

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

M.V., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
U.S. COAST GUARD, Baltimore, MD, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 07-2226
Issued: May 13, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 4, 2007 appellant filed a timely appeal from a June 13, 2007 merit decision of the Office of Workers' Compensation Programs finding that he received an overpayment of compensation and was not entitled to waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$24,481.07 from June 1, 1998 to June 10, 2006; (2) whether the Office properly denied waiver of the recovery of the overpayment; and (3) whether the Office properly determined that it would recover the overpayment by deducting \$300.00 from his continuing compensation payments every four weeks.

FACTUAL HISTORY

On July 5, 1989 appellant, then a 48-year-old welder, filed an occupational disease claim alleging that he sustained asthmatic bronchitis and asthma causally related to exposure to

welding fumes. The Office accepted the claim for extrinsic asthma and placed him on the periodic rolls effective May 31, 1990. The Office paid appellant compensation at the augmented rate of three-fourths of his monthly pay which is applicable to claimants with dependents.

While conducting a periodic review of the file, a claims examiner noted that appellant reported no dependents from the time his son stopped attending college in May 1998. The Office calculated that he received \$221,792.87 in compensation at the augmented rate of 75 percent for a claimant with dependents from June 1, 1998 to June 10, 2006. He should have received \$197,311.80 at the statutory rate of 66 and 2/3 percent of his monthly pay applicable to claimants without dependents during this period. The Office subtracted \$197,311.80 from \$221,792.87 to find an overpayment of \$24,481.07.

On February 2, 2007 the Office notified appellant of its preliminary determination that he received an overpayment of \$24,481.07 for the period June 1, 1998 to June 10, 2006 as he was incorrectly paid at the augmented rate for a claimant with dependents. The Office advised him of its preliminary determination that he was without fault in creating the overpayment. The Office additionally informed appellant that, within 30 days of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing. The Office requested that he submit an overpayment recovery questionnaire and supporting financial information.

On February 19, 2007 appellant requested a telephone conference. He did not contest fact or amount of overpayment but contended that he was entitled to waiver of the overpayment. In a completed overpayment recovery questionnaire dated February 18, 2007, appellant asserted that he received \$115.00 in income from another government entity. He listed expenses of \$670.00 for his rent or mortgage, \$300.00 for food, \$75.00 for clothing, \$110.00 for utilities and \$350.00 for miscellaneous expenses. Appellant further paid \$321.00 per month on various loans, for total monthly expenses of \$1,826.00.

At a telephone conference, held on April 19, 2007, appellant related that his income was \$2,118.16 per month and his monthly expenses were \$1,826.00 per month. He had \$1,100.00 in his checking account and \$5,000.00 in personal property. Appellant did not contest the amount of the overpayment but noted that he repeatedly informed the Office that he did not have a dependent.

In a decision dated June 13, 2007, the Office finalized its finding that appellant was without fault in creating the \$24,481.07 overpayment of compensation. The Office determined that he was not entitled to wavier of the overpayment as his income exceeded his expenses. The Office found that it would deduct \$300.00 from his continuing monthly compensation payments to recover the overpayment.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act¹ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained

¹ 5 U.S.C. §§ 8101-8193.

while in the performance of duty.² If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.³ Where the employee has one or more dependents as defined in the Act, he or she is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.⁴ A dependent includes a student, which under 5 U.S.C. § 8101 means an individual under 23 years of age who has not completed four years of education beyond high school and is pursuing a full-time course of study.⁵ If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation he was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the three-quarters rate constitutes an overpayment of compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$24,481.07 for the period June 1, 1998 to June 10, 2006. He advised the Office that he had no dependents beginning May 1998. The Office, however, erroneously paid appellant compensation at the augmented rate of 75 percent of his monthly pay from June 1, 1998 to June 10, 2006 instead of at the 66 2/3 rate for employees with no qualifying dependents. Accordingly, he received an overpayment of compensation.

The Office paid appellant \$221,792.87 at the augmented rate for the period June 1, 1998 to June 10, 2006. He should have been paid \$197,311.80. Appellant consequently received an overpayment of \$24,481.07, the difference between the compensation to which he was entitled at the two-thirds rate and the augmented compensation he received at the three-quarters rate.⁷

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act 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.

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8105(a).

⁴ *Id.* at § 8110(b).

⁵ *Id.* at § 8110(a).

⁶ *Diana L. Booth*, 52 ECAB 370 (2001).

⁷ *Id.*

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 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.⁸ An individual's liquid assets include but are not limited to the case, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.⁹ 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.¹⁰

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.¹¹ 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.¹²

ANALYSIS -- ISSUE 2

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.¹³

The Office determined that appellant did not require substantially all of his income to meet ordinary and normal living expenses. He asserted that he had monthly income of \$2,118.16 per month and monthly expenses of \$1,826.00 per month. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁴ As appellant's current income

⁸ 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).

⁹ *Id.*

¹⁰ *Id.*

¹¹ 20 C.F.R. § 10.436.

¹² *Id.* at § 10.437(b)(1).

¹³ *Id.* at § 10.436.

¹⁴ *Desiderio Martinez*, 55 ECAB 336 (2004).

exceeds his currently ordinary and necessary living expenses by \$292.16, he does not need substantially all of his income for ordinary and necessary living expenses.¹⁵

Additionally, the evidence does not demonstrate that repayment of the overpayment would be against equity and good conscience. Appellant submitted no evidence that he relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt. Consequently, the Office properly denied waiver of the recovery of the overpayment.

On appeal, appellant does not contest fact or amount of overpayment but contends that he was without fault in creating the overpayment. Section 10.435(a) provides, however, that an error by a government entity, including the Office, which resulted in an overpayment does not relieve a claimant from liability for repayment.¹⁶

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act.¹⁷ Section 10.441(a) of the regulation provides:

“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 his or her attention is called to same. If no refund is made, [the Office] 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.”¹⁸

ANALYSIS -- ISSUE 3

The Office reviewed the financial information provided by appellant and denied waiver based on its determination that his income exceeded his expenses. With respect to recovery of the overpayment, the Office concluded that \$300.00 per month would be deducted from his continuing compensation. There is no evidence, however, that the Office considered the financial circumstances so as to minimize hardship as required under section 10.441(a). The amount deducted from continuing compensation exceeds the monthly amount available to appellant after monthly expenses based on the information relied upon by the Office. The Office did not explain how it determined the amount to be recovered each month from continuing compensation. The Board thus finds that the Office did not follow its regulations in calculating

¹⁵ As appellant's income exceeds his ordinary and necessary living expenses by more than \$50.00, it is not necessary for the Office to consider whether his assets exceed the allowable resource base.

¹⁶ 20 C.F.R. § 10.435(a); *Lawrence J. Dubuque*, 55 ECAB 667 (2004).

¹⁷ *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

¹⁸ 20 C.F.R. § 10.441(a).

the amount to be deducted from continuing compensation as it failed to address the relevant factors to minimize, but not necessarily eliminate, hardship when it decreased his compensation to recover the overpayment.¹⁹ The case will be remanded to the Office for appropriate consideration of the factors under section 10.441(a).

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$24,481.07 from June 1, 1998 to June 10, 2006. The Board further finds that the Office properly denied waiver of the recovery of the overpayment. The case will be remanded for proper consideration of relevant factors as to the amount to be deducted from his continuing compensation as repayment of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 13, 2007 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 13, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁹ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Preliminary and Final Decisions*, Chapter 6.200.4d(1)(b) (May 2004).