

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SALLY H. BUFFORD and DEPARTMENT OF THE ARMY,
Fort Gordon, Ga.

*Docket No. 96-2084; Submitted on the Record;
Issued July 24, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$5,961.20 overpayment of compensation from December 20, 1994 to February 17, 1995; and (2) whether the Office abused its discretion in denying waiver of a \$5,961.20 overpayment.

On October 19, 1994 appellant filed a claim for a traumatic injury which occurred on October 13, 1994 when she fell down a flight of stairs. The Office accepted appellant's claim for low back sprain, headache, and post-concussion syndrome. Appellant received continuation of pay from October 13 to December 19, 1994. From December 20, 1994 to February 17, 1995, appellant used her sick and annual leave for her missed days of work.

On January 24, 1995, appellant filed a claim for compensation (Form CA-7) requesting compensation for December 20, 1994 to February 17, 1995. The Office issued appellant a check for compensation in the amount of \$5,961.20 for this period.

By letter dated March 30, 1995, the Office informed appellant that it had mistakenly issued compensation for the period of December 20, 1994 to February 17, 1995 and requested that she refund the money or buy back her leave from the employing establishment.

In a letter dated May 4, 1995, the Office informed appellant of its preliminary determination that she received an overpayment of \$5,961.20. The Office stated that the overpayment occurred because appellant concurrently received leave pay from her employing establishment and total disability compensation benefits from the Office for the period from December 20, 1994 to February 17, 1995. The Office further notified appellant of its preliminary determination that she was without fault in the creation of the overpayment, advised appellant that she could submit additional evidence or arguments, and provided her an overpayment recovery questionnaire to complete and submit.

Appellant submitted a completed overpayment recovery questionnaire and requested a prerecoupment hearing, which was held on March 16, 1996.

By decision dated June 6, 1996, an Office hearing representative found that appellant received an overpayment of compensation in the amount of \$5,961.20, that she was without fault in the creation of the overpayment, and that she was not entitled to waiver of the overpayment.

The Board finds that the Office properly determined that an overpayment of compensation occurred in the amount of \$5,961.20 for the period from December 20, 1994 to February 17, 1995.

The record establishes and appellant does not dispute that she used sick and annual leave from her employing establishment for the period from December 20, 1994 to February 17, 1995. Office computer records establish that appellant also received compensation for disability for the period December 20, 1994 to February 17, 1995. Appellant argues that she was entitled to payments both from the Office and the employing establishment; however, she should not have received compensation for loss of wages if she was concurrently utilizing sick or annual leave from the pay.¹ Thus, the Office properly determined that she received an overpayment of compensation during that period.

The Office also correctly calculated the amount of overpayment at \$5,961.20 as the Office records show that this is the amount of net compensation that appellant received from December 20, 1994 to February 17, 1995.² There is no evidence that appellant received less than \$5,961.20 in compensation during this period.

The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment.

Section 8129 of the Act³ 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 of the [Act] or would be against equity and good conscience.”⁴ 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.⁵ The Office must exercise its discretion to determine whether waiver is warranted under either the “defeat the purpose of the Act” or

¹ See *Joan S. Stalboercer*, 41 ECAB 766 (1990); *Lee B. Bass*, 40 ECAB 334 (1988). Section 8116 and section 8118 of the Federal Employees’ Compensation Act provide that an employee may not receive sick or annual leave pay and disability compensation for the same period. 5 U.S.C. §§ 8118(c) and 8116(a).

² The Office paid appellant \$6,151.46 in compensation less a deduction of \$190.26 for insurance.

³ 5 U.S.C. § 8101 *et seq.*

⁴ 5 U.S.C. § 8129.

⁵ *George E. Dabdoub*, 39 ECAB 929 (1988).

“against equity and good conscience” standards pursuant to the guidelines set forth in sections 10.322 and 10.323 of the Office’s regulations.⁶

Section 10.322 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 the criteria set out in this section. Recovery will defeat the purpose of this subchapter to the extent that:

“(1) The individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current and 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....”

The terms “income,” “expenses” and “assets” are defined in section 10.322(b), (c) and (d). For waiver under the “defeat the purpose of the Act” standard, appellant must show both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the applicable resource base.⁷

In her overpayment recovery questionnaire, appellant verified that she had a savings account balance of \$500.00, a checking account balance of \$2,400.00, savings certificates or certificates of deposit worth \$15,000.00 and stocks, bonds or mutual funds worth \$45,000.00, for an asset balance of \$62,900.00. The Office thus properly determined that appellant had assets exceeding the applicable resource base, and that therefore recovery of the overpayment would not defeat the purpose of the Act.

The Board also finds that the Office properly determined that the repayment of the overpayment would not be against equity and good conscience.

Section 10.323 of the regulations 20 C.F.R. § 10.323 provides in relevant part:

“(a) Recovery of an overpayment is considered to be ‘against equity and good conscience’ when an individual presently or formerly entitled to benefits would experience severe financial hardship in attempting to repay the debt. The criteria to be applied in determining severe financial hardship are the same as in section 10.322.

⁶ 20 C.F.R §§ 10.322-323.

⁷ *Robert E. Wenholz*, 38 ECAB 311 (1986).

“(b) Recover 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... 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 on reliance on the payments or on the notice of payment. To establish that the individual’s position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits, and that this decision resulted in a loss.”

Office procedures cite examples where detrimental reliance is demonstrated and explain that “a claimant must show that if required to repay the overpayment, he or she would be in a worse position after repayment than would have been the case if the benefits had never been received in the first place.”⁸

There is no evidence of record that establishes that appellant would sustain hardship in repaying the debt. While appellant indicated that as a result of receiving the overpayment she bought a dog for her daughter and helped her son purchase a truck, she has not submitted any evidence to show that she is now in a worsened position. Appellant thus has not established that she relinquished a valuable right or sufficiently changed her position for the worse, in reliance on the overpayment, in order to require waiver of recovery.⁹ The evidence of record does not substantiate that a waiver is warranted in this case.

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(b)(3) (1994). Where an employee resigns a federal job held at the time of injury, based on a belief that he is entitled to continuing compensation through the periodic rolls system, and later finds out that the award was erroneous, he had changed his position for the worse by forfeiting his ability to return to his work and giving up his job retention rights. Where a widow who received death benefits, which later were known to be in error, used the money to pay for her daughter’s tuition which she would not have been able to do without that money, the widow has changed her position for the worse. Where a claimant uses a portion of a schedule award to pay for a down payment on a farm and later forfeits that down payment because of an inability to pay the first payment six months later when advised about the overpayment, the claimant has changed his position for the worse and recovery of the amount forfeited would be against equity and good conscience.

⁹ See *Alfonso S. Gonzalez*, 45 ECAB 200 (1993) (where the Board held that appellant had not established that his sacrifices in order to send his children through college were made in reliance on the overpayment); *Jesse T. Adams*, 45 ECAB 256 (1992) (where the Board found that a claimant who purchased a new automobile and made loans to his son and daughter from erroneous payments had not established a loss or change in position for the worse).

The decision of the Office of Workers' Compensation Programs dated June 6, 1996 is hereby affirmed.

Dated, Washington, D.C.
July 24, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member