

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH W. BRENNER and U.S. POSTAL SERVICE,
POST OFFICE, Orange City, Fla.

*Docket No. 96-1892; Submitted on the Record;
Issued August 14, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant received a \$1,020.00 overpayment of compensation from August 9, 1994 to March 4, 1995; and (2) whether the Office of Workers' Compensation Programs properly determined that the overpayment was not subject to waiver.

On May 19, 1980 appellant, then a 23-year-old mail clerk, sustained injury to his right knee when he twisted it to return to a carrier's case he had passed. On September 1, 1981, appellant sustained a second injury when he fell as his feet got twisted in a plastic band. The Office accepted claims for the conditions of right knee sprain; surgery for a torn right medial meniscus; and depression.¹ The Office began payment of compensation at the augmented rate of three-fourths of appellant's pay,² on the basis that he had a wife who qualified as an eligible dependent.

On August 2, 1994, appellant informed the Office that he was getting divorced.

By CA-1032 form dated August 9, 1994 appellant notified the Office that although he was married, his wife did not live with him and he did not make regular direct payments for her support. In a letter dated September 26, 1994, appellant informed the Office that he was in the process of getting divorced and that he was requesting a change in his health insurance policy as he felt he should not be responsible for his soon to be ex-wife's health bills. In a subsequent letter dated February 15, 1995, appellant notified the Office that he was recently divorced and attached a copy of the divorce decree, which indicated the divorce was effective January 24, 1995.

¹ The Office terminated medical benefits for the treatment of depression on the basis that appellant no longer had continuing work-related depression as a result of the accept knee injury and subsequent surgery. Appellant does not contest this decision on the present appeal.

² See section 8110(a)(1) of the Federal Employees' Compensation Act, 5 U.S.C. § 8110(a)(1).

The Office changed appellant's compensation to the two-thirds rate effective March 5, 1995.

In a decision dated December 5, 1995, the Office reduced appellant's compensation to zero effective December 10, 1995, because the position of full-time modified clerk fairly and reasonably represented appellant's wage-earning capacity. Appellant did not appeal this decision.

By letter dated January 8, 1996 the Office informed appellant it had made a preliminary determination that he received an overpayment of compensation in the amount of \$1,020.00³ for the period August 9, 1994 through March 4, 1995 on the grounds that he had no dependents and was entitled to the basic rate of two-thirds effective August 9, 1994 when he and his spouse separated, but he was being paid at the three-fourths augmented rate to which he was without fault. The Office informed appellant of the circumstances under which the overpayment could be waived. The Office noted that appellant advised the Office on August 9, 1994 that he and his spouse were separated and that he no longer claimed a dependent. The Office also informed appellant that information regarding his financial circumstances was "important" and requested that he complete and submit the enclosed "Overpayment Recovery Questionnaire" with supporting documents, as well as any other relevant information, within 30 days.

In an undated letter, which the Office received on January 26, 1996, appellant stated that he did not agree with the amount of the overpayment because his divorce was not final until January 19, 1995 and that his former wife was still his dependent through that date. Appellant stated that he was still responsible for paying bills and providing insurance for her up through January 19, 1995. Appellant did not provide any supporting documentation nor did he return the overpayment recovery questionnaire.

By decision dated March 6, 1996 the Office found that appellant received an overpayment of compensation in the amounts of \$1,020.00 for the period August 9, 1994 through March 4, 1995 and that the overpayment was not subject to waiver. The Office noted that appellant did not provide any evidence to substantiate that he made regular contributions to his wife's support from August 9, 1994 through the date of the divorce.⁴

The Board finds that appellant received a \$1,020.00 overpayment of compensation from August 9, 1994 to March 4, 1995.

The basic rate of compensation paid under the Act is $66 \frac{2}{3}$ percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, he is entitled to have his basic compensation augmented at the rate of $8 \frac{1}{3}$ percent of his monthly pay.⁵ Under the Act, a wife is considered an employee's dependent if "(a) she is a

³ The Office calculated this amount by subtracting \$8,235.14, the amount he should have received based on the basic rate, from \$9,255.14, the rate he received at the augmented rate.

⁴ Following the Office's March 6, 1996 decision, appellant submitted additional evidence. However, the Board's review is limited to the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

⁵ 5 U.S.C. § 8110(b).

member of the same household as the employee; (b) she is receiving regular contributions from the employee for her support; or (c) the employee has been ordered by a court to contribute to her support.”⁶

In this case, appellant notified the Office by a CA-1032 form dated August 9, 1994 that his wife was no longer a member of the same household as appellant. He further stated that he did not make regular direct payments for her support. Although appellant indicated in his letters to the Office that he paid her bills through the date of the divorce, appellant failed to provide proof of this. The fact that the wife was still covered under appellant’s health insurance policy does not qualify as “receiving regular contributions from the employee for her support.”⁷ Moreover, appellant did not provide any evidence that he was ordered by a court to contribute to his wife’s support prior to the divorce.

In light of the above, the beginning date of the overpayment is August 9, 1994, the date appellant advised the Office that he was separated from his wife and that he was no longer making regular payments for her support. The proper period is August 9, 1994 through March 4, 1995, as the Office changed the compensation amount to the two-thirds rate effective March 5, 1995. The Board additionally finds that the Office’s calculations in the January 8, 1996 decision is correct as to the amount of overpayment.

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

Section 8129 of the Act⁸ 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.” (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.⁹

Section 10.322 of the implementing federal regulations¹⁰ provides that “[r]ecovery 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 under the criteria set out in this section,” and outlines the specific financial circumstances under which recovery may be considered to “defeat the purpose of the Act.” Section 10.324 of the regulations¹¹ provides that “[i]n requesting waiver of an

⁶ 5 U.S.C. § 8110(a)(1).

⁷ *William G. Dimick*, 38 ECAB 751 (1987); *Sam R. Ekovich*, 37 ECAB 113 (1985).

⁸ 5 U.S.C. § 8129(a)(6).

⁹ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

¹⁰ 20 C.F.R. § 10.322.

¹¹ 20 C.F.R. § 10.324.

overpayment ... the overpaid individual has the responsibility for providing the financial information described in section 10.322, as well as such additional information as the Office may require to make a decision with respect to waiver.” Appellant was advised by the Office to provide the necessary financial information by completing the overpayment recovery questionnaire on January 8, 1996. However, he failed to submit the requested information within 30 days of the January 8, 1996 preliminary overpayment finding nor did he otherwise submit any such information prior to the Office’s March 6, 1996 decision. As a result, the Office did not have any financial information to indicate that recovery of the overpayment would defeat the purpose of the Act when it issued its decision on March 6, 1996.

With respect to whether recovery would be against equity and good conscience, section 10.323(b) of the federal regulations provides that “[r]ecovery of an overpayment is considered to be inequitable and against good conscience when an individual, 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.” Appellant has not alleged, and the evidence does not show, that he relinquished a valuable right or changed his position for the worse in reliance on the overpayments.

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 did not abuse its discretion in denying waiver of the overpayment.¹²

The decisions of the Office of Workers’ Compensation Programs dated March 6, 1996 and January 8, 1996 are affirmed.

Dated, Washington, D.C.
August 14, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

¹² The Board is without jurisdiction over recovery of the overpayment as the record indicates that appellant is no longer receiving continuing compensation payments; *see Lewis George*, 45 ECAB 144 (1993).