

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUSSELL C. HARVEY and DEPARTMENT OF THE AIR FORCE,
LORING AIR FORCE BASE, Maine

*Docket No. 97-1745; Submitted on the Record;
Issued March 24, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether appellant received an overpayment in the amount of \$2,100.00; and (2) if so, whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment.

On December 7, 1994 appellant, then a heavy mobile equipment mechanic filed a notice of occupational disease and claim for compensation alleging that he suffered from degenerative arthritis of the wrists and wrist synovitis caused by factors of his federal employment. Appellant stated that he was first aware of the condition on October 21, 1988. The Office accepted the claim for wrist synovitis and an aggravation of osteoarthritis of the wrists, noting the date-of-injury as October 10, 1988. Appellant's employment was terminated on June 30, 1994 due to the closing of his employing establishment's unit and he has not worked since that date. Appellant began receiving compensation on May 18, 1995 when his severance pay ended.

By letter dated January 8, 1997, the Office advised appellant of its preliminary determination that an overpayment of compensation had occurred in the amount of \$2,100.00. The Office explained that appellant's benefits for the period of July 7 through December 7, 1996 had been calculated using an incorrect pay rate date of October 21, 1988, thereby giving him CPI increases from 1990 to 1996 to which he was not entitled. The Office noted the correct effective pay rate date as June 30, 1994. The Office also made a preliminary determination that appellant was without fault in the creation of the overpayment and advised him of his rights regarding

waiver.¹ The Office requested that appellant complete an overpayment recovery questionnaire and submit financial information if he desired waiver of the overpayment.

By decision dated February 11, 1997, the Office finalized its preliminary determination that appellant had received an overpayment in the amount of \$2,100.00 and that appellant was without fault in the creation of the overpayment. The Office determined that the circumstances of appellant's case did not warrant waiver of recovery of the overpayment and requested repayment of the overpayment. The Office noted that appellant did not respond to its preliminary finding.

The Board finds that appellant received an overpayment in the amount of \$2,100.00.

In an occupational disease claim, the date-of-injury for purposes of computing compensation is the date the employee was last exposed to work factors alleged to have caused his condition.² During the period of July 7 through December 7, 1996, the Office improperly calculated appellant's monthly benefits using an incorrect pay rate date of October 21, 1988, instead of June 30, 1994, the date of appellant's termination of employment.³ Because appellant has not shown, nor does the record otherwise establish, that the Office erred in calculating the amount of the overpayment, the Board concludes that the Office properly determined the amount of the overpayment to be \$2,100.00.⁴

The Board also finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

Section 8129(a) of the Act⁵ provides that when an overpayment of compensation is made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled. Section 8129(b) provides the only exception to this mandatory adjustment:

¹ The Office advised appellant in an August 30, 1995 letter, that an overpayment in the amount of \$967.77 had occurred because the Office failed to make proper deductions for health benefits and optional life insurance from his compensation for the period of July 10, 1994 through May 13, 1995. Appellant requested waiver of the overpayment. By letter dated January 16, 1997, the Office waived recovery of the overpayment, finding that recovery would defeat the purpose of the Act.

² *Hugh A. Feeley*, 45 ECAB 255 (1993).

³ This effectively allowed appellant to receive years of cost-of-living adjustments for which he was not entitled; *see* 5 U.S.C. § 8146a (provides for annual cost-of-living adjustments to compensation only where the claimant has been receiving compensation for disability or death occurring more than one year before March 1 of each year).

⁴ In a letter dated January 7, 1997, the Office correctly calculated appellant's monthly compensation benefits prior to July 21, 1996 as \$1,688.36, using the proper June 30, 1994 pay rate date. Appellant received monthly benefits in the amount of \$2,108.36 during the period of July 21 through December 7, 1996 using the incorrect pay rate date of October 21, 1988. The difference between the amounts is \$420.00 and when multiplied by 5 (the number of months the compensation was incorrectly calculated) the amount of the overpayment is \$2,100.00.

⁵ 5 U.S.C. §§ 8101-8193.

“Adjustment or recovery [of an overpayment] 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 this subchapter or would be against equity and good conscience.”⁶

Because the Office found appellant to be without fault in the matter of the \$2,100.00 overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it is determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.322 of the Office regulations provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses. Recovery will defeat the purpose of the Act to the extent that: (1) the individual from whom recovery is sought needs substantially all of his current income, including compensation benefits, to meet ordinary and necessary living expenses, and (2) the individual’s assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).⁷

Section 10.323 of the Office regulations provides that recovery of an overpayment would be against equity and good conscience if an individual would experience severe financial hardship, as when an individual, in reliance on such payments or notice that such payments would be made, relinquished a valuable right or changed his or her position for the worse.⁸

In the instant case, appellant failed to timely complete the overpayment recovery questionnaire as directed by the Office’s January 8, 1997 letter.⁹ Without an accurate and complete breakdown of appellant’s monthly expenses and assets, supported by financial documentation, the Office was not able to calculate whether monthly income exceeds monthly expenses by more than \$50.00 or whether assets exceed the specified resource base. There was also no information of record from which to conclude that appellant would be under severe financial hardship if recovery was sought because he had relinquished a valuable right or changed his position for the worse.

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office’s discretion pursuant to statutory guidelines.¹⁰ As the evidence in this case

⁶ 5 U.S.C. § 8129(b).

⁷ See 20 C.F.R. § 10.322(a)(1)-(2).

⁸ See 20 C.F.R. § 10.323(a) and (b); *Richard S. Gumper*, 43 ECAB 811 (1992).

⁹ In requesting waiver of an overpayment, either in whole or in part, the overpaid individual has the responsibility for providing the financial information as described in section 10.322, as well as such additional information as the Office may require to make a decision with respect to waiver. Failure to furnish the information within 30 days of request shall result in denial of waiver and no further requests for waiver shall be entertained until such time as the requested information is furnished. 20 C.F.R. § 10.324.

¹⁰ 20 C.F.R. §§ 10.322, 10.323.

fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion by denying waiver of recovery.¹¹

The decision of the Office of Workers' Compensation Programs dated February 11, 1997 is hereby affirmed.

Dated, Washington, D.C.
March 24, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

¹¹ The Board notes that the case record contains evidence submitted to the Office following the February 11, 1997 decision. The Board does not have jurisdiction to review this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).