

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAN N. FOUNTAIN and DEPARTMENT OF THE INTERIOR,
BUREAU OF LAND MANAGEMENT, Santa Fe, NM

*Docket No. 99-1419; Submitted on the Record;
Issued January 16, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant received an \$11,815.41 overpayment of compensation for the period August 14, 1992 through August 17, 1996; (2) whether the Office of Workers' Compensation Programs properly waived a portion of appellant's overpayment such that he was only required to repay \$5,908.00; and (3) whether the Office properly required repayment of the overpayment by deducting \$100.00 from appellant's compensation payments every 4 weeks.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹ These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."² The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.322 and 10.323, respectively, of the Code of Federal Regulations.

Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).³ Section 10.323 provides, generally, that recovery of an overpayment

¹ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

² 5 U.S.C. § 8129(b).

³ 20 C.F.R. § 10.322(a). Section 10.322 defines the terms "income," "expenses" and "assets." 20 C.F.R.

would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by using the same criteria set forth in section 10.322; or (2) the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.⁴

With respect to the method of recovery of an overpayment, section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to 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 upon such individual.”⁵

The Board finds that the case is not in posture for decision with regard to the above issues.

On July 26, 1989 appellant, then a 29-year-old instrument mechanic, sustained a right knee and leg strain and a loose body in his right pelvis and began to receive compensation at an augmented rate. On November 13, 1996 the Office made a preliminary determination that appellant received an \$11,815.41 overpayment of compensation for the period August 14, 1992 through August 17, 1996 because he was not entitled to receive augmented compensation for this period.⁶ The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment and therefore the overpayment was not subject to waiver.

Appellant requested a hearing before an Office hearing representative and, by decision dated December 2, 1998 and finalized December 4, 1998, an Office hearing representative finalized the Office’s preliminary determination with respect to the amount of the overpayment. The Office hearing representative reversed the preliminary determination regarding fault by determining that appellant was not at fault in the creation of the overpayment. He then effectively waived half of the overpayment by finding that appellant was only required to repay

§ 10.322(b), (c) and (d). For waiver under the “defeat the purpose of the Act” standard, a claimant must show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base; see *George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986). An individual is deemed to need substantially all of his current income to meet ordinary and necessary living expenses if his monthly income does not exceed monthly expenses by more than \$50.00; see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1) (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991); 20 C.F.R. § 10.323.

⁴ 20 C.F.R. § 10.323.

⁵ 20 C.F.R. § 10.321(a). See *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

⁶ Appellant was divorced effective August 14, 1992 and had no dependents.

\$5,908.00 of the overpayment. The Office hearing representative noted that appellant had monthly income of approximately \$2,000.00 and monthly expenses of approximately \$3,400.00 and stated:

“Based on the financial information described above, I find that the claimant cannot afford to pay back the overpayment in full and that it should be compromised. As the claimant has minimal monthly discretionary income, requiring him to repay the overpayment in full would cause undue financial hardship. Therefore, I am reducing the overpayment by half, and instructing the Office to reduce the claimant’s compensation by \$100.00 each pay period until the \$5,908.00 remaining of the overpayment is usurped. I do not find that reducing the claimant’s compensation check each 28 days by \$100.00 will cause him undue financial hardship.”

The Board finds that the Office did not make adequate findings of fact or otherwise sufficiently explain the basis for its overpayment determination with respect to the amount of overpayment, the waiver of a portion of the overpayment and the method of recovery of the overpayment. In particular, the Office did not provide a complete factual discussion of its waiver determination⁷ or provide the statutory basis for effectively waiving a portion of the overpayment. Nor did the Office adequately discuss the factual basis for its determination regarding the amount of the overpayment or the factual or statutory basis for the method of recovery.

In determinations regarding a claimant’s entitlement to compensation benefits, the Office is required by statute and regulation to make findings of fact.⁸ A final decision denying a claim must include findings of fact and provide “a correct description of the basis for denial so that the parties of interest will have a clear understanding of the precise defect of the claim and the kind of evidence which would tend to overcome it.”⁹ These requirements are supported by Board precedent.¹⁰

Consequently, the case should be remanded to the Office for a proper fact finding and discussion of the relevant statutory sources pertaining to the determination of the amount of overpayment, waiver of overpayment, and, if relevant, method of recovery of the overpayment. The Board notes that portions of the record appear to be missing¹¹ and that, on remand, the

⁷ For example, the Office did not discuss whether appellant had any savings or other assets.

⁸ 5 U.S.C. § 8124(a) provides: “The [Office] shall determine and make a finding of facts and make an award for or against payment of compensation.” 20 C.F.R. § 10.130 provides in pertinent part that the final decision of the Office “shall contain findings of fact and a statement of reasons.”

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.9a (July 1993).

¹⁰ See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

¹¹ For example, although financial matters are discussed in the hearing transcript in the record, the record is missing appellant’s overpayment questionnaire.

Office should make efforts to recover these records. After such development the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated December 2, 1998 and finalized December 4, 1998 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
January 16, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member