

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES A. THOMPSON and U.S. POSTAL SERVICE,
POST OFFICE, Tampa, FL

*Docket No. 02-2150; Submitted on the Record;
Issued April 8, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied waiver of recovery of an overpayment in the amount of \$1,840.20; and (2) whether the Office properly determined that the overpayment would be recovered by requiring appellant to remit \$200.00 each month.

On May 29, 1998 appellant, then a 40-year-old distribution window and markup clerk, filed an occupational disease claim alleging that he sustained an injury to his right thumb and elbow due to his job and first became aware that his condition might be work related on January 29, 1998. He had also filed another occupational disease claim that was combined with the January 29, 1998 claim. The Office accepted his claim for de Quervain's syndrome of the left wrist and bilateral carpal tunnel syndrome.

On December 23, 1998 appellant underwent surgery on his right arm. He used sick leave and annual leave for periods of disability between June 25, 1998 and June 3, 1999.

On July 9, 1999 appellant filed a claim for a schedule award.

By decision dated September 20, 1999, the Office granted appellant a schedule award for 62.40 weeks¹ from March 1, 1999 to May 11, 2000 based on a 20 percent permanent impairment of the right arm. His schedule award was based on a weekly pay rate of \$756.33 as provided by the employing establishment, which included premium pay for Sunday work.

By letter dated May 4, 2001, the Office advised appellant that it had made a preliminary finding that he had received an overpayment of compensation in the amount of \$1,840.20 because his schedule award had been based on an incorrect pay rate. The Office stated that appellant received a total schedule award payment of \$35,550.55 based on an incorrect weekly

¹ Section 8107(c)(1) of the Federal Employees' Compensation Act provides for 312 weeks of compensation for 100 percent loss or loss of use of an arm (20 percent of 312 weeks equals 62.40 weeks). *See* 5 U.S.C. § 8107(c)(1).

pay rate of \$765.33 but should have received a total of \$33,710.35 based on his correct weekly pay rate of \$720.31, thus creating an overpayment of \$1,840.20. The Office made a preliminary determination that appellant was at fault in the creation of the overpayment because he reasonably should have been aware that he was receiving an incorrect pay rate. In an accompanying letter dated May 3, 2001, the Office noted that it had based his schedule award on a form that incorrectly indicated that he was entitled to Sunday premium pay.

By decision dated June 12, 2001, the Office issued a final determination that an overpayment of compensation had occurred in appellant's case in the amount of \$1,840.20 because he was paid a schedule award based upon an incorrect pay rate. The Office determined that appellant was at fault in the creation of the overpayment because he did not respond to the Office's letter requesting that he submit additional evidence if he believed that he was not at fault.

On May 30, 2001 appellant requested a hearing on the issues of fault and waiver and he submitted financial information. He indicated that his monthly income was \$2,800.00 and that his monthly expenses for himself, wife and stepdaughter included \$520.00 for a mortgage payment, \$450.00 for food, \$300.00 for clothing, \$415.00 for utilities, miscellaneous expenses of \$530.00 and installment debt of \$547.00. Appellant indicated that he had a total of \$205.00 in cash and in his checking and savings accounts. He stated that he was not at fault in the creation of the overpayment because the employing establishment provided the Office with the incorrect pay rate information and he was not aware of this error until he filed a claim for leave buyback.

On March 28, 2002 a hearing was held. Appellant testified that his monthly family income included his monthly salary of \$2,800.00 and his wife's salary of \$1,600.00 for a total monthly income of \$4,400.00. His monthly expenses totaled \$3,741.00 and included \$520.00 for mortgage payment, \$450.00 for food, \$300.00 for clothing, \$240.00 for a car payment, \$500.00 for utilities, medical expenses of \$200.00, child support payments of \$850.00, \$200.00 for miscellaneous expenses, \$381.00 for two loan payments and \$100.00 for undetermined expenses.

By decision dated June 20, 2002, the Office hearing representative affirmed the Office's June 12, 2001 decision with the modification that appellant was without fault in the creation of the overpayment. He found that appellant had an excess of \$659.00 a month after expenses and therefore he could comfortably repay the overpayment of compensation at the monthly rate of \$200.00. The hearing representative found that there was no evidence that recovery of the overpayment of compensation would defeat the purpose of the Act or be against equity or good conscience. The hearing representative found that repayment at the rate of \$200.00 a month would recover the overpayment in a reasonable amount of time and would not cause significant hardship on appellant or his family.

On appeal appellant does not contest the fact or the amount of the overpayment.

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

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.² 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 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."³ Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), 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 regulation⁴ provides that recovery of an overpayment will defeat the purpose of the Act if 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.⁵ 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 \$50.00.⁶

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.⁷

In this case, appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. As noted above, his monthly income exceeds his monthly ordinary and necessary expenses by \$659.00. As appellant's current income exceeds his current ordinary and necessary living expenses by more than \$50.00 appellant has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses. Because he has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider

² See *Robert Atchison*, 41 ECAB 83, 87 (1989).

³ See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

⁴ 20 C.F.R. § 10.436.

⁵ 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).

⁶ See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

⁷ 20 C.F.R. § 10.437.

the second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base.

With respect to whether recovery of the overpayment 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 \$1,840.20.

With respect to the recovery of the overpayment, the Board notes that its jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.⁸ As appellant is not receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment by requiring appellant to remit \$200.00 per month.

The decision of the Office of Workers' Compensation Programs dated June 20, 2002 is affirmed.

Dated, Washington, DC
April 8, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ See *Levon H. Knight*, 40 ECAB 658, 665 (1989); *Edward O. Hamilton*, 39 ECAB 1131, 1137 (1988).