

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN H. HARP and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, Jacksonville, Fla.

*Docket No. 96-1847; Submitted on the Record;
Issued August 18, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation occurred in the amount of \$1,624.61; (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; (3) whether the Office properly denied appellant's request for waiver of the overpayment; and (4) whether the Office properly determined that \$162.46 should be withheld from appellant's continuing compensation checks to recover the overpayment.

The Office accepted appellant's claim for a lumbosacral strain and herniated nucleus pulposus at L4-5. Appellant was awarded temporary total disability benefits.

In a preliminary overpayment determination dated December 5, 1995, the Office found that appellant received an overpayment of \$1,624.61 from August 1, 1994 through August 4, 1995 because appellant received compensation at the augmented three-quarters rate and was only entitled to receive compensation at the statutory two-thirds rate for that period. The Office found that appellant should have received the two-thirds compensation rate during the time period as the status of his dependent son changed in that he no longer attended school after July 31, 1994.¹ The Office noted that on August 5, 1995 appellant got married and he again became entitled to the augmented compensation rate. The Office found that appellant was at fault in the creation of the overpayment and informed appellant he could request a telephone conference or a prerecoupment hearing.

A telephone conference was held on February 15, 1996 between appellant and a senior claims examiner at which it was noted that the overpayment from August 1, 1994 through

¹ Section 20 C.F.R. § 10.301(b) of the Federal Employees' Compensation Act provides that an injured employee who qualifies for disability benefits is entitled to a three-quarters compensation rate if he has one or more dependents. The statute defines a dependent child as one who is unmarried and under 18 years of age or, if over 18, incapable of self-support or a student. 20 C.F.R. § 10.301 (b).

August 4, 1995 was created when appellant's son, who was over 18 and appellant's only dependent, was unable to attend college due to an injury. The claims examiner changed the initial finding of fault to a finding of without fault in the creation of the overpayment. The claims examiner also reviewed appellant's annual expenses.

By decision dated March 6, 1996, the Office found that appellant was overpaid \$1,624.61 because he received the augmented three-quarters monthly compensation rate for his son who was his only dependent and who no longer attended school for the period August 1, 1994 through August 4, 1995. The Office found that appellant was without fault in the creation of the overpayment because appellant timely notified the Office of his son's withdrawal from school and the Office failed to take timely action to reduce his benefits. The Office found, however, that the circumstances of his case did not warrant waiver of the overpayment. The Office found that appellant's monthly household income consisted of \$629.00 in Social Security payments, \$1,320.00 wages for appellant's wife, and \$1,198.00 compensation for appellant, or a total monthly income of \$3,147.17. The Office also found that appellant had resources of \$1,054.01 in his cash and checking account. Based on the February 15, 1996 conference call and documentation appellant submitted, the Office found that appellant had a total \$2,509.68 in monthly expenses. The Office concluded that the difference between appellant's monthly income and expenses was \$637.49 and appellant was not eligible for a waiver of the overpayment because he did not need substantially all of his current monthly income to meet his current and ordinary living expenses. The Office concluded that \$162.46 would be withheld from appellant's continuing compensation effective March 3, 1996 to recover the overpayment.

The Board finds that the Office properly found that appellant received an overpayment of \$1,624.61 for the period August 1, 1994 through August 4, 1995.

The Office found in its December 5, 1995 preliminary determination that appellant received an overpayment of \$1,624.61 because he was receiving the augmented three-quarter compensation rate based on his son being a dependent when he should have received the statutory two-third compensation rate because after August 1, 1994 his son did not qualify as a dependent. Appellant indicated on Forms EN-1615 dated January 13, 1994 and January 13 and February 6, 1995 that his son was a dependent in that he was attending school. In subsequent letters, one received by the Office in February 20, 1995 and another dated later in 1995, appellant stated that his son was unable to continue going to school as of August 1994 because he underwent shoulder surgery. As shown on computer printout sheets for the relevant time period and calculations on the disability benefits payment work sheet, the Office properly calculated that the amount appellant was overpaid was \$1,624.61.

Section 8129(b) of the Act² 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

² 5 U.S.C. § 8129(b).

and good conscience.³ Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is at fault.⁴

The implementing regulation⁵ provides that a claimant is at 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.

In the present case, although the Office initially determined that appellant was at fault in the creation of the overpayment in its December 5, 1995 preliminary determination. However, following the February 15, 1996 telephone conference the Office changed the finding to no fault in the creation of the overpayment. In the March 6, 1996 decision, the Office explained that appellant gave timely notice of his son's change in status, and the Office failed to take timely action to reduce the benefits.

Section 8129(a) of the Act⁶ provides that, where an overpayment of compensation has been made "because of an error of fact or law" adjustments 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): "Adjustments or recovery by the United States may not be made when incorrect payments 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

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.⁸ The Office must 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," pursuant to the guidelines provided in sections 10.322-.323 of the implementing federal regulations.

Section 10.322⁹ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a beneficiary of income and resources needed

³ *Philip G. Arcadipane*, 48 ECAB ____ (Docket No. 95-1024, issued June 6, 1997); *Michael H. Wacks* 45 ECAB 791, 795 (1994).

⁴ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁵ 20 C.F.R. § 10.320(b).

⁶ 5 U.S.C. § 8129(a).

⁷ 5 U.S.C. § 8129(b).

⁸ *James Lloyd Otte*, 48 ECAB ____ (Docket No. 95-672, issued February 24, 1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

⁹ 20 C.F.R. § 10.322.

for ordinary and necessary living expenses when 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.¹⁰

The Office found that appellant had a monthly income of \$3,147.17 which exceeded his monthly expenses of \$2,509.68 by \$637.49 based on the financial information appellant submitted. The Office also found that appellant had resources of \$1,054.01 in his cash and checking account. The Office therefore properly determined that appellant did not need substantially all of his income to meet his current ordinary and necessary living expenses and therefore recovery of the overpayment would not defeat the purpose of the Act.

Section 10.323(b) of Title 20 of the Code of Federal Regulations¹¹ provides that recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse. In making such a decision, the individual's present ability to repay the overpayment is not considered. To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely on reliance on the payments or on the notice of such payments.¹² To establish that the individual's 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. Conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit, does not constitute a loss for this purpose.¹³

There is no evidence in this case that appellant relinquished a valuable right or changed his position for the worse in reliance on the excess compensation payments he received constituting the overpayment. Nor did appellant allege that he relinquished a valuable right or changed his position for the worse in reliance on the extra compensation he received due to lack of withholding. The Board therefore finds that the Office did not abuse its discretion in denying waiver of the overpayment.

Section 10.321(a) provides if an overpayment of compensation has been made to one entitled to future payments, proper adjustments shall be made by decreasing subsequent payments of compensation, "having due regard to the probable extent of future payments, the

¹⁰ *James Lloyd Otte*, *supra* note 8; *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

¹¹ 20 C.F.R. § 10.323(b).

¹² *John B. Moore*, 44 ECAB 709, 712 (1993).

¹³ *Stanley K. Handler*, 44 ECAB 698, 707 (1993).

rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual."

In this case, the Office considered appellant's income and expenses and found that, as appellant's monthly income exceeded his living expenses by \$637.49 and appellant had savings of approximately \$1,054.01, recovery of the overpayment by withholding \$162.46 from his continuing compensation payments would not cause undue hardship. The Board finds that the repayment schedule was not unreasonable under the circumstances.¹⁴

Accordingly, the decision and order of the Office of Workers' Compensation Programs dated March 6, 1996 is hereby affirmed.

Dated, Washington, D.C.
August 18, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁴ *James Lloyd Otte*, *supra* note 8; see *Forrest E. Brown II*, 44 ECAB 278, 286 (1992).