

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARL L. WOODARD and U.S. POSTAL SERVICE,
POST OFFICE, Little Rock, Ark.

*Docket No. 95-2346; Submitted on the Record;
Issued April 14, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of \$5,731.11 was created due to the payment of augmented compensation during a period when appellant had no dependents; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly determined that appellant should repay the overpayment by withholding \$75.00 every 28 days from his continuing compensation.

On December 4, 1988 appellant, then a 33-year-old flat sorter machine operator, filed a claim for compensation alleging that on that day he injured his right shoulder and arm while in the performance of duty. The Office accepted appellant's claim and paid appropriate benefits.

On January 21, 1994 the Office notified appellant that a preliminary determination had been made that he had been overpaid compensation in the amount of \$5,731.11 because the Office incorrectly paid him compensation at 75 percent of his weekly pay rate (based on appellant having dependents) from June 29, 1991 through December 12, 1993. The Office further stated that appellant was without fault in the creation of the overpayment. The Office requested that he indicate whether he wished to contest the existence or amount of the overpayment or to request waiver of the overpayment, and asked him to complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

In a February 15, 1994 letter to a congressional representative, appellant requested assistance in resolving the Office's reduction in his rate of compensation, stating that because he had had guardianship over his nephew he should have been allowed compensation at the augmented rate.

On March 2, 1994 the Office, in a decision, denied appellant's claim for augmented compensation on the grounds that his nephew was not considered a dependent under the Federal Employees' Compensation Act.¹

On March 4, 1994 the Office notified the congressional office that it had denied appellant's claim for augmented compensation based on his guardianship of his nephew.

On April 16, 1994 appellant requested an oral hearing on the issue of overpayment.

On January 11, 1995 a hearing was held before an Office hearing representative at which time appellant presented testimony. Appellant testified that he owned no real estate, stocks or bonds, and that at that time he had about \$70.00 in his checking account. He testified and submitted documentation that his income consisted of an \$87.00 monthly disability check from the Department of Veterans Affairs, a \$61.00 monthly social security check and his compensation check every 28 days of \$1,453.54 totaling \$1,722.67. Appellant also testified and submitted documentation that his monthly expenses consisted of the following: \$512.00 for rent; \$200.00 for food; \$50.00 for clothing; \$229.72 for telephone, electric, utilities and an air conditioning maintenance fee; \$219.19 for car payment and insurance; \$30.00 veterinarian bill; \$81.40 for cable and a satellite television dish reception payment; \$11.40 dental insurance; \$30.00 scheduled dental bill; \$30.00 payment for counseling services; \$100.00 for home maintenance and \$50.00 miscellaneous living expenses totaling \$1,594.33. This resulted in a surplus income of \$128.34 monthly from which appellant would be able to pay \$75.00 every 28 days.

By decision dated March 13, 1995 and finalized the same day, the hearing representative affirmed the Office's January 21, 1994 decision regarding the amount of overpayment and the fact that appellant was without fault in the creation of the overpayment. The hearing representative further found that, although appellant was without fault in creation of the overpayment, recovery of the overpayment was not subject to waiver, and directed the Office to withhold the amount of \$75.00 from appellant's continuing compensation payments every 28 days until the overpayment of \$5,731.11, plus interest, had been recovered.

The Board finds that appellant received a \$5,731.11 overpayment in compensation because his compensation was based on 75 percent of his weekly pay rate to which he was not entitled because he had no dependents to support an augmented rate. The Board finds that appellant's nephew did not qualify as a dependent under the Act because he was not an unmarried child living at home with appellant or receiving regular contributions from the appellant towards his support. The term "child" is further defined to mean one who is under 18 years of age or over that age and incapable of self-support, and includes step-children, adopted children, and posthumous children, but does not include married children. Since a nephew was not included in this definition, the Office properly denied appellant's claim for an augmented compensation rate.

¹ As noted in the hearing representative's decision dated March 13, 1995, appellant did not exercise his appeal rights pursuant to the Office's March 2, 1994 determination.

Section 8110(b) of the Act provides that a disabled employee with one or more dependents is entitled to augmented compensation.² Under this section a dependent includes an unmarried child, while living with the employee or receiving regular contributions from the employee towards his support, and who is under 18 years of age or over and incapable of self-support because of physical or mental disability.³ The Board has determined that to qualify as “wholly dependent” the person claiming dependency status must have “no consequential sources or means of maintenance other than the earnings of the employee.”⁴

The record contains evidence which shows that appellant received an overpayment of \$5,731.11 in compensation between June 29, 1991 and December 12, 1993 based on 75 percent of his weekly pay rate to which he was not entitled because he had no dependents to support an augmented rate. Appellant did not allege or submit evidence to show that he did not receive a \$5,731.11 overpayment for this period and the Office properly found that he received such an overpayment.

Therefore, the Board finds that appellant received a \$5,731.11 overpayment in compensation.

The Board finds that the Office properly found that appellant was without fault in the creation of the overpayment and did not abuse its discretion by denying waiver of the overpayment.

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter which rests within its discretion to be exercised pursuant to the statutory guidelines. Thus, the only question before the Board is whether the Office’s refusal to deny waiver under the factual circumstances of this case constituted an abuse of discretion.⁵

Section 8129 of the Act⁶ provides that an overpayment of compensation must be recovered unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter of the [Act] or would be against equity and good conscience.”⁷

² 5 U.S.C. § 8110(b). This section provides that a disabled employee with one or more dependents receives an additional 8 and 1/3 percent of his or her monthly pay above the 66 and 2/3 provided under 5 U.S.C. § 8105.

³ 5 U.S.C. § 8110(a)(3).

⁴ 3 *William L. Rogers*, 1 ECAB 191 (1948).

⁵ *Ronald E. Smith*, 36 ECAB 652, 654 (1985).

⁶ 5 U.S.C. §§ 8101-8129.

⁷ *Id.*

In the present case, the Office determined that appellant was not at fault in the creation of the overpayment and thus fault is not at issue. The Office must therefore exercise its discretion to determine whether waiver is warranted under either the “defeat the purpose of the Act” or the “against equity and good conscience” provisions of the Act⁸ pursuant to the guidelines set forth in sections 10.322 and 10.323 of the Office’s regulations.⁹

Section 10.322 of the regulations¹⁰ provides in relevant part:

“(a) Recovery of an overpayment will defeat the purpose of the act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery will defeat the purpose of this subchapter to the extent that:

- (1) The individual from whom recovery is sought needs substantially all of his or his current income (including compensation benefits) to meet current ordinary and necessary living expenses; and
- (2) The individual’s assets do not exceed the 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....”

The terms “income,” “expenses,” and “assets” are defined in section 10.322(b), (c) and (d).¹¹ For waiver under the “defeat the purpose of the Act” standard, appellant 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.¹²

For waiver under this standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base.¹³ An individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁴

⁸ *Jesse T. Adams*, 44 ECAB 256, 259 (1992).

⁹ 20 C.F.R. §§ 10.322-323.

¹⁰ 20 C.F.R. § 10.322.

¹¹ *Id.*

¹² *Jesse T. Adams*, *supra* note 8 at 260.

¹³ *Forrest E. Brown, II*, 44 ECAB 278, 284 (1992); Federal (FECA) Procedure Manual, Part 9 -- Debt Management, *Initial Overpayment Actions*, Chapter 9.200.(6)(a) (September 1989).

¹⁴ Federal (FECA) Procedure Manual, Part 9 -- Debt Management, *Initial Overpayment Actions*, Chapter 9.200.6(a)(1) (September 1989).

In this case, appellant testified that his income consisted of an \$87.00 monthly disability check from the Department of Veterans Affairs, a \$61.00 monthly social security check and his compensation check every 28 days of \$1,453.54 for a total monthly income of. \$1,722.67. Appellant's monthly expenses of \$512.00 for rent, \$200.00 for food, \$50.00 for clothing, \$229.72 for all utilities, \$219.19 for car payment and insurance; \$30.00 veterinarian bill; \$81.40 for cable and a satellite television, \$11.40 dental insurance; \$30.00 scheduled dental bill; \$30.00 payment for counseling services; \$100.00 for home maintenance and \$50.00 miscellaneous living expenses totaled \$1,594.33.

Therefore, since appellant's income exceeds his expenses by more than \$50.00 per month, the Board finds that the Office did not abuse its discretion in denying waiver of the overpayment of compensation in this case.¹⁵

The Board further finds that the Office did not abuse its discretion in requiring repayment of the overpayment by withholding \$75.00 from appellant's continuing monthly compensation benefits.

Section 10.321(a) of the regulations provides:

“Whenever an overpayment of compensation has been made to an individual who is entitled to future 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.”¹⁶

Based on appellant's information regarding his income, assets and expenses, the Office's decision to withhold \$75.00 every 28 days from appellant's continuing compensation payments was made with due regard to appellant's monthly household income and expenses, and is therefore appropriate under the circumstances of this case. Therefore, the Board finds that recovery of the overpayment by withholding \$75.00 every 28 days from appellant's periodic compensation does not constitute an abuse of discretion.

¹⁵ Since appellant did not introduce evidence that he relinquished a valuable right or changed his position for the worse based on his receipt of an augmented compensation, the Board need not address the issue as to whether it would be against equity and good conscience to recover the overpayment.

¹⁶ 20 C.F.R. § 10.321(a).

The March 13, 1995 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
April 14, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member