on a house, but that appellant did not list the house as “personal” property with regard to listing assets. Therefore the hearing representative found that appellant had an asset base greater than the allowable maximum and that recovery of the overpayment would not defeat the purpose of the Act.

LEGAL PRECEDENT -- ISSUE 1

The Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of her duty.² If the disability is total, the United States shall pay the

² 5 U.S.C. § 8102(a).

employee during the disability monthly monetary compensation equal to 66 2/3 percent of her monthly pay, which is known as her basic compensation for total disability.³ Under section 8110 of the Act, an employee is entitled to compensation at the augmented rate of 75 percent of her weekly pay if she has one or more dependents.⁴ Section 8110 provides in pertinent part that the term “dependent” includes an unmarried child “while living with the employee or receiving regular contributions from the employee toward her support.”⁵ The term “child” is defined at 8101(9), as follows: “Child means one who ... is under 18 years of age or over that age and incapable of self-support, and includes stepchildren, adopted children, and posthumous children, but does not include married children.”⁶ If a claimant receives augmented compensation during a period where she has no eligible dependents, the difference between the compensation she was entitled to receive at the 66 2/3 percent compensation rate and the augmented compensation received at the 75 percent rate constitutes an overpayment of compensation.⁷

ANALYSIS -- ISSUE 1

Appellant’s claim was accepted for left shoulder tendinitis for which she was disabled.⁸ She was placed on the periodic compensation rolls and received compensation at the basic rate of 66 2/3 percent, effective August 31, 2000. On October 31, 2000 appellant informed the Office that she had one dependent, a minor niece, who lived with her and for whom she was the sole source of support. The Office advised that she was not eligible for compensation at the augmented rate for her minor niece unless she had adopted the child and requested supporting documentation if she had indeed adopted her niece. Appellant submitted a February 14, 1994 court order granting her legal guardianship and custody of her niece. She received compensation at the augmented rate effective October 26, 2002. The Office determined that appellant was underpaid for the period May 7, 2000 to October 10, 2002 and issued compensation in the amount of \$10,999.97, or the difference between the basic compensation rate appellant received during that period and the augmented compensation rate. The Office paid ongoing compensation at the augmented rate until August 17, 2004, when it informed appellant that it had erroneously determined that legal guardianship of her niece constituted a basis for the payment of compensation at the augmented rate. The Office calculated the amount of overpayment as the \$10,999.97 in back compensation and \$8,759.00 in compensation at the augmented rate beginning on November 3, 2002, or a total overpayment of \$19,759.33. Effective September 23, 2004, the Office terminated appellant’s compensation benefits.

³ 5 U.S.C. § 8105(a); *see also Duane C. Rawlings*, 55 ECAB 366 (2004).

⁴ 5 U.S.C. § 8110.

⁵ *Id.*

⁶ 5 U.S.C. § 8101(9).

⁷ *Diana L. Booth*, 52 ECAB 370 (2001) (where the Board held that as the claimant received compensation at the augmented rate for certain periods, even though she had no dependents, she received an overpayment of compensation).

⁸ *See* 20 C.F.R. § 10.5(f) (“disability” defined).

The Board finds that appellant was not entitled to compensation at the augmented rate because her minor niece does not constitute a dependent under the Act. As noted, the term “child” in section 8101(9) of the Act provides for three specific relationships in addition to the biological relation between a parent and his or her natural child: stepchildren, adopted children and posthumous children. There are other close relationships between an adult and a child, such as that between a legal guardian and a ward, which are not included.⁹ Section 8110 of the Act defines the classes of persons who qualify as “dependents” for purposes of augmented compensation. Sections 8101(9) and 8110 state that only individuals specifically defined as a “child” under section 8110 would entitle an employee to augmented compensation for such a dependent. A niece or legal ward is not included among the definitions of a “child” pursuant to the Act. Therefore, appellant is not eligible for augmented compensation based on the legal guardianship of her niece.¹⁰

Appellant erroneously received compensation from May 7 to October 5, 2000 and from November 3, 2002 to August 7, 2004 at the augmented rate in the amount of \$19,759.33. This constitutes an overpayment of compensation. Office records support its calculation of \$19,759.33 as the amount of this overpayment and there is no evidence indicating that this amount was improperly calculated. The Board finds that the Office correctly determined the fact and amount of overpaid compensation in this case.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment of compensation only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹¹ 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.¹²

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: (1) 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.¹³ An individual is deemed to need substantially all of his or her current income to meet current monthly expenses, and thus repayment defeats the purpose of the Act, when the claimant’s income does not exceed expenses by more than \$50.00,

⁹ *Louis L. Jackson, Sr.*, 39 ECAB 423 (1988), *citing Aretha Hudson*, 28 ECAB 169, 170 (1977) (where the Board held that appellant’s legal guardianship and support of her two minor nephews did not qualify the children as dependents pursuant to the Act, because appellant had not adopted the children).

¹⁰ *See id.*

¹¹ 20 C.F.R. § 10.433(a).

¹² 20 C.F.R. § 10.434.

¹³ 20 C.F.R. § 10.436.

and when the claimant's liquid and nonliquid asset base does not exceed the specified amount set by the Bureau of Labor Statistics.¹⁴ An individual's liquid assets include but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds and certificate of deposits.¹⁵ 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/supplies.¹⁶ Effective October 2004 the allowable asset base for waiver was increased to \$4,800.00 for an individual and \$8,000.00 for claimant and spouse.¹⁷

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.¹⁸ Recovery of an overpayment is also 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.¹⁹

The individual who received the overpayment is responsible for providing 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.²⁰

ANALYSIS -- ISSUE 2

The Board finds that the Office improperly denied appellant's request for waiver of the overpayment. As noted, Office procedures provide that an individual is deemed to need substantially all of her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.²¹

Appellant submitted an overpayment recovery questionnaire stating that she had \$2,630.00 in monthly income and \$2,781.00 in monthly expenses, with \$2,672.00 in available funds. At the hearing, she testified that her income and expenses had changed and that, although she was not employed, she was attending vocational school and hoped to be employed in the

¹⁴ See *supra* note 11; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (October 2004).

¹⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(4) (May 2004); see also *W.F.*, 57 ECAB __ (Docket No. 06-779, issued August 11, 2006).

¹⁶ *Id.*

¹⁷ *Id.* at Chapter 6.200.6(a)(1)(b).

¹⁸ 20 C.F.R. § 10.437(a).

¹⁹ 20 C.F.R. § 10.437(b).

²⁰ 20 C.F.R. § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

²¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (May 2004).

future. After the hearing, appellant submitted an updated overpayment recovery questionnaire reporting that her monthly income had increased to \$2,645.00 and her monthly expenses had increased to \$3,000.00. She informed the Office that her niece had become pregnant and was moving back with her. The hearing representative found that appellant's current monthly income totaled \$2,686.00 and that she had current monthly expenses of \$2,800.00. She found that appellant's income would increase as appellant stated that she hoped to become reemployed, that her niece would have income and social security payments which could contribute to the family's total income and that appellant would receive an increase in her disability retirement payments. The hearing representative noted that appellant's last increase, from 2004 to 2006, totaled \$41.00 and presumed that appellant would receive the same amount in a new increase. She concluded that appellant's income would increase by approximately \$600.00 per month and adjusted appellant's household income to \$3,468.00, an increase of \$782.00 per month.

The Board finds that the hearing representative did not provide adequate rationale in support of appellant's potential future income in denying waiver of the overpayment. As noted, Office regulations indicate that recovery of the overpayment would defeat the purposes of the Act if the claimant needs all of her current income to meet her current expenses.²² There is no provision for conjecture concerning a claimant's potential future income. The Office's procedures also note that the Act is "social legislation intended to benefit entitled employees. Every effort should be made to accommodate the claimant's best interests."²³ The information provided on appellant's overpayment recovery questionnaire indicated that her current monthly expenses exceeded her current income. The hearing representative projected that appellant's income would increase due to her plans to begin working in the future, although appellant did not have a job at the time of her hearing. She noted appellant's niece's intention to move back home, although appellant did not indicate that her niece would contribute to the household income. The hearing representative stated that social security payments of appellant's niece would be available for appellant's use. The Board has previously found, however, that the Office may not assume that a claimant's future income would be higher than the amount reported in the overpayment questionnaire.²⁴ The Board notes that the hearing representative did not consider the possibility that appellant's expenses would also increase. In light of the expenses and income reported on appellant's overpayment recovery questionnaires, the Board finds that the Office did not adequately explain why appellant did not need substantially all of her current income to meet her ordinary and necessary living expenses.²⁵

Recovery of an overpayment will also defeat the purpose of the Act by causing severe financial hardship when a claimant's liquid and nonliquid asset base does not exceed the specified amount set by the Bureau of Labor Statistics.²⁶ An individual's liquid assets include

²² See *supra* note 13.

²³ Federal (FECA) Procedure Manual, Chapter 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.1 (May 2004).

²⁴ See *Connie L. Potratz-Hasson*, 42 ECAB 359 (1991).

²⁵ *Id.*, citing *Ella M. Moore*, 41 ECAB 1012 (1990).

²⁶ See *supra* note 13.

but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds and certificate of deposits.²⁷ 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/supplies.²⁸ The Board notes that as of October 2004 the allowable asset base for waiver was increased to \$4,800.00 for an individual and \$8,000.00 for claimant and spouse, with additional amounts allowable for other dependants.²⁹

Because appellant is unmarried and has no allowable dependants, her allowable asset base is \$4,800.00. In her initial overpayment recovery questionnaire appellant reported that she had \$2,672.00 in available funds with no significant nonliquid assets. At the hearing, she testified that her available funds had decreased as she had drawn from her asset base to meet expenses. Following the hearing, appellant reported that her liquid asset base had decreased to \$1,367.00 and that she still had no significant nonliquid assets. However, the hearing representative determined that appellant's mutual fund contained \$7,200.00 at the time of the hearing and \$3,000.00 at the time the decision was issued. She noted that appellant was receiving payments of \$600.00 monthly from this fund, but appears to be referring to appellant's thrift savings account, the payments from which she had already included in appellant's monthly income. The hearing representative made assumptions as to the amount in the thrift fund, noting that appellant received \$600.00 per month and multiplying this by 12, to reach a total of \$7,200.00. However, appellant testified at the hearing that the fund was almost depleted. The evidence of record is insufficient to support the hearing representative's finding regarding the amount of appellant's asset base. The hearing representative also appeared to consider appellant's home as part of her nonliquid assets for purposes of calculating her asset base. The Board notes that the Office's procedures provide that a primary residence is not included among nonliquid assets for purposes of calculating a claimant's asset base.³⁰ As the hearing representative did not provide adequate explanation in support of her conclusion that appellant's liquid and nonliquid assets were higher than those reported on the overpayment questionnaire, the evidence is insufficient to show that appellant has assets in excess of \$4,800.00.

Accordingly, the Board finds that the Office's decision did not properly explain why recovery of the overpayment would not defeat the purpose of the Act. The case will be remanded to the Office to further evaluate and further develop as necessary the evidence regarding waiver pursuant to its procedures, regulations and Board precedent. Following such further development as it deems necessary, the Office shall issue an appropriate decision regarding appellant's eligibility for waiver of the overpayment of compensation.

²⁷ *Supra* note 15.

²⁸ *Id.*

²⁹ *Supra* note 17.

³⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(b) (May 2004).

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation. The Board further finds that the case should be remanded for further consideration of appellant's eligibility for waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2007 decision of the Office of Workers' Compensation Programs is affirmed in part and hereby set aside in part and the case remanded for further action consistent with this decision.

Issued: April 21, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board