

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEMITRI J. FASI and ARCHITECT OF THE CAPITOL,
MAINTENANCE DIVISION, Washington, D.C.

*Docket No. 95-1903; Submitted on the Record;
Issued January 13, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found an overpayment of compensation of \$2,027.12 in appellant's case for the period June 24, 1984 to October 17, 1992 as an incorrect pay rate was used in determining his compensation; and (2) whether the Office's refusal to waive recovery of the overpayment constituted an abuse of discretion.¹

The record indicates that on March 27, 1984 appellant sustained a low back injury in the performance of duty, accepted by the Office as a herniated L4-5 disc. A June 27, 1984 form indicates that appellant received continuation of pay from April 16 to 28, 1984, worked April 29 to May 9, 1984, again received continuation of pay from May 10 to June 10, 1984, used sick leave on June 11 to 20, 1984, then annual leave to June 24, 1984. He received temporary total disability compensation on the daily and periodic rolls beginning June 24, 1984.²

In an October 15, 1992 letter, the Office discussed information recently obtained from the employing establishment regarding appellant's pay rate. The Office stated that on the March 27, 1984 date of injury and April 16, 1984, the date disability began, appellant was a wage grade (WG) 3, step 1 custodian with a base pay rate of \$13,686.40 per year, or \$6.58 per hour. The Office noted that appellant worked a fixed nightshift schedule during the entirety of his tenure at the employing establishment and received a 10 percent nightshift differential in addition to his base pay, for a total of \$7.24 per hour or \$289.60 per week. The Office explained that it had erroneously paid appellant's compensation at the rate of \$293.59 per week, based on a pay rate

¹ At the time of his March 27, 1984 injury, appellant's name was Stephen R. Cass. On May 13, 1986 appellant legally changed his name to Demitri Jesus Fasi.

² The record indicates that appellant was incarcerated in a New Hampshire state prison psychiatric facility for a five-year term from 1988 to 1992.

adjustment made by the employing establishment in promoting appellant to WG-3, step 2 on June 10, 1984, after the period of disability had already begun.

By preliminary notice dated April 30, 1993 and finalized June 8, 1993, the Office reduced appellant's compensation effective June 27, 1993 from \$995.00 each 4 weeks to \$467.00 based on his capacity to earn wages in the selected position of cashier.³

By notice dated June 8, 1993, the Office advised appellant of its preliminary determination that an overpayment of compensation had been made in his case in the amount of \$2,027.12 as he had been paid compensation based on an incorrect pay rate of \$293.59 for the period June 24, 1984 to October 17, 1992, whereas the correct pay rate was \$289.60. The Office explained that errors were made in adjusting appellant's April 16, 1984 pay rate.⁴ The Office found that from June 24, 1984 to October 17, 1992, appellant was paid \$92,732.50 in compensation, representing 2/3 of a weekly pay rate of \$293.59 plus applicable cost-of-living increases. The Office noted that on both the March 27, 1984 date of injury and April 16, 1984, appellant's pay rate was \$7.24 per hour or \$289.60 per week. The Office calculated that from June 24, 1984 to October 17, 1992, appellant was entitled to have received \$90,705.38 in compensation, whereas he received \$92,732.50, resulting in an overpayment of \$2,027.12. The Office found that appellant was without fault in creation of the overpayment, as he "had no way of knowing he was being overpaid after his compensation was adjusted. The Office provided appellant with a copy of Form OWCP-20, an overpayment recovery questionnaire and advised him of the necessity of furnishing the requested financial information if waiver of the overpayment was to be considered.

On June 14, 1993 appellant requested waiver of the overpayment and returned the Form OWCP-20 signed and dated June 14, 1993 but otherwise blank. In a November 16, 1993 letter, appellant requested a review of the written record in lieu of a hearing, asserting that he was totally disabled for work.

The Office accepted appellant's December 14, 1993 lumbar surgery as related to the March 27, 1984 injury and authorized retroactive payment for temporary total disability beginning December 14, 1993.

By decision dated March 31, 1995 and finalized April 3, 1995, the Office found that appellant was not entitled to waiver of recovery of the overpayment. The Office found that appellant was without fault in the creation of the overpayment "because he had no way of knowing that he was being overpaid and had accepted the benefits paid to him in good faith." The Office found that recovery of the overpayment could not be waived as appellant did not provide the required financial information. The Office noted that appellant signed and returned a Form OWCP-20 questionnaire on June 14, 1993, but that the questionnaire was otherwise blank. The Office also noted that the record did not demonstrate, nor did appellant allege, that he relinquished a "valuable right or changed his position for the worse in reliance on the erroneous

³ This decision is not before the Board on the present appeal.

⁴ The Office noted that the employing establishment provided incorrect information regarding appellant's pay rate.

wage-loss compensation which formed the basis of the overpayment he received.” The Office found that due to the lack of financial information, an appropriate repayment schedule could not be determined, thus the overpayment of \$2,027.12 was found due and payable in its entirety by lump-sum repayment.

By decision dated April 17, 1995, the Office finalized its determination that an overpayment of compensation was made in appellant’s case in the amount of \$2,027.12 and directed that recovery of the overpayment be made by a lump-sum payment of the entire amount.

The Board finds that the Office properly found an overpayment of compensation of \$2,027.12 compensation in appellant’s case for the period June 24, 1984 to October 17, 1992 as an incorrect pay rate was used in determining his compensation. Appellant does not contest the fact or amount of the overpayment, but asserts that the overpayment should be waived as he is not with fault in its creation and has financial hardship.

Regarding the second issue, the Board finds that the Office properly found that appellant was without fault in the creation of the overpayment and did not abuse its discretion by denying waiver of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter which rests within its discretion to be exercised pursuant to the statutory guidelines. Thus, the only question before the Board is whether the Office’s refusal to deny waiver under the factual circumstances of this case constituted an abuse of discretion.⁵

Section 8129 of the Act⁶ provides that an overpayment of compensation 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 this subchapter [Act] or would be against equity and good conscience.”⁷ (Emphasis added.) Thus, the fact that appellant is without fault in creating the overpayment of compensation does not, under the Act, automatically preclude the Office from recovering all or part of the overpayment. The Office must exercise its discretion to determine whether waiver is warranted under either the “defeat the purpose of the [Act]” or the “against equity and good conscience” standards pursuant to the guidelines set forth in sections 10.322 and 10.323 of the Office’s regulations respectively.⁸

With regard to the “defeat the purpose of the Act” standard, section 10.322(a) of the regulations provides in relevant part:

“(a) ... Recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under

⁵ *Ronald E. Smith*, 36 ECAB 652, 654 (1985).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 5 U.S.C. § 8129(b).

⁸ *Ella M. Moore*, 41 ECAB 1012, 1014-15 (1990). 20 C.F.R. § 10.322-23.

the criteria set out in this section. Recovery will defeat the purpose of this subchapter to the extent:

- (1) The individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and
- (2) The individual's assets do not exceed the resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent, plus \$600.00 for each additional dependent.”⁹

For waiver under this standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base.¹⁰ An individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$500.00.¹¹

In the present case, the Office requested that appellant complete a Form OWCP-20 overpayment recovery questionnaire provided to him accompanying the June 8, 1993 preliminary notice of overpayment. Appellant returned the Form OWCP-20 to the Office on June 14, 1993, but did not complete any of the questions regarding his finances or otherwise provide any financial information regarding his earnings, assets or expenses. Also, the record indicates that appellant did not telephone the Office to provide the financial information requested. The Office therefore found in its decision dated March 31 and finalized April 3, 1995 that appellant was ineligible for waiver as he did not attempt to complete the overpayment recovery questionnaire or provide the requested financial information to the Office although he had been advised by a June 8, 1993 letter that such information was needed to consider a request for waiver.

Section 10.324 of Title 20 of the Code of Federal Regulations states, “In requesting waiver of an overpayment, the overpaid individual has the responsibility for providing the financial documentation described in section 10.322 as well as such additional information as the Office may require to make a decision with respect to waiver.” As the Office provided appellant with clear notice of the need for him to submit the requested financial information in order for his waiver request to be considered, the Board finds that the Office did not abuse its discretion in finding that appellant was not eligible for waiver.¹²

With regard to the “against equity and good conscience” standard, section 10.323(b) of the regulations provides:

⁹ 20 C.F.R. § 10.322(a).

¹⁰ *Forrest E. Brown, II*, 44 ECAB 278, 284 (1992); Federal (FECA) Procedure Manual, Part 9 -- Debt Management, *Initial Overpayment Actions* Chapter 9.200.(6)(a) (September 1989).

¹¹ Federal (FECA) Procedure Manual, Part 9 -- Chapter 9.200.6(a)(1) (September 1989).

¹² *See Stanley K. Hendler*, 44 ECAB 698, 706 (1993); *William J. Murphy*, 40 ECAB 569 (1989).

“Recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse. In making such a decision, the individual’s present ability to repay the overpayment is not considered....”¹³

The evidence in this case does not establish that appellant relinquished a valuable right or changed his position for the worse in reliance on the payment of compensation. To show detrimental reliance under section 10.323(b), appellant must show that he made a decision he otherwise would not have made in reliance on the overpaid compensation and that this decision resulted in a loss.¹⁴ Appellant did not allege any substantial reliance on the overpayment of compensation in this case, nor was detrimental reliance shown.

The Board therefore finds that the Office did not abuse its discretion in denying waiver of the overpayment of compensation in this case.

The decisions of the Office of Workers’ Compensation Programs dated April 17, 1995 and dated March 31 and finalized April 3, 1995 are hereby affirmed.

Dated, Washington, D.C.
January 13, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ 20 C.F.R. § 10.323(b).

¹⁴ *Forrest E. Brown, II, supra* note 10 at 285-86; Federal (FECA) Procedure Manual, Part 9 -- Chapter 9.200.6(b)(3) (September 1989).