

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH E. GERSTELL and U.S. POSTAL SERVICE,
POST OFFICE, Petersburg, WV

*Docket No. 03-1709; Submitted on the Record;
Issued January 12, 2004*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether appellant received an overpayment in the amount of \$14,273.78 during the period November 4, 2001 through April 19, 2003; (2) whether the Office of Workers' Compensation Programs properly denied waiver of the overpayment; and (3) whether the Office properly withheld \$252.30 every month from appellant's continuing compensation to recover the overpayment.

On February 29, 2000 appellant, then a 49-year-old full-time postmaster, filed an occupational disease claim alleging that on May 15, 1999 he became aware of his stroke with neurological defects related to stress. He also alleged that on January 6, 2000 he first realized that his condition was caused by factors of his employment.

By letter dated April 6, 2001, the Office accepted appellant's claim for conversion disorder, an emotional condition.

On May 9, 2001 appellant filed a claim for compensation (Form CA-7) for the period May 15, 2000 through May 4, 2001. Appellant indicated on the form that he worked as a part-time minister during this period.

Appellant submitted a copy of his 2000 tax return and W2 forms for the same year. Appellant also submitted a Form CA-1032 indicating that he received \$12,962.00 as a part-time pastor, which was verified by Potomac Highlands District of the United Methodist Church.

In an April 15, 2003 letter, the Office advised appellant that, when he received supplemental payments in 2001 for retroactive compensation pay, his employment as a part-time minister was taken into consideration and payments were reduced accordingly. The Office noted, however, that, when he was placed on the periodic rolls effective November 4, 2001, the prior reduction based on his part-time employment was mistakenly omitted. Thus, since November 3, 2001 appellant had been overpaid. The Office stated that effective April 20, 2003

appellant's compensation would be reduced and that an overpayment would be calculated for the period November 4, 2001 through April 19, 2003.

By letter dated May 15, 2003, the Office made a preliminary finding that appellant had received an overpayment in the amount of \$14,273.78 during the period November 4, 2001 through April 19, 2003. The Office stated that appellant was paid compensation for total disability when he should have been paid a reduced amount due to actual earnings. The Office found that appellant was not at fault in the creation of the overpayment. Appellant was informed of his right to challenge the amount of the overpayment or request a waiver within 30 days of the May 15, 2003 letter by: (1) requesting a telephone conference; (2) requesting a written review of the record; or (3) requesting 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. Appellant did not challenge the overpayment, request a waiver or submit the requested financial information.

By decision dated June 17, 2003, the Office finalized its preliminary findings and denied waiver. As appellant had not submitted any financial information or requested a hearing, the Office deducted 10 percent or \$252.30 every month from appellant's compensation payments to repay the overpayment amount.

On July 2, 2003 appellant submitted financial information regarding his monthly expenses.¹

The Board finds that appellant received an overpayment in the amount of \$14,273.78 during the period November 4, 2001 through April 19, 2003 because he was erroneously paid compensation without reduction for actual earnings.

In this case, appellant sustained an injury on May 15, 1999. Beginning July 6, 2001, he began to receive wage-loss compensation for the period May 23, 2000 through June 16, 2001. Appellant's compensation was adjusted based on his actual earnings as a part-time minister and he received compensation in the amount of \$39,056.19 reflecting the adjustment. In June 2001, the Office discovered that it had been using an incorrect salary and recalculated appellant's wage-earning capacity. The correct wage-earning capacity was \$240.07 effective January 1, 2001 based on appellant's actual earnings of \$12,961.76 a year. Appellant received payments based on this wage-earning capacity calculation through November 2, 2001. The Office then placed appellant on the periodic rolls effective November 4, 2001, but failed to reflect his actual earnings. The Office discovered this error in April 2003. Since appellant's earnings as a minister had remained the same according to a W2 form for 2002, the wage-earning capacity figure of \$240.07 that was effective on November 1, 2001 was added to the periodic rolls beginning April 20, 2003. The record reveals that appellant should have received compensation in the amount of \$50,834.43 based on his actual earnings as a part-time minister but he actually

¹ In addition to the financial information he submitted after the Office's June 17, 2003 decision, appellant submitted financial information on appeal before the Board. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952); 20 C.F.R. § 501.2(c).

received \$65,108.21 in compensation for temporary total disability. Thus, appellant received an overpayment in the amount of \$14,273.78.

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

Regarding waiver, section 10.434 of the Office's regulations provides that, if the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless:

“(a) Adjustment or recovery of the overpayment would defeat the purposes of the [Federal Employees' Compensation Act,²] or

“(b) Adjustment or recovery of the overpayment would be against equity and good conscience.”³

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purposes of the Act if the beneficiary needs substantially all of his current income to meet current ordinary and necessary living expenses⁴ and the beneficiary's assets do not exceed a specified amount as determined by the Office.⁵ Section 10.437 provides that a recovery of an overpayment would be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or when any individual in reliance on such payments gives up a valuable right or changes his or her position for the worse.⁶

In the instant case, no financial information appeared in the case record at the time the Office made its overpayment determination. Appellant did not complete an overpayment questionnaire as requested by the Office, nor did he provide any financial information to show that recovery of the overpayment would defeat the purpose of the Act within the allotted time period. On appeal, appellant contends that he never received the May 15, 2003 preliminary overpayment notice and accompanying questionnaire. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.⁷ This presumption, commonly referred to as the “mailbox rule,” arises when it appears from the record that the notice was properly addressed and duly mailed.⁸

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.434.

⁴ This occurs when monthly income does not exceed monthly expenses by more than \$50.00. *Jan K. Fitzgerald*, 51 ECAB 659, 661 (2000).

⁵ 20 C.F.R. § 10.436. This amount has been considered to be \$3,000.00 for an individual. *Jan K. Fitzgerald*, *supra* note 4.

⁶ 20 C.F.R. § 10.437. This amount has been considered to be \$3,000.00 for an individual. *Jan K. Fitzgerald*, *supra* note 4.

⁷ *George F. Gidicsin*, 36 ECAB 175 (1984).

⁸ *Mike C. Geffre*, 44 ECAB 942 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

The May 15, 2003 letter notifying appellant of the overpayment and asking for his response was sent to his address of record, the same address to which all prior correspondence was sent, all of which was apparently duly received by appellant. The record does not show that this particular correspondence was not properly mailed and it does not contain any evidence which rebuts the presumption of receipt raised by the “mailbox rule.”

The Office’s regulations provide that failure to provide the requested information regarding income, expenses and assets within 30 days of the request shall result in denial of waiver, and that no further request for waiver shall be considered until the requested information is furnished.⁹ As appellant failed to complete the financial questionnaire or otherwise respond to the Office within the 30-day period, the Office could not determine whether appellant was entitled to waiver and, therefore, waiver was properly denied.¹⁰

Further, appellant has not alleged and the evidence does not demonstrate that he relinquished a valuable right or changed his position for the worse in reliance on the erroneous amount of compensation benefits received in this case without adjustment for his earnings as a part-time minister from November 3, 2001 through April 19, 2003. Because 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.

The Board also finds that the Office properly withheld \$252.30 every month from appellant’s continuing compensation to recover the overpayment.

Section 10.441(a)¹¹ provides that, if an overpayment of compensation has been made to one entitled to future payments, an immediate refund of the overpayment should be made and that if no refund is forthcoming then proper adjustment shall be made by decreasing subsequent payments of compensation, considering “the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship.” When, as in this case, an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collection guidelines, which state 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.¹² The Board finds that since appellant did not request a waiver of the recovery of the overpayment and did not submit any financial information within the allotted time frame, the Office did not abuse its discretion in determining that 10 percent of appellant’s continuing compensation, or \$252.30 per month, was a reasonable amount in recovering the overpayment.

⁹ 20 C.F.R. § 10.438.

¹⁰ *Marlon G. Massey*, 49 ECAB 650, 652 (1998).

¹¹ 20 C.F.R. § 10.441(a).

¹² See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.4.d(1)(b) (July 1997); *Frederick Arters*, 53 ECAB ____ (Docket No. 01-1237, issued February 27, 2002; *Gail M. Roe*, 47 ECAB 268, 276 (1995).

The June 17, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 12, 2004

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member