

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT M. FOWLER and DEFENSE LOGISTICS AGENCY,
DEFENSE GENERAL SUPPLE CENTER, Richmond, VA

*Docket No. 03-1502; Submitted on the Record;
Issued November 14, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$2,627.42; (2) whether the Office abused its discretion by denying waiver of recovery of the overpayment; and (3) whether the Office properly required repayment by withholding \$100.00 each four weeks from appellant's continuing compensation.

This is appellant's second appeal before the Board. In the prior appeal, the Board determined that he had a loss of wage-earning capacity based upon his actual wages of \$340.00 a week as a counter sales person and that he did not sustain a recurrence of disability commencing August 1, 2001, causally related to his July 15, 1999 employment injury.¹ The facts and circumstances of the case are fully presented in the prior decision and are hereby incorporated by reference.

On February 20, 2002 the Office determined that appellant had received an overpayment in the amount of \$2,627.42, because he was paid compensation for total disability for the period April 30 through July 14, 2001, during which time he was also working for wages 42 to 45 hours a week.

On February 22, 2002 the Office issued appellant a preliminary notice of overpayment, finding that he had been overpaid benefits in the amount of \$2,627.42. The Office found that the overpayment occurred because appellant was paid full compensation for total disability for the period April 30 through July 14, 2001, during which he was also earning \$8.50 an hour working at Biglerville Tire & Auto as a counter sales person for 42 to 45 hours a week. The Office further found that appellant was not at fault in the creation of the overpayment and that he could be entitled to waiver of recovery of the overpayment if he could demonstrate that recovery would defeat the purpose of the Federal Employees' Compensation Act² or would be against equity and

¹ Docket No. 02-1570 (issued October 15, 2002).

² 5 U.S.C. §§ 8101-8193.

good conscience. The Office advised appellant that if he disagreed with the fact or amount of the overpayment or if he felt entitled to waiver of recovery of the overpayment, he could request a prerecoupment hearing before a hearing representative and request waiver of recovery of the overpayment. Appellant was advised to submit a detailed explanation of his reason for seeking waiver, a completed OWCP-20 overpayment recovery questionnaire and support documents to include copies of income tax returns, bank account statements, bills and canceled checks, pay slips and other records to support income and expenses shown of Form OWCP-20.

However, appellant did not respond to the Office's preliminary finding advising him of the overpayment, but rather he requested reconsideration and an appeal.

On January 6, 2003 the Office advised appellant that the "Board recently upheld this Office's decision on the overpayment of compensation in your case, in the amount of \$2,627.42. This ruling represents a final decision on this issue. Therefore, in order to collect this debt, this Office will deduct the amount of \$100.00 per compensation check (issued every 28 days) to recover this overpayment. This amount is less than 10 percent of your monthly compensation check and within the guidelines of the Act. Deductions will begin with your January 25, 2003 check."³

On January 9, 2003 the Office finalized the February 22, 2002 preliminary determination of the overpayment of compensation in the amount of \$2,627.42 that was found in appellant's case. The Office indicated that appellant should disregard the January 6, 2003 letter and that this letter represented a formal decision in his case. The letter stated that it fully considered any additional evidence or argument submitted and decided not to waive the overpayment. It stated that the overpayment would be recovered in the manner described on an attached form.

In a January 9, 2003 attached memorandum to the record, the Office noted that appellant had been given a preliminary determination on February 22, 2002 with a memorandum of explanation and a request for submission of material supporting any request for waiver of recovery of the overpayment. The Office noted that appellant did not respond to the Office's preliminary finding advising him of the debt, that he had not submitted any financial data which would support a waiver of this debt and that the sum of \$100.00, per compensation check would be withheld until the debt was paid in full. It noted that appellant received \$1,112.26 every 28 days and that this withholding constituted less than 10 percent of his net check.

By representative request dated January 21, 2003, appellant complained that he was not at fault in the creation of the overpayment and he requested waiver.

By response dated February 3, 2003, the Office explained that, even though appellant was found to be without fault in the creation of the overpayment, regulations required that the overpayment be recovered unless recovery would cause significant financial hardship or be against equity and good conscience. The Office noted that it considered appellant's financial circumstances and determined that he did not qualify for consideration of waiver of recovery of the overpayment.

³ The Board notes that there is no such Board decision in the case record.

In a letter dated February 26, 2003, appellant claimed that, as of a February 18, 2003 appointment with his physician, he was not even able to work light duty, even if he could find a light-duty position. He claimed that he had written several letters to the Office about his financial circumstances and alleged that he could not even afford his house payments.

A further preliminary determination of an overpayment in the amount of \$525.21, for the period October 25, 1999 to January 25, "1993"⁴ was made on March 5, 2003, which occurred because appropriate deductions were not made for appellant's basic life insurance. He was found to be without fault in the creation of this overpayment as well. Appellant requested a hearing on this overpayment and on May 6, 2003 the hearing representative reversed the March 5, 2003 decision and recommended that collection action toward recovery of this overpayment be terminated. As this decision is not adverse to appellant it is not now before the Board on this appeal.⁵

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,627.42.

Appellant received compensation for temporary total disability for the period April 30 through July 14, 2001, during which time he was also employed at Biglerville Tire & Auto full time. As no claimant is entitled to both compensation for temporary total disability and wages from full-time employment, appellant received an overpayment of compensation. It had been determined by the Board in its previous decision that appellant had a loss of wage-earning capacity of \$334.00 per week. That means he should have received compensation for the period April 30 through July 14, 2001, in the amount of \$3,626.29. However, appellant actually received compensation for that period in the amount of \$6,253.71. This means he received an overpayment in the amount of \$2,627.42.

The Board further finds that the Office did not abuse its discretion by denying waiver of recovery of the overpayment.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery 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."⁶ 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.⁷

⁴ The Office meant 2003 as appellant was not injured until 1999.

⁵ See 20 C.F.R. § 501.3(a) (a person must be adversely affected by the final decision for him to appeal it.)

⁶ 5 U.S.C. § 8129.

⁷ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

Title 20 C.F.R. § 10.436 provides:

“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.

In this case, following the preliminary notification of overpayment, appellant did not submit any financial information on income or expenses or argue that he sought waiver based on financial hardship. Therefore, he did not demonstrate that recovery would defeat the purpose of the Act.

Waiver, therefore, depends on whether adjustment or recovery would be against equity and good conscience. Section 10.437(b) of Title 20 of the Code of Federal Regulations addresses the meaning of the phrase “against equity and good conscience:”

“Recovery of an overpayment is also considered to be against equity and good conscience, 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. 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 and that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on 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 individuals’ 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.”

In the instant case, appellant has not alleged or demonstrated that he relinquished a valuable right or changed his position for the worse, based on the receipt of the incorrect amount of compensation. As he has not alleged or demonstrated that he sustained a loss or suffered detrimental reliance on the basis of receipt of the incorrect amount of compensation, he has not demonstrated that recovery of the overpayment would be against equity or good conscience.

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

The Board further finds that the Office properly required repayment of the overpayment by withholding \$100.00 per 28 days from appellant's continuing compensation.

Section 10.441(a) provides that if an overpayment has been made to an individual who is entitled to further payments and 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."⁸

The record established that appellant failed to submit any financial information on income or expenses, from which the Office could determine what amount he could afford to repay out of his continuing compensation benefits.⁹ The Office, therefore, considered the total amount of net compensation appellant was receiving every 28 days of \$1,112.26 and determined that a \$100.00, withholding every 4 weeks from compensation would promptly repay the overpayment with the least amount of burden on appellant. As he has submitted no financial information indicating that such an amount would not minimize any hardship, the Office properly directed repayment by withholding this amount from continuing compensation.

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 9, 2003 is hereby affirmed.

Dated, Washington, DC
November 14, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁸ 20 C.F.R. § 10.441(a).

⁹ See 20 C.F.R. § 10.438 which provides that if financial information is not submitted or a prerecoument hearing is not requested within 30 days of the Office's preliminary overpayment determination, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action. The overpaid individual has the responsibility for providing the financial information as the Office may require.