

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD E. HALE and DEPARTMENT OF THE ARMY,
ARMY NATIONAL GUARD, St. Augustine, FL

*Docket No. 02-398; Submitted on the Record;
Issued July 19, 2002*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to waiver of recovery of an overpayment of compensation in the amount of \$7,632.21.

On July 10, 1989 appellant, then a 46-year-old automobile worker, sustained a back strain in the performance of duty. He indicated that he had one dependent, a daughter, born May 7, 1978.

In April 1994, appellant elected to receive compensation benefits under the Federal Employees' Compensation Act in lieu of benefits from the Office of Personnel Management.

Effective May 1, 1994 appellant was placed on the periodic compensation rolls to receive compensation for temporary total disability at the augmented rate.

By letter dated July 27, 1999, the Office noted that augmented compensation (three-fourths rather than two-thirds) is paid to a claimant who has at least one dependent and that compensation paid on behalf of an unmarried child, which would otherwise be terminated at age 18, could continue if the child was a student pursuing a full-time course of study at an accredited institution. The Office noted that appellant had indicated on his Form 1032 dated February 25, 1997 that his daughter was "18 and out of school" in "July 1996." The Office asked appellant to advise within 30 days whether his daughter, who turned 18 on May 7, 1996, was attending any school. The Office stated that, if appellant's daughter had not been attending school full time, he had been overpaid, due to the augmented compensation, since May 7, 1996.

In a memorandum dated November 8, 1999, an Office claims examiner noted that appellant had not responded to the Office's July 27, 1999 letter regarding the status of his daughter.

By letter dated August 28, 2000, the Office advised appellant of its preliminary finding that he had been overpaid compensation in the amount of \$7,632.21 for the period May 7, 1996 to July 17, 1999 because he continued to receive augmented compensation during that period although his daughter turned 18 years of age and was no longer in school. He was advised that he was found to be without fault in the creation of the overpayment because he had attempted to notify the Office of the change in dependency but the Office failed to take action to adjust his compensation at that time. Appellant was advised on how to submit evidence, including financial evidence, if he disagreed with the fact or amount of the overpayment or wished to request waiver of recovery of the overpayment.

The record shows that no information was received from appellant in response to the Office's August 28, 2000 letter.

By final decision dated September 17, 2001, the Office found that an overpayment had occurred in the amount of \$7,632.21 for the period May 7, 1996 through July 17, 1999 and appellant was without fault in the creation of the overpayment. The Office noted that waiver of the recovery of an overpayment could be granted when certain legal requirements and financial criteria were met. The Office stated that it had advised appellant by letter dated August 28, 2000 that he could submit financial information if he wished to request a waiver of recovery of the overpayment but he did not respond and, therefore, the Office could not ascertain whether appellant met the financial test in regard to his income-to-expenses ratio and/or assets in order to be considered for a waiver of the overpayment. The Office found that waiver of recovery of the overpayment should not be granted because the evidence of record did not support a finding that collection of the overpayment would defeat the purpose of the Act or be against equity and good conscience and, therefore, waiver was not warranted. The Office stated that the overpayment of compensation would be recovered by withholding \$100.00 from each of appellant's continuing compensation payments beginning October 6, 2001.

The Board finds that the Office properly determined that appellant was not entitled to waiver of the overpayment of compensation.

Appellant does not contest the fact of overpayment or amount of the overpayment. The record supports that the overpayment occurred because appellant was incorrectly paid at the augmented three-fourths rate for the period May 7, 1996 through July 17, 1999 and, therefore, received an overpayment of \$7,632.21.

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 Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when [an] 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."² Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b),

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

² See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulations³ provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined [by the Office] from data furnished by the Bureau of Labor Statistics.⁴ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁵

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.⁶

Section 10.438 of the regulations provides that “[t]he individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery on an overpayment would defeat the purpose of the Act or be against equity and good conscience.”⁷ However, in this case, appellant failed to provide the requested financial information to the Office.

With respect to whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience, the evidence does not demonstrate that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpaid compensation.

Inasmuch as appellant has not shown that recovery of the overpayment 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 of compensation in the amount of \$7, 632.21.

³ 20 C.F.R. § 10.436.

⁴ An individual's assets must 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; *see Robert F. Kenney*, 42 ECAB 297 (1991).

⁵ *See Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

⁶ 20 C.F.R. § 10.437.

⁷ 20 C.F.R. § 10.438.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$100.00 from appellant's continuing compensation payments every four weeks.

The method by which the Office may recover overpayments is defined by regulation. The applicable regulation, 20 C.F.R. § 10.441(a), provides as follows:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, the Office shall decrease later payments of compensation, taking into account 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 hardship....”

Appellant did not provide any information for the Office to consider in determining the amount to be withheld from appellant's continuing compensation and the Board finds that the Office did not abuse its discretion in determining that the overpayment sum of \$7,632.21 would be recovered by deducting \$100.00 from appellant's continuing compensation benefits.

The decision of the Office of Workers' Compensation Programs dated September 17, 2001 is affirmed.

Dated, Washington, DC
July 19, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member