

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of RICHARD P. MUSIAL and DEPARTMENT OF THE ARMY,
ARMY DEPOT, Corpus Christi, TX

*Docket No. 99-1837; Submitted on the Record;
Issued September 5, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that an overpayment existed in the amount of \$26,332.33; and (2) whether the Office properly denied waiver of recovery of the overpayment under section 8129(a).

Appellant filed a traumatic injury claim on May 14, 1987 due to his slipping on a piece of metal and hitting his head.¹ The Office accepted the claim for a contusion to the head and left knee and paid appropriate compensation.

Appellant filed a claim for a schedule award on February 2, 1988. On June 15, 1989 the Office issued appellant a schedule award for a 20 percent permanent impairment of the left lower extremity.

On March 10, 1993 appellant filed a recurrence of disability claim.

On August 10, 1993 appellant filed a claim for a schedule award. On November 10, 1993 the Office issued appellant an additional 19 percent impairment for loss of use of his left lower extremity.

Appellant filed a traumatic injury claim on December 19, 1995 which the Office accepted for a left knee strain.²

Appellant filed a claim for a schedule award on May 30, 1996. On August 30, 1996 the Office issued appellant a schedule award for a 25 percent permanent impairment of his left lower extremity.

¹ This was assigned claim number A16-0128277.

² This was assigned claim number A16-0272985. On January 20, 1998 the Office combined claim number A16-0128277 and A16-0272985 with claim number A16-0272985 as the master claim.

On October 2, 1997 appellant filed another claim for a schedule award. On January 8, 1998 the Office awarded appellant a 50 percent impairment for his left lower extremity less the 25 percent previously paid.

On May 19, 1998 the Office notified appellant that it had made a preliminary decision that an overpayment in compensation occurred in the amount of \$26,332.33 because appellant had been paid an additional schedule award in error.³

On May 29, 1998 appellant submitted financial information, which established that he and his wife had a joint monthly income of \$4,538.00⁴ and \$230.00 in his checking account. Appellant also submitted information regarding monthly expenses for eight persons as follows: rent/mortgage including property tax \$474.00; food \$400.00; utilities \$300.00; other expenses \$85.00; Citibank MC \$141.00; GMAC car loan \$254.44; Sutherlands \$62.00; Home Depot \$96.01; Car insurance \$213.15; Wachovia Visa \$23.44; Premiere Auto Loan \$640.00; Chase Visa \$56.00; Nation Credit \$38.90; Household \$165.48; Bank of America \$102.08; Sears \$68.00; Discover \$72.00; First Use Visa \$77.71; Bank Card Visa \$163.00; Goodyear \$80.00; Marine Visa \$41.79; Compu Add \$22.00; TCI Cable \$48.36; Bank One \$33.41; Foley's \$30.00; Citgo \$211.59; Progressive \$213.15; Service Merchandise \$5.25; Kmart \$38.00; MBNA \$454.00;⁵ Marine Visa \$41.79; Nations Bank \$374.70; and Green Tree \$236.20.⁶ Appellant submitted a copy of his 1998 federal tax return (married filing joint) which listed \$51,806.00 as gross income and that he owed \$273.00 in federal taxes.

On March 30, 1999 the Office determined that appellant was without fault in the creation of the overpayment in the amount of \$26,332.33. However, the Office found that appellant would be required to repay the overpayment on the grounds that the circumstances in his case did not warrant waiver of recovery. In reaching this determination, the Office disallowed the Compu Add and TCI Cable as unnecessary expenses, found that the debt owed to Bank One,⁷ Foley's,⁸ Citgo,⁹ Service Merchandise,¹⁰ Nations Bank,¹¹ Kmart,¹² and Green Tree¹³ would have

³ In the attached memorandum, the Office noted that appellant was entitled to a total schedule award of 50 percent for impairment to his left lower extremity. In calculating the overpayment, the Office noted that appellant had been awarded a schedule award for 39 percent for impairment to his left lower extremity under claim number 16-128277. Under claim number 16-272985, the Office medical adviser determined on August 12, 1996 that appellant had a 25 percent impairment of the left lower extremity and paid an additional schedule award of 25 percent under claim number 16-272985 for the period May 25, 1996 to October 10, 1997. On December 27, 1995 the Office found that appellant had a 50 percent impairment of the left lower extremity and awarded appellant and began to pay appellant for the additional 25 percent impairment for the period October 11, 1997 to January 3, 1998. At the time the schedule award was issued for claim number 16-272985, the Office was unaware of the 39 percent schedule award issued under claim number 16-128277.

⁴ Appellant indicated the total as \$4,532.00 which appears to be a mathematical error.

⁵ Appellant listed the account number as 749-81017-009-152.

⁶ This totaled \$3,548.51 not \$3,738.51 as noted by appellant.

⁷ Appellant listed the balance owed as \$33.41.

⁸ Appellant listed the balance owed as \$255.57.

⁹ Appellant listed the balance owed as \$411.59.

been paid in full at the time of the decision and disallowed the MBNA debt as a mortgage loan listed elsewhere on his overpayment recovery questionnaire.

The Board finds that the Office properly found that appellant received an overpayment of compensation in the amount of \$26,332.23.

The Office determined that appellant had been erroneously paid an additional schedule award for his left lower extremity for 25 percent impairment for the period May 25, 1996 to October 10, 1997 and a 25 percent impairment for the period October 11, 1997 to January 3, 1998, which totaled \$26,332.33 based on appellant's employment records. Appellant did not dispute the amount. The Office, therefore, properly determined the amount of the overpayment.

The Board also finds that the Office properly determined that appellant was without fault in the creation of the overpayment as the Office conceded that it erroneously paid appellant an additional schedule award for his left lower extremity during the relevant time period.

The Board further finds that the Office properly denied waiver of recovery of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act provides that when an overpayment of compensation occurs "because of an error of fact or law," adjustment or recovery shall be made by decreasing later payment to which the individual is entitled.¹⁴ The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b):

"Adjustment or recovery 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 the Act or would be against equity and good conscience."

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must 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," pursuant to the guidelines provided in the implementing federal regulations.

¹⁰ Appellant listed the balance owed as \$217.86.

¹¹ Appellant listed the balance owed as \$9.00.

¹² Appellant listed the balance owed as \$361.68.

¹³ Appellant listed the balance owed as \$848.00.

¹⁴ 5 U.S.C. § 8129(a).

Section 10.436(a) of the implementing regulations¹⁵ provides that 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. Recovery will defeat the purpose of the Act to the extent that (a) the individual from whom recovery is sought needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses, *i.e.*, monthly income does not exceed monthly expenses by more than \$50.00¹⁶ and (b) the individual's assets do not exceed a 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. This base includes all of the individual's assets not exempt from recoupment. 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 of \$5,000.00.¹⁷

For waiver under the "defeat the purpose" of the Act standard, appellant must show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base.¹⁸ An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.¹⁹

In this case, appellant argued that because he was found to be without fault he should not have to repay the overpayment. However, the Act and the implementing regulations are clear that entitlement to waiver is not established solely by finding that appellant is without fault in creating the overpayment.²⁰ Rather, such a finding entitles appellant only to the opportunity to establish a basis for granting waiver of the recovery of the overpayment pursuant to section 8129.

Here, appellant provided financial information as requested by the Office. His monthly income, as of May 29, 1998 was \$3,107.00 plus \$740.00 from his wife's supplemental security income payment and \$691.00 from his wife's civil service benefit for a total of \$4,538.00.

Total monthly expenses were listed as \$3,548.51 from which amount the Office excluded \$22.00 listed for Compu Add; \$48.36 for TCI Cable; \$33.41 for Bank One; \$30.00 for Foley's; \$211.59 for Citgo; \$5.25 for Service Merchandise; \$374.00 for Nations Bank; \$38.00 for Kmart; \$236.20 for Green Tree; \$454.00 for MBNA which left \$3,767.15 for ordinary and necessary expenses. Thus, the Office found that \$770.85 per month remained of appellant's monthly income.

¹⁵ 20 C.F.R. § 10.322(a).

¹⁶ *Leticia C. Taylor*, 47 ECAB 198, 203 (1995).

¹⁷ *Id.*

¹⁸ *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

¹⁹ *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

²⁰ *See William J. Murphy*, 40 ECAB 569 (1989).

The Board finds that the exclusion of the payments for Bank One, Foley's, Citgo, Nations Bank, Kmart and Greentree was proper given that the debt on these accounts should have been paid off by March 30, 1999 based upon the debt and monthly payments listed on appellant's May 29, 1998 overpayment recovery questionnaire. The Office properly determined that the Nations Bank payment was duplicative of the rent payment in view of the account number given by appellant for this debt and the amount of the monthly payment. As to the exclusion of the payments for Service Merchandise and cable television, the Board notes, without deciding the merits of whether these expenses are ordinary and necessary, that the additional expenses would result in a monthly expense total of \$3,884.55, a total that would not disturb the Office's determination that recovery of the overpayment would not defeat the purposes of the Act.²¹

Therefore, the Office did not abuse its discretion in denying waiver of the overpayment.

The decision of the Office of Workers' Compensation Programs dated March 30, 1999 is hereby affirmed.

Dated, Washington, D.C.
September 5, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

²¹ See *Jesse T. Adams*, *supra* note 18.