

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AGUSTIN HERNANDEZ and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION, Dallas, Tex.

*Docket No. 96-1342; Submitted on the Record;
Issued August 17, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$27,604.98 occurred; and (2) whether the Office properly determined that appellant was not entitled to a waiver of the recovery of \$27,604.98.

The Office accepted appellant's claim for major depression and post-traumatic stress disorder. Appellant began receiving total disability benefits.

In a preliminary determination dated October 27, 1995, the Office found that appellant received an overpayment of \$27,490.44 because appellant received Veterans Administration benefits while he was receiving workers' compensation benefits for the period from September 2, 1994 through October 14, 1995. Appellant's receipt of dual benefits occurred when he increased his disability compensation with the Veterans Administration retroactively to the effective date of September 2, 1994. The Office informed appellant that he should provide information regarding his income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of Federal Employees' Compensation Act to recover the overpayment.

On November 14, 1995 appellant submitted the overpayment recovery questionnaire, Form OWCP-20, on which he indicated that he had a monthly income of Veterans Administration benefits of \$2,341.00, monthly household expenses totaling \$5,418.29 and monthly credit card payments of \$1,406.00. Appellant listed his monthly household expenses as \$396.00 for rent or mortgage, \$462.00 for food, \$500.00 for clothing, \$233.05 for utilities and \$3,827.24 for other expenses.

By decision dated February 21, 1996, the Office affirmed its preliminary determination that appellant received an overpayment of \$27,490.44 and that he was without fault in the matter of the overpayment. The Office found that waiver of the recovery was not warranted, stating

that appellant did not request a waiver and did not submit any documentation to support that he needed one. The Office noted that appellant was receiving monthly benefits of \$2,341.00 in Veterans Administration benefits as well as monthly benefits of \$1,916.00 in workers' compensation and therefore had a total monthly income of \$4,527.48. The Office further noted that appellant's monthly expenses totaled \$6,824.29 consisting of the \$5,418.29 in household expenses and the \$1,406.00 in credit payments. The Office concluded that because appellant's monthly expenses exceeded his monthly income by almost \$2,600.00, appellant either failed to include other family income as from a spouse or working child or made errors in the amounts he indicated he owed to his creditors. The Office also noted that appellant's monthly clothing expense of \$500.00 was high and appellant did not provide an explanation for what the \$3,827.00 in "other expenses" represented.

The Board finds that appellant received an overpayment of \$27,490.44.

The Office's findings in its October 27, 1995 preliminary determination that appellant received an overpayment of \$27,490.44 is supported by the fact, that pursuant to the Office's instructions, on October 9, 1995, on the election of benefits form, Form CA-687, appellant elected to receive Veterans Administration benefits instead of workers' compensation benefits, and was informed that the Veterans Administration benefits would be paid retroactively as of September 2, 1994. Appellant's workers' compensation benefits were terminated on October 15, 1995. Therefore, from September 2, 1994 to October 15, 1995 appellant simultaneously received Veterans Administration benefits and workers' compensation benefits. A computer printout shows that the amount of worker's compensation benefits appellant received for that time period totaled \$27,490.44. Appellant does not refute the fact of overpayment and he has not submitted any evidence to the contrary.

Section 8129(b) of the Act¹ provides that an overpayment of compensation shall be recovered by the Office unless 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 be against equity and good conscience.² Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.³

The implementing regulation⁴ provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.

¹ 5 U.S.C. § 8129(b).

² *Philip G. Arcadipane*, 48 ECAB _____ (Docket No. 95-1024, issued June 6, 1997); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

³ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁴ 20 C.F.R. § 10.320(b).

The Office determined that appellant was without fault in the matter of the overpayment because it resulted from his retroactive election of benefits. Since the Office required that appellant make an election, and appellant had no control over the fact it was applied retroactively, none of the above-mentioned criteria apply.

The Board finds that the Office properly determined that appellant was not entitled to waiver of recovery of the overpayment.

The Act provides that, where an overpayment of compensation has been made, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁵ The applicable regulation provides for “decreasing subsequent payments of compensation, having due regard to the probable extent of the 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.”⁶ The only exception to the Office’s right to adjust later payments or to recover overpaid compensation is where an overpayment 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.”⁷ The regulations provide that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary living expenses.⁸ The criteria used are whether the individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet his current ordinary and necessary living expenses, and 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. 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 current ordinary and necessary living expenses and that his assets do not exceed the resource base of \$3,000.00.⁹ Recovery is considered against equity and good conscience where a claimant has relied on the payment or notice of payments by relinquishing a valuable right or changing his or her position for the worse.¹⁰

In the instant case, the figures appellant provided on the overpayment of recovery questionnaire, Form OWCP-20, showed that his monthly expenses of \$6,824.20 exceeded his monthly income of \$4,527.48 by almost \$2,600.00. In its February 21, 1996 decision, because the Office was unable to account for the fact that appellant’s monthly expenses significantly exceeded his monthly income, the Office presumed that appellant either failed to include family

⁵ 5 U.S.C. § 8128(a); *see William D. Emory*, 47 ECAB ____ (Docket No. 94-881, issued February 14, 1996).

⁶ 20 C.F.R. § 10.321(a); *see Roger Seay*, 39 ECAB 441 (1988).

⁷ 5 U.S.C. § 8129(a); *see William D. Emory*, *supra* note 5.

⁸ 20 C.F.R. § 10.322; *James Lloyd Otte*, 48 ECAB ____ (Docket No. 95-672, issued February 24, 1977).

⁹ *James Lloyd Otte*, *supra* note 8; *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

¹⁰ 20 C.F.R. § 10.323.

income such as supplementary income earned by his wife or children or he made errors in the amounts he indicated he paid to his creditors. The Office therefore denied appellant's request for a waiver. It is not clear from the record what some of the figures appellant provided on Form OWCP-20 represent. For instance, appellant did not explain what the \$3,827.24 in "other expenses" represented and did not submit evidence documenting the amount of his monthly credit card payments. Because, however, appellant has the burden to present sufficient evidence to establish his eligibility for a waiver, and he did not present such evidence, the Office properly found that appellant was not entitled to a waiver.¹¹ Further, appellant did not make any argument that he was entitled to waiver on the grounds of equity and good conscience. The Office, therefore, did not abuse its discretion by refusing to waive recovery of the overpayment of compensation.

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 21, 1996 is hereby affirmed.

Dated, Washington, D.C.
August 17, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

¹¹ See generally *Jesse T. Adams*, 44 ECAB 256, 260 (1992).