

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LAWERENCE C. PUGH and DEPARTMENT OF THE ARMY,  
WALTER REED ARMY MEDICAL CENTER, Washington, D.C.

*Docket No. 96-378; Submitted on the Record;  
Issued January 29, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying waiver of a \$2,202.40 overpayment of compensation, in which appellant was not at fault, on the grounds that he did not timely provide the financial information required to determine if he qualified for waiver.

The Office accepted that appellant, then a 46-year-old custodian, sustained a June 8, 1986 lumbar strain. He received continuation of pay through August 30, 1986, used leave then received compensation for temporary total disability on the daily and periodic rolls beginning in March 1987 through August 21, 1993. Following vocational rehabilitation, appellant returned to work at the employing establishment as a mail clerk on June 27, 1993, Grade 4, Step 7, with an annual salary of \$21,307.00.<sup>1</sup>

In an August 20, 1993 letter, the Office advised appellant that as he had been re-employed effective June 27, 1993, his monetary compensation would be terminated "effective August 22, 1993 based upon [his] actual earnings." The Office noted that appellant had no loss of wage-earning capacity as his date of injury pay rate was exceeded by his actual earnings. The Office also noted that appellant continued to be entitled to medical benefits."

The record reflects that following appellant's return to work on June 27, 1993, he received compensation on the periodic rolls in the amount of \$1,101.20 by check dated July 24, 1993, and \$1,101.20 by check dated August 21, 1993. In a work sheet dated September 2, 1993, the Office calculated that appellant had received an overpayment of compensation in the amount of \$2,202.40, the sum of the 2 checks, for the period June 27 to August 21, 1993. In a September 21, 1993 file memorandum, the Office found that appellant was "not with fault" in creation of the overpayment as, when placed on the periodic roll, he was not issued a Form CA-

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<sup>1</sup> Appellant's attending neurologist Dr. Howard M. Silby, reviewed a position description for the mail clerk job and opined appellant was capable of performing the position as of May 26, 1993.

1049, and was thus not informed why benefits were paid or of his responsibilities “if his circumstances changed.”

By notice dated September 21, 1993, appellant was advised that a preliminary determination had been made of a \$2,202.40 overpayment of compensation in his case as he received compensation on the periodic rolls from June 27 to August 21, 1993 while working. The Office provided appellant with an overpayment recovery questionnaire (Form OWCP-20) and advised him to return the completed questionnaire within 30 days if he wished to seek waiver of recovery of the overpayment.

Appellant completed the Form OWCP-20 on September 27, 1993. The Office date-punched the form as received on September 29, 1993.

By decision dated November 16, 1993, the Office found a \$2,202.40 overpayment of compensation in appellant’s case, and that the overpayment was not subject to waiver as appellant failed to return the Form OWCP-20 within 30 days of September 21, 1993. Appellant disagreed with this decision, asserting that he had timely submitted the Form OWCP-20 and filed an appeal with the Board on November 23, 1993.

By order remanding case issued June 19, 1995,<sup>2</sup> the Board set aside the Office’s November 16, 1993 decision, and remanded the case to the Office for a *de novo* decision on the grounds that it had failed to review a Form OWCP-20, provided to appellant on September 21, 1993 and received by the Office on September 29, 1993, approximately six weeks prior to the Office’s November 16, 1993 decision.

In an August 28, 1995 letter, the Office advised appellant that information about his current financial status was required in order to issue a final decision in his case. The Office requested that appellant fill out an enclosed copy of Form OWCP-20, and provide “copies of receipts and pay stubs to document the figures he [would] report.” Appellant was advised that he could request a telephone conference to provide the requested financial information. The Office stated that appellant should submit the requested information “within 30 days from the date of this letter,” or a decision would be rendered based on the evidence already on record.

In an October 20, 1995 letter,<sup>3</sup> the Office enclosed a copy of the August 28, 1995 letter, and advised appellant that the “requested financial information [was] needed to resolve the overpayment issue.... Unless [appellant would] contact the Office within 20 days of the date of this letter, action w[ould] be taken to deny waiver of the overpayment.” The Office provided appellant with the telephone number of a claims examiner to call with any questions. The record

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<sup>2</sup> Docket No. 94-580.

<sup>3</sup> A September 22, 1995 Office telephone memorandum states that appellant telephoned that day, asserting that the August 28, 1995 preliminary notice of overpayment went to the wrong address, and that he did not receive it until approximately September 18, 1995. Appellant indicated that his address had changed and provided his new address to the Office. An October 20, 1995 file memorandum states that “[c]opies of correspondence to [appellant] w[ould] be sent to both addresses to ensure delivery.”

does not contain any response or reply by appellant to the Office prior to the issuance of the November 9, 1995 decision.

By decision dated November 9, 1995, the Office found that an overpayment of \$2,202.40 had been created in appellant's case as he received temporary total disability compensation for the period June 27 to August 16, 1993 while employed. The Office noted that accompanying the August 28, 1995 preliminary notice of overpayment, appellant was provided with a Form OWCP-20 questionnaire and "was also advised of his right to a telephone conference.... No reply was received from this letter. [Appellant] could not be reached by telephone." The Office noted that appellant did not respond to a second request for information made on October 20, 1995, in which appellant was advised to respond within 20 days or be subject to denial of waiver. The Office found that without current financial information, it could not be established that appellant qualified for waiver. The Office therefore determined that "recovery of the overpayment would not cause financial hardship, defeat the purpose of the Federal Employees' Compensation Act, or be against equity and good conscience."

On appeal, appellant does not dispute the fact or amount of the overpayment, but asserts that he timely submitted the Form OWCP-20 to the Office, and therefore wished to be considered for waiver of recovery of the overpayment.

The Board finds that the Office did not abuse its discretion by denying waiver of the \$2,202.40 overpayment of compensation.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter which rests within its discretion to be exercised pursuant to the statutory guidelines. Thus, the only question before the Board is whether the Office's refusal to deny waiver under the factual circumstances of this case constituted an abuse of discretion.<sup>4</sup>

Section 8129 of the Act<sup>5</sup> 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 this subchapter [Act] or would be against equity and good conscience."<sup>6</sup> As applied to this case, the fact that appellant is without fault in creating the overpayment of compensation does not, under the Act, automatically preclude the Office from recovering all or part of the overpayment. The Office must exercise its discretion to determine whether waiver is warranted under either the "defeat the purpose of the [Act]" or the "against equity and good conscience" standards pursuant to the guidelines set forth in sections 10.322 and 10.323 of the Office's regulations respectively.<sup>7</sup>

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<sup>4</sup> *Ronald E. Smith*, 36 ECAB 652, 654 (1985).

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> 5 U.S.C. § 8129(b).

<sup>7</sup> *Ella M. Moore*, 41 ECAB 1012, 1014-15 (1990). 20 C.F.R. §§ 10.322-23.

In order for the Office to exercise its discretion regarding whether a claimant's financial situation meets one of the above standards, claimants are provided the opportunity to submit detailed financial information regarding their monthly income and expenses. Section 10.324 of Title 20 of the Code of Federal Regulations states, "In requesting waiver of an overpayment, either in whole or in part, *the overpaid individual has the responsibility for providing the financial information* described" in section 10.322 of Title 20, as set forth generally on Form OWCP-20, "as well as such additional information as the Office may require to make a decision with respect to waiver."<sup>8</sup>

Thus, it was appellant's responsibility in this case to have provided sufficient financial information, as requested by the Office's August 28 and October 20, 1995 letters, in order for the Office to decide whether appellant's financial situation qualified him for waiver. The Office advised appellant by August 28, 1995 letter that information about his current financial status was required in order to issue a final decision in his case, and requested that he fill out an enclosed Form OWCP-20 and provide supporting documentation. Appellant was also advised of his option to provide this information by telephone conference. The Office clearly stated that if appellant did not submit the required information within 30 days of August 28, 1995, a decision would be issued based on the current record. When appellant did not respond, the Office sent him a second letter on October 20, 1995, enclosing a copy of the August 28, 1995 letter and providing appellant with 20 additional days to respond. Appellant did not respond to the October 20, 1995 letter within 20 days, and thus the Office issued its November 9, 1995 decision finding that appellant was ineligible for waiver as he failed to submit the requested financial information.

Consequently, as appellant did not fulfill his responsibility to provide financial information as required by section 10.322 of the Act's implementing regulations, the Office did not abuse its discretion in denying waiver of recovery of the overpayment.

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<sup>8</sup> 20 C.F.R. § 10.324.

The decision of the Office of Workers' Compensation Programs dated November 9, 1995 is hereby affirmed.

Dated, Washington, D.C.  
January 29, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member