

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUNIOUS EPPS and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Norfolk, VA

*Docket No. 00-137; Submitted on the Record;
Issued January 29, 2001*

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 determined that an overpayment occurred in the amount of \$8,172.34; and (2) whether the Office properly denied waiver of the overpayment.

On November 7, 1996 appellant, then a 77-year-old retired warehouseman, filed a notice of occupational disease and claim for compensation alleging that he developed asbestosis as a result of asbestos exposure in the performance of duty. Appellant also filed a CA-7 claim for a schedule award with respect to his condition. The Office accepted the claim for asbestosis on January 21, 1998.

In a decision dated October 14, 1998, the Office issued a schedule award to appellant for a 60 percent permanent loss of the use of the left lung, and a 60 percent permanent loss of the use of the right lung. The period of the award was July 30, 1997 to March 1, 2001. Appellant was to receive a lump-sum payment in the amount of \$5,906.74 for the period July 30, 1997 to October 10, 1998 and continuing checks in the amount of \$377.60 each month.

On March 24, 1999 the Office made a preliminary determination that an overpayment occurred in appellant's case in the amount of \$8,172.34 because the date of appellant's last exposure to asbestosis in his federal employment occurred on August 23, 1971, which was prior to the effective date of the 1974 amendments to the Federal Employees' Compensation Act providing for schedule awards for internal organs. The Office advised appellant that a finding had been made that he was without fault in the creation of the overpayment. Appellant was further informed of his right to challenge the amount of the overpayment or request a waiver of the overpayment by one of three methods including a request for a telephone conference, a request for a written review of the record, or a request for a recoupment hearing. If appellant wished to request a waiver of the overpayment, he was specifically directed to submit financial information by completing an Office overpayment recovery questionnaire.

In a decision dated May 28, 1999, the Office determined that the circumstances of appellant's case did not warrant a waiver of the recovery of the overpayment and directed appellant to reimburse the Office the amount of \$8,172.34.¹

The Board finds that appellant received an overpayment in the amount of \$8,172.34.

The record supports the Office's determination that appellant erroneously received a schedule award since the date of his last exposure to asbestosis predated the amendments to the Act enacting schedule awards for internal organs. The record indicates that appellant received \$5,906.704 in a lump-sum payment for the period July 30, 1997 to October 10, 1998 and thereafter received six monthly payments of \$377.60 from October 10, 1998 to March 27, 1999 for a total of \$8,172.34.

The Board also finds that the Office properly denied waiver of an overpayment of compensation.

Section 8129 of the Act² 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 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.³

Section 10.436 of the implementing regulations⁴ provides that recovery of an overpayment will defeat the purpose of the FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because:

"(a) The beneficiary from who [the Office] seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and

¹ The senior claims examiner noted in an attached memorandum that, although appellant had been provided an OWCP-20 financial disclosure form to complete and determine his ability to repay the debt, that form had not been completed and returned to the Office prior to the decision. The senior claims examiner further stated that an attempt to telephone claimant had been made on May 28, 1999 to determine an equitable way to collect the debt but claimant's telephone number of record was apparently disconnected.

² 5 U.S.C. § 8129.

³ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

⁴ 20 C.F.R. § 10.436 (1999).

“(b) The beneficiary’s assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics....”⁵

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.⁶

Under section 10.438 of the regulations it states that “the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of that Act, or be against equity and good conscience.”⁷

In the instant case, appellant failed to complete the overpayment recovery questionnaire as directed by the Office’s March 24, 1999 letter.⁸ 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.⁹ 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.¹⁰

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office’s discretion pursuant to statutory guidelines.¹¹ As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be

⁵ An individual’s assets must 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. *See Robert F. Kenney*, 42 ECAB 297 (1991).

⁶ 20 C.F.R. § 10.437 (1999).

⁷ 20 C.F.R. § 10.438 (1999).

⁸ 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.

⁹ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Leticia C. Taylor*, 47 ECAB 198 (1995).

¹⁰ Although appellant submitted financial information subsequent to the Office’s May 28, 1999 decision, the Board does not have jurisdiction to consider evidence that was not before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c).

¹¹ *Carroll R. Daub*, 46 ECAB 361 (1994).

against equity and good conscience, the Board finds that the Office did not abuse its discretion by denying waiver of recovery.

The decision of the Office of Workers' Compensation Programs dated May 28, 1999 is hereby affirmed.

Dated, Washington, DC
January 29, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member