

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK J. CASSINO and U.S. POSTAL SERVICE, BALTIMORE
MANAGEMENT SECTION CENTER, Baltimore, Md.

*Docket No. 95-3020; Submitted on the Record;
Issued April 22, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation occurred in the amount of \$633.01 for the period June 1, 1991 to July 25, 1992 as appellant received augmented compensation without having any dependents; and (2) whether the Office properly denied waiver of the overpayment.

On January 12, 1982 appellant, then a 35-year-old postal worker, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on or around November 13, 1981 he injured his back when the postal vehicle he was driving suddenly dropped into a drainage ditch, jarring the vehicle.

On January 11, 1990 the Office accepted appellant's claim for ruptured lumbar disc and aggravation of spondylolisthesis with subsequent surgery. Subsequently, the Office expanded the accepted conditions to include major depression. Effective November 21, 1981 appellant became totally disabled and the Office began paying appropriate compensation benefits at the augmented rate of compensation for a person with dependents.

Effective May 29, 1986 appellant returned to work part time. In a decision dated August 7, 1992, the Office determined that the position of a letter carrier fairly and reasonably represented his wage-earning capacity and recalculated his compensation benefits accordingly.

In a CA-1032 form letter dated July 28, 1992, appellant advised the Office that he no longer had any dependents as both of his children had reached the age of 18 and his financial obligations to both his children and his ex-wife had ceased. Appellant further explained that his son attended college until June 20, 1991, but had since left school to join the service. The Office continued to pay disability compensation at the augmented rate through July 25, 1993.

In letter dated July 18, 1994, the Office advised appellant that it had made a preliminary determination that he received an overpayment of compensation in the amount of \$633.01 from

June 1, 1991 through July 25, 1992 because he received compensation at the augmented three-fourths rate after his children ceased to be dependents. The Office further advised appellant that he was found not without fault in creating the overpayment, as he should have reasonably been aware that he was not entitled to the higher rate and failed to advise the Office of the change in his children's status. Appellant was informed that should this determination become final, there would be no basis to waive recovery of the overpayment, and that he had the right to request a prerecoupment hearing or to submit additional evidence. The Office further informed appellant that in the event that the preliminary determination was overturned as a result of new evidence or arguments presented, appellant should submit a completed financial questionnaire, and attach supporting documentation, to assist the Office in deciding whether or not to waive the overpayment, or in the event that waiver was not granted, to assist the Office in deciding how to recover the overpayment.

In a letter dated August 7, 1994, appellant requested an oral hearing before an Office representative. Appellant additionally completed and returned the overpayment questionnaire. The hearing was scheduled for February 2, 1995, however, appellant failed to appear on the appointed day.

By decision dated June 26, 1995, the Office hearing representative finalized the preliminary determination that an overpayment in the amount of \$633.01 had been created. The Office modified its preliminary decision, however, to find that appellant was not at fault in the creation of the overpayment. The hearing representative specifically found that a review of the case file revealed that the Office did not properly advise appellant of his reporting requirements and that appellant had, in any event, properly notified the Office that his son and daughter were no longer his dependents. Finally, the Office determined that, on the basis of the information appellant provided on his overpayment questionnaire, he was not eligible for waiver of recovery.

Subsequently, on August 8, 1995 the Office issued a second decision on the issue of overpayment in which the Office confirmed the findings of the Office hearing representative.

The Board finds that appellant received an overpayment of compensation in the amount of \$633.01 due to his receipt of augmented compensation benefits when he had no eligible dependents.

Appellant received augmented compensation based on his dependent children through July 25, 1992. Beginning June 1, 1991, however, appellant's children were no longer dependent on him. Because appellant had no eligible dependents for the period June 1, 1991 through July 25, 1992, the Board finds that appellant received an overpayment of compensation due to receipt of augmented benefits for this period.

The Board further finds that the Office properly determined the amount of the overpayment.

The record reflects that for the period June 1, 1991 through July 25, 1992 appellant received compensation at the augmented rate of 75 percent in the amount of \$5,670.06.¹ As

¹ The basic rate of compensation paid under the Federal Employees' Compensation Act is 66 2/3 percent of the

appellant had no eligible dependents for that period, he was entitled to compensation at the basic two-thirds rate, or \$5,037.05. The difference between the augmented compensation and the basic rate for the period June 1, 1991 through July 25, 1992, \$633.01, represents the overpayment of compensation to appellant.

The Board additionally finds that the Office properly denied waiver of recovery of the overpaid 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 this subchapter or would be against equity and good conscience."³ Because the Office found appellant to be without fault in the matter of the \$633.01 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.

The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.322 and 10.323, respectively, of the Code of Federal Regulations. Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).⁴ Section 10.323 provides,

injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent for a total of 75 percent of monthly pay; *see William G. Dimick*, 38 ECAB 751 (1987).

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

³ 5 U.S.C. § 8129(b).

⁴ 20 C.F.R. § 10.322(a). Section 10.322 defines the terms "income," "expenses" and "assets." 20 C.F.R. § 10.322(b), (c) and (d). For waiver under the "defeat the purpose of the Act" standard, a claimant 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; *see George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986). An individual is deemed to need substantially all of his current income to meet ordinary and necessary living expenses if his monthly income does not exceed monthly expenses by more than \$50.00; *see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, Initial Overpayment Actions, Chapter 6.200.6(a)(1)* (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991).

generally, that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by using the same criteria set forth in section 10.322; or (2) the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.⁵

In the instant case, while appellant returned the overpayment questionnaire on which he indicated that his monthly income is \$1,042.00, appellant’s responses with respect to his monthly expenses are less clear, and appear to indicate total monthly expenses in the amount of \$1,125.00.⁶ Appellant further indicated, however, that he had approximately \$13,000.00 in his savings account.

First, reviewing appellant’s income and expenses as outlined in the overpayment recovery questionnaire completed by him, the Board notes that appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown 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 allowable resource base. While appellant’s monthly income, as noted above, appears insufficient to meet his ordinary and necessary expenses, appellant did not provide the Office with the requested financial documentation in support of his claimed expenses, and thus did not provide the Office with the complete information required to determine his ability to repay the overpaid amount.⁷

In addition, the Board notes that appellant’s assets, comprised of \$100.00 in his checking account, and \$13,000.00 in his savings account, amount to \$13,100.00. Section 10.322(a)(2)⁸ provides that recovery of the overpayment would defeat the purpose of the Act if 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. As appellant has no dependents, the appropriate resource base is \$3,000.00.⁹ The Board finds that using this figure, appellant’s assets exceed the resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt¹⁰ or that he

⁵ 20 C.F.R. § 10.323.

⁶ On the Office questionnaire, appellant indicated that he spent \$900.00 a year (or \$75.00 a month) for rent or mortgage, including property tax, listed monthly expenses of \$425.00 for food, \$400.00 for utilities, and \$200.00 in miscellaneous household expenses.

⁷ See 20 C.F.R. § 10.321(h) which provides that if additional financial information is not submitted, or a precoupment hearing is not requested, within thirty 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; see *Connie L. Potratz-Hasson*, *supra* note 4.

⁸ 20 C.F.R. § 10.322(a)(2).

⁹ The Board notes that the Office mistakenly determined appellant’s savings account contained only \$1,300.00.

¹⁰ Whether a claimant experiences severe financial hardship in attempting to repay an overpayment is

relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.¹¹ Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, he has failed to show that the Office abused its discretion by refusing to waive the overpayment.

The decisions of the Office of Workers' Compensation Programs dated August 8 and June 26, 1995 are affirmed.

Dated, Washington, D.C.
April 22, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

determined by using the same criteria set forth in 20 C.F.R. § 10.322; *see supra* note 5 and accompanying text.

¹¹ *See William J. Murphy*, 41 ECAB 569, 571-72 (1989).