

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUNICE RICE and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, North Island, CA

*Docket No. 99-1758; Submitted on the Record;
Issued August 9, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment occurred in the amount of \$2,941.35; and (2) whether the Office properly denied waiver of the overpayment.

Appellant filed a traumatic injury claim on November 1, 1982 alleging that he sustained a back injury while in the performance of duty. The Office accepted appellant's claim for lumbosacral sprain on December 7, 1982 and paid appropriate compensation.¹ Appellant stopped work on November 1, 1982 and retired from federal employment in April 1984.

On April 7, 1982 appellant's physician determined that, with restrictions, he could return to work. Appellant, through rehabilitative efforts, commenced employment as a security guard on May 7, 1988. The Office noted in appellant's file that, until a formal decision was issued, appellant's compensation would be adjusted to reflect his actual earnings. In a decision dated November 21, 1990, the Office determined that appellant's position as a security guard fairly and reasonably represented his wage-earning capacity and adjusted his compensation benefits accordingly.

Appellant submitted a CA-1032 questionnaire form to the Office every fifteen months, as required under the Federal Employees' Compensation Act, in order to report his employment history, any benefits that he might have received any dependent information to the Office. On October 3, 1989 appellant reported in a CA-1032 form that he had been reemployed as a security guard, that he had received a disability annuity check within the last fifteen-month period and

¹ Appellant had received total or partial disability from the Office since January 4, 1983.

that he was married with one dependent child.² Appellant continued to submit CA-1032 forms to the Office on a regular basis.

On June 10, 1997 appellant submitted an updated CA-1032 form to the Office. Appellant indicated that his employment as a security guard ceased in November 1994; that his wife had died in July 1994 and that his youngest son who had turned 18 on June 28, 1995 had attended college, but later stopped and that he was getting ready to go into the workforce.

On December 31, 1997 the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$5,319.04. The Office found that, as appellant's dependent son was not a full-time student after he turned 18 on June 28, 1995, appellant had not been entitled to augmented compensation rate of 75 percent after that date. The Office determined, however, that appellant was not at fault in this matter as appellant properly reported his dependent information in CA-1032 forms submitted to the Office on June 2, 1995 and June 10, 1997.

On February 2, 1998 appellant submitted information regarding his son's enrollment status in school and requested a waiver of the \$5,319.04 overpayment.

By decision dated November 18, 1998, the Office found that the overpayment previously determined in the amount of \$5,319.04 had in fact occurred in the amount of \$2,941.35. The Office found that, although appellant's son had turned 18 on June 29, 1995, he had received augmented compensation for having a dependent from June 18, 1996, the date appellant's son was last in school, through August 16, 1997. Appellant was found without fault, however, because he had followed Office instructions by providing information requested by the Office. Nevertheless, the Office determined that appellant submitted insufficient evidence to determine that he qualified for waiver and as appellant received social security income and loss of wage-earning capacity benefits, the overpayment of \$2,941.35 would be recovered at a rate of \$100.00 per month.

The Board finds that the Office properly determined that an overpayment occurred in amount of \$2,941.35.

Initially, the Board notes that appellant does not contest that an overpayment occurred. Appellant simply asserts on appeal that he had previously indicated on his CA-1032 form in June 1996 that his son was no longer a dependent and had entered the workforce.

In the instant claim, appellant received compensation benefits at the augmented rate of 75 percent of his rate of pay at the time of his injury because he had a wife and dependent son. Appellant's wife subsequently died leaving appellant's son the last qualifying dependent. On

² In a decision dated April 5, 1990, the Office determined that an overpayment had occurred in the amount of \$5,818.43 and that appellant was at fault because he knew or should have known that he could not work and receive compensation for total disability concurrently. By May 22, 1997, the overpayment had been duly recovered. A previous overpayment in the amount of \$1,171.20 occurred in October 1984 after the Office mistakenly mailed a check to appellant for compensation that he subsequently cashed. Appellant was found at fault in that matter and the Office adjusted appellant's compensation by \$400.00 per month to recoup the overpayment.

December 31, 1997 the Office made a preliminary determination that an overpayment had occurred, as appellant's dependent son was not a full-time student after he turned 18 on June 28, 1995, therefore, appellant had not been entitled to augmented compensation rate of 75 percent after that date. The Office determined later that the overpayment previously determined in the amount of \$5,319.04 had in fact occurred in the amount of \$2,941.35 and as such, the Office issued a final decision finding an overpayment in the reduced amount. The Board finds that the Office's calculation of the amount of overpayment as \$2,941.35 is supported by the record.

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

Section 8129 of the Act³ 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. 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.⁴

Section 10.322(a) of the implementing regulations⁵ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses. Recovery will defeat the purpose of the Act to the extent that: (1) the individual from whom recovery is sought needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses; and (2) the individual's assets do not 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.⁶

In this case, appellant submitted an incomplete overpayment recovery questionnaire. Appellant provided only that he received \$609.80 per month from social security benefits and had \$300.00 in cash. Appellant did not account for any monthly expenses or otherwise provide financial information needed by the Office in order to consider whether waiver of recovery of the overpayment was warranted. The Office, however, determined that, in addition to his social security income, appellant was also receiving loss of wage-earning capacity payments and as the overpayment would be recovered from his ongoing benefits, appellant did not meet the criteria for waiver.

With respect to whether recovery would be against equity and good conscience, section 10.323(b) of the implementing regulations⁷ provides that recovery of an overpayment is

³ 5 U.S.C. § 8129.

⁴ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

⁵ 20 C.F.R. § 10.322(a).

⁶ *Robert F. Kennedy*, 42 ECAB 297 (1991).

⁷ 20 C.F.R. § 10.323(b).

considered to be inequitable and against good conscience when an individual, in reliance on such payments or 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 demonstrate that he relinquished a valuable right or changed his position for the worse in reliance of the erroneous wage-loss compensation, which formed the basis for the overpayment. 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.

The decision of the Office of Workers' Compensation Programs dated November 16, 1998 is affirmed.

Dated, Washington, D.C.
August 9, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member