

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL MIRCHEFF and DEPARTMENT OF HOUSING & URBAN
DEVELOPMENT, Los Angeles, CA

*Docket No. 01-1627; Submitted on the Record;
Issued September 26, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying waiver of the overpayment.

On January 9, 1979 appellant, then a 55-year-old engineer, injured his back as a result of an automobile accident. The Office accepted cervical sprain and placed appellant on the periodic rolls. From February 25, 1980, appellant's disability compensation was reduced as a result of a wage-earning capacity determination. In worksheets dated March 27, 1981, the Office stated that appellant was capable of earning \$346.00 a week and that his compensation benefit check was, therefore, reduced to \$280.75 per week or \$1,063.94 every 28 days.

By letter dated December 14, 1992, appellant notified the Office that he had received a check in the amount of \$3,197.08. Appellant asked if this amount was correct.

By letter dated March 3, 1993, the Office advised appellant that "Until further notice, you will be paid compensation under the conditions set forth in this letter." The Office noted that appellant's regular compensation checks would be for \$3,197.08 every 28 days.

By letter dated March 1, 1999, the Office advised appellant that it had made a preliminary determination that an overpayment had occurred in the amount of \$136,516.22. The Office explained that since 1992 it failed to reduce appellant's compensation by his wage-earning capacity amount and thus he was overpaid by approximately \$1,500.00 every 28 days from that time. The Office made a preliminary finding that appellant was at fault in the creation of the overpayment because it determined that he should have known that he was not entitled to

receive compensation at that higher level “since he had been receiving the smaller amount for many years.”¹

By letter dated March 17, 1999, appellant through counsel, requested a precoupment hearing. A hearing was held on September 1, 1999 and he testified that when he received a disability check for \$3,197.08 in November 1993, appellant wrote the Office asking whether that amount was correct. The Office’s subsequent correspondence dated March 1993, noted that he would receive a compensation check every 28 days for \$3,197.08.

In a decision dated February 1, 2000, the hearing representative determined that appellant was without fault in creation of the overpayment because he reasonably relied on the Office’s notification to him after he sought clarification that the \$3,197.08 compensation check appellant received in November 1992 was correct. The hearing representative nonetheless found that recovery of the overpayment would not defeat the purposes of the Federal Employees’ Compensation Act nor be against equity and good conscience. He, therefore, ordered that appellant repay the overpayment of \$136,516.22. He noted that appellant’s income questionnaire revealed cash assets of \$721,403.00.

By letter dated January 10, 2001, appellant through counsel, requested reconsideration. He argued that he relied to his detriment on the overpayment and thus the collection of the overpayment would be against equity and good conscience.

By decision dated March 9, 2001, the Office denied modification of the February 1, 2000 decision.

The Board finds that the Office properly denied appellant’s request for a waiver of the overpayment.²

On appeal, appellant, through counsel, argued that recovery of the overpayment would violate equity and good conscience because he relied to his detriment on the overpayment when he refinanced his home “to pay for maintenance to his home that normally would not have been done.”³

Although the Office found that appellant was not at fault in the creation of the overpayment, the overpayment nonetheless occurred and, under section 8129 of the Act,

¹ In a letter dated February 22, 1999, the Office in response to a telephone call from appellant, advised him that he had been overpaid from November 1992 to January 1998, because his wage-earning capacity of \$297.79 per week had not been included during that time frame.

² Appellant did not argue that recovery would cause hardship by depriving him of the resources needed of ordinary expenses, nor that such recovery would deprive him of substantially all of his income to meet his ordinary and necessary living expenses. In the statement of the case section of his brief, appellant stated that: “[h]e detrimentally relied on the overpayment.” No other issue was addressed specifically.

³ Appellant’s counsel cited 20 C.F.R. § 10.323 in his brief. That regulation was replaced by 20 C.F.R. § 10.434 and 437 (1999). The term detrimental reliance appears in 20 C.F.R. § 10.323(b) in discussion of waivers based on equity and good conscience. 20 C.F.R. § 10.437 (1999) which relates to waiver of recovery based on equity and good conscience does not include the term detrimental reliance.

“adjustment shall be made” unless adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.⁴

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 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. A higher amount is specified for a beneficiary with one or more dependents.⁵ Appellant did not argue on reconsideration or on appeal that he sought waiver based on financial hardship. Waiver, therefore, depends on whether adjustment or recovery would be against equity and good conscience.

With regard to the “against equity and good conscience” standard, section 10.437(b) of the regulations provides:

“(b) Recovery of an overpayment is also considered to be against equity and good conscience when any 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. In making such a decision, [the Office] does not consider the individual’s current ability to repay the overpayment.

“(1) To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights.

“(2) To establish that an individual’s position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss.”⁶

With regard to whether recovery of the overpayment is against “equity and good conscience,” paragraph 6(b) of the Office procedure manual provides in pertinent part:

“Against Equity and Good conscience. If the claimant is not entitled to waiver under the defeat the purpose of this subchapter clause, the ‘against equity and good conscience clause’ must be considered.”⁷

⁴ 5 U.S.C. § 8129.

⁵ 20 C.F.R. § 10.436 (1999).

⁶ 20 C.F.R. § 10.437(b) (1999).

⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b) (September 1994).

This clause is divided into three sections, financial hardship, knowledge and detrimental reliance. Appellant alleged detrimental reliance.

“(2) Detrimental Reliance. Recovery payments is considered to be inequitable and against good conscience when a person, 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. In making such a decision, the individual’s present ability to repay the overpayment is not considered.”⁸

This provision contemplates that a claimant made a decision that he otherwise would not have made in reliance upon the receipt of benefits and that this decision resulted in a loss.⁹ When a claimant states he has relinquished a valuable right, he must show that the right was, in fact, valuable; that he is unable to get it back; and that his action was based chiefly or solely on reliance on his payments or notice of payment. When the claimant states that he has changed his position for the worse, he must show that he made a decision that he would not otherwise have made, but for his receipt for benefits and that this decision resulted in a loss. The claimant must show that if he is required to repay the overpayment, he would be in a worse position after repayment, than he would have been had he never received the benefits in the first place. Conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit, is not to be considered as a loss.¹⁰

In this regard, the Board has previously explained that the detrimental reliance provision is not applicable to conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit.¹¹ Any purchase of personal property or consumer goods which appellant made in expectation of the augmented compensation rate does not establish detrimental reliance. Further, the Office procedure manual provides that the detrimental reliance provision is not applicable to conversion of the overpayment into a different form, such as consumer goods or real estate, from which the claimant derives some benefit.¹² Appellant’s conversion of his overpayment into home improvements would, therefore, not be considered detrimental reliance.

To show detrimental reliance under section 10.437(b) appellant must show that he made a decision he otherwise would not have made in reliance on the overpaid compensation and that this decision resulted in a loss.¹³ The facts reveal that appellant refinanced his home for an amount greater than his overpayments (\$150,000.00 versus \$136,516.22) and made

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (September 1994).

⁹ *Stanley K. Hendler*, 44 ECAB 698, 707 (1993).

¹⁰ *Id.*

¹¹ *Robert Crow*, 38 ECAB 253 (1986).

¹² *Id.*

¹³ *Forrest E. Brown, II*, 44 ECAB 278, 285-86 (1992); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (September 1994).

improvements upon his property. Appellant stated that he “would not have incurred [the refinancing expenses] if he had not (sic) known of the overpayment,” and added that improvements “added no value to his home, merely maintained what he owned” and that the repayment obligation “has now placed a financial burden on him and his family.”

Although appellant alleges that the value of his home did not increase by the improvements, he nonetheless benefited from the improvements and obtained personal satisfaction in maintaining his home properly.¹⁴ Thus appellant did not establish any substantial reliance on the overpayment of compensation in this case, nor did he demonstrate detrimental reliance. Indeed, appellant’s income questionnaire revealed net assets of over \$700,000.00.

While appellant has incurred a mortgage debt, it has not been established that this debt was incurred in reliance upon the receipt of compensation benefits or that this decision resulted in a loss to appellant. Furthermore, it has not been established that but for the overpayment, appellant would not have incurred the expenses associated with a refinancing venture. Indeed, appellant’s assets were sufficient to support the refinancing venture without the additional overpayment.

Accordingly, the Office did not abuse its discretion in refusing to waive the overpayment in this case.

The March 9, 2001 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 26, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁴ *John M. Dunn* 48 ECAB 136 (1996) (appellant relied on the overpayment and obtained personal satisfaction in assisting his girlfriend in the repayment of her debts. Thus he did not establish that he relinquished a valuable right or sufficiently changed his position for the worse in reliance on the overpayment).