

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICTOR G. VALDEZ and U.S. POSTAL SERVICE,
POST OFFICE, Denver, CO

*Docket No. 02-515; Submitted on the Record;
Issued January 21, 2003*

DECISION and ORDER

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

The issues are: (1) whether appellant received a \$1,093.45 overpayment of compensation; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment.

The Office accepted that appellant, a machine distribution clerk born July 26, 1944, developed a right wrist and hand condition in the performance of duty on or about March 10, 1988. The record reflects that appellant has had several claims with the Office, the master claim number being 12-0107525, with other claim numbers combined into it. The Office has accepted numerous injuries as work related, including: right arm tendinitis, right carpal tunnel syndrome, right carpal tunnel release, right thumb fracture and fusion, temporary aggravation of cervical stenosis, herniated disc C3-4, surgical fusion of C3-4, left shoulder bursitis/tendinitis, left rotator cuff tear, arthroscopy and surgical repair. Appellant has had intermittent periods of total disability resulting from his work-related injuries and surgeries. He returned to modified work with the employing establishment approximately September 2000 with subsequent periods of intermittent disability.

In a preliminary determination dated April 13, 2001, the Office made a finding that appellant received a \$1,093.45 overpayment of wage-loss compensation. The Office found that the overpayment occurred during the period from December 2, 2000 through March 9, 2001 because appellant received duplicate payments of compensation. Appellant initially was paid for the period of January 11 through 27, 2001. Subsequent to that payment, the Office paid appellant for the entire period from December 2, 2000 through March 9, 2001, repaying the period of January 11 through 27, 2001. In addition, the Office found that the duplicate payment was set up with an erroneous pay rate and a different pay rate date, which consecutively, resulted in an erroneous cost-of-living calculation included in the payment. The Office determined that appellant was not at fault in the creation of the overpayment and requested that he submit financial information in support of any claim for overpayment waiver.

By decision dated May 15, 2001, the Office finalized the preliminary overpayment determination regarding the fact and amount of the overpayment and appellant's lack of fault in its creation. The Office noted that as of the date of decision it had not received any information from appellant regarding any claim for waiver. The Office, in the May 15, 2001 decision, determined that for the period December 2, 2000 through March 9, 2001 appellant was paid \$6,893.95, when he was only entitled to an amount of \$5,716.15, if he had been paid properly with the correct pay rate and effective pay rate date.

The Office further stated:

"Using the correct pay rate of \$694.90 a week, effective pay rate date of April 22, 1996, with a compensation rate of 3/4, appellant was entitled to a gross and net amount of \$6,893.95 for the period from December 2, 2000 through March 9, 2001."

Appellant was paid for the period from January 11 through 27, 2001 using the correct pay rate of \$694.90 a week and effective pay rate date of April 22, 1996 for a total of \$1,177.80 with check issued on or about February 2, 2001.

Appellant was paid for the period from December 2, 2000 through March 9, 2001 using the incorrect pay rate of \$716.69 a week, with an effective pay rate date of December 9, 1995 in the total amount of \$6,809.60."

The Office also outlined the following information regarding compensation:

The Office also outlined the following information regarding compensation:

Total net entitlement for the period from December 2, 2000 through March 9, 2001:	\$6,893.95
Less that paid previously for the period January 11 through 27, 2001:	\$1,177.80
Total entitlement due:	\$5,716.15
The erroneous payment for the period from December 2, 2000 through March 9, 2001:	\$6,809.60
Amount overpaid due to the Office:	(\$1,093.45)

Following the May 15, 2001 decision, the Office, in a letter dated June 4, 2001, notified appellant that it had collected the declared overpayment of \$1,093.45 in full from his entitlement for wage loss for the period from March 10 through April 13, 2001.

The Board finds that appellant received an overpayment of compensation.

Appellant was entitled to wage-loss compensation totaling \$6,893.95 for the period December 2, 2000 through March 9, 2001. Initially, the Office paid appellant \$1,177.80 for the

period January 11 through 27, 2001 for wage-loss compensation, however, in addition, the Office incorrectly paid appellant \$6,809.60 for the entire compensation period of December 2, 2000 through March 9, 2001. Consequently, appellant actually received \$7,987.40, when he was only entitled to \$6,893.95. Thus, utilizing the correct compensation rate of 3/4, weekly pay rate of \$694.90 and pay rate date of April 22, 1996 appellant was overpaid by \$1,093.45. Appellant received the above overpayment of compensation. The Board notes that appellant has not challenged the amount of the overpayment on appeal.

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

Section 8129 of the Federal Employees' Compensation Act¹ provides that an overpayment 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." 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.²

Section 10.436 of the implementing federal regulations³ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to "defeat the purpose of the Act." Section 10.438 of the regulations⁴ provides that "the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office] and failure to furnish the information within 30 days of the request shall result in denial of waiver."

With respect to whether recovery would be against equity and good conscience, section 10.437(a)(b) of the federal regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or, 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 this case, appellant was advised by the Office to provide the necessary financial information by completing the overpayment recovery questionnaire issued on April 13, 2001 if he wanted to request waiver. However, he failed to submit a completed OWCP-20 form or otherwise submit financial information supporting a request for waiver. As a result, the Office did not have the necessary financial information to determine whether recovery of the

¹ 5 U.S.C. § 8129.

² See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

³ 20 C.F.R. § 10.436.

⁴ 20 C.F.R. § 10.438.

overpayment would defeat the purpose of the Act.⁵ Appellant did not submit any financial information to show that he would experience severe financial hardship; that he relinquished a valuable right; or showed that his position changed for the worse. As appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience” the Board finds that the Office properly denied waiver of recovery of the overpayment.

On appeal, appellant asserts that on June 4, 2001 the Office improperly deducted the overpayment amount from continuing compensation following the overpayment decision and closed the case without giving him an avenue of appeal. He reiterated that he was not at fault in the creation of the overpayment and noted that had the Office not taken the declared overpayment from his compensation check, he would have never been able to pay it. Appellant indicates that he had just been discharged from the hospital and had been out of work for six months.

The Board notes that the Office requested that appellant provide financial information to enable it to determine the rate of recovery of the overpayment having due regard to the factors noted above. Appellant, however, did not provide any information as requested to indicate that his financial circumstances were such that recovery of the overpayment from his continuing compensation would cause him undue financial hardship.⁶ The Office’s procedure manual notes that if a claimant is being paid compensation or is due accrued benefits from the Office and does not respond to the preliminary overpayment decision, the debt should be recovered from such benefits as quickly as possible.⁷ The Board, therefore, notes that the Office recouped the overpayment sum of \$1,093.45 from appellant’s due and accrued compensation benefits in accordance with its procedures and regulations.

⁵ See 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

⁶ In establishing the initial collection strategy, the Office must weigh the individual’s income, ordinary and necessary expenses and assets in a manner similar to the waiver considerations. When an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collections guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly. *Gail M. Roe*, 47 ECAB 268 (1995); see *Nina D. Newborn*, 47 ECAB 132 (1995).

⁷ Federal (FECA) Procedure Manual, Part 6 -- *Debt Management*, Chapter 6.200.4(c)(2) (September 1994).

The decision of the Office of Workers' Compensation Programs dated May 15, 2001 is affirmed.⁸

Dated, Washington, DC
January 21, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ With his appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; see 20 C.F.R. § 501.2(c).