

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARLON G. MASSEY and DEPARTMENT OF THE ARMY,  
WATERWAYS EXPERIMENT STATION, Vicksburg, Miss.

*Docket No. 96-2102; Submitted on the Record;  
Issued August 25, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issues are whether the Office of Workers' Compensation Programs properly found an overpayment of \$3,639.00 and denied waiver of recovery of the overpayment under section 8129(a) of the Federal Employees' Compensation Act.<sup>1</sup>

The Board has reviewed the case record and finds that the Office properly found that appellant was without fault in the creation of the overpayment and denied waiver of recovery of the amount of \$3,639.00.

Section 8129(a)<sup>2</sup> of the Act provides that when an overpayment of compensation occurs "because of an error of fact or law," adjustment or recovery shall be made by decreasing later payments to which the individual is entitled. The only exception to this requirement that an overpayment must be recovered is set forth 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."<sup>3</sup> (Emphasis added.)

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.<sup>4</sup> 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

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<sup>1</sup> 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8129(a).

<sup>2</sup> 5 U.S.C. § 8129(a).

<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> *William J. Murphy*, 40 ECAB 569, 571 (1989).

and good conscience,” pursuant to the guidelines provided in sections 10.322 and 10.323 of the implementing federal regulations.<sup>5</sup>

Section 10.322 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 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 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.<sup>6</sup> An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.<sup>7</sup>

In this case, the Office accepted appellant’s claims for disability benefits, filed on March 4, 1981 and April 10, 1986, and paid compensation.

On March 23, 1994 the Office determined that appellant had been overpaid compensation from November 14, 1993 through February 5, 1994. The Office stated that appellant was paid temporary total disability but had returned to work and should have been paid only for his loss of wage-earning capacity. The Office sent notice of its preliminary decision to appellant’s attorney of record with a copy to appellant at an address on Joor Avenue, Rolling Fork, Mississippi.

On June 4, 1996 the Office determined that appellant was without fault in the creation of the overpayment but was not entitled to waiver of recovery because he had neither requested waiver nor submitted a financial statement. The Office sent a copy of this decision to appellant at an address on Walnut Avenue, Rolling Fork, Mississippi.

Appellant argues on appeal that he “had no knowledge” of the overpayment and was not asked to submit a financial statement regarding waiver of recovery of the overpayment. Appellant thus contends that he did not receive the March 23, 1994 letter, with its accompanying overpayment recovery questionnaire and options for further review.

The record shows that appellant completed a Form CA-1032 on October 25, 1993, notifying the Office of his change of address from Joor Avenue to Walnut Avenue. Thus, appellant complied with the Office’s instruction to notify it of a change of address. However, computer printouts dated November 6 and 27, 1993, February 12, 1994 indicate that appellant’s address was not changed in the Office’s automated compensation payments system. Thus, the March 23, 1994 letter from the Office was erroneously sent to appellant’s former address on Joor Avenue.

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<sup>5</sup> 20 C.F.R. §§ 10.322-23; *James M. Albers, Jr.*, 36 ECAB 340, 345 (1984).

<sup>6</sup> *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

<sup>7</sup> *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

The Board finds that the Office's error is mitigated by two factors. First, the March 23, 1994 preliminary determination letter was sent to appellant's attorney of record in Jackson, Mississippi whose address has remained constant since appellant appointed him in August 1990. The record does not indicate that appellant's attorney withdrew his representation. Inasmuch as the Board has held that appellant has the responsibility of ensuring that his attorney keeps him informed of developments in his case,<sup>8</sup> the Board will not speculate on whether appellant was actually aware of his options in responding to the preliminary notice of overpayment.<sup>9</sup>

Second, the record indicates that a Form CA-1032 dated March 31, 1994 was mailed to appellant at his Joor Avenue address and was obviously received by him because he signed the form on April 8, 1994, noting his new address as Walnut Avenue, and returned the completed document to the Office. Further, appellant's address was not changed by the Office until April 21, 1994 and his compensation checks from November 1993 onwards were sent to the Joor Avenue address, yet the record indicates no inquiries regarding benefits not received. Therefore, the Board finds that the Office's error in mailing the preliminary notice of overpayment to appellant's old address was harmless.

Appellant also argues that he should not have to repay the overpayment because he was found to be without fault. The Act and its implementing regulations are clear that entitlement to waiver is not established solely by a finding that appellant is without fault in creating the overpayment.<sup>10</sup> Rather, such a finding entitles appellant only to the opportunity to establish a basis for granting waiver of the recovery of the overpayment pursuant to section 8129.

In this case, appellant submitted no evidence regarding his assets, income, and expenses. While section 10.321(a) provides that recovery of an overpayment shall be effected to minimize any resulting hardship on the individual,<sup>11</sup> appellant has the burden of establishing a basis for waiver and has failed to submit any evidence showing that he needs substantially all of his current monthly income to meet living expenses or that the amount of the overpayment was wrongly computed. Therefore, he does not qualify for waiver under the "defeat the purpose of the Act" standard.<sup>12</sup>

Section 10.323 of the regulations 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. To establish that a valuable right was relinquished, the individual must

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<sup>8</sup> *Raymond H. Parker*, 33 ECAB 1737, 1739 (1982).

<sup>9</sup> The Board has held that, absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have arrived at the mailing address in due course. *Charles R. Hibbs*, 43 ECAB 99, 700-01 (1992). There is no indication in the record that the March 23, 1994 letter was not received by appellant's attorney.

<sup>10</sup> *William J. Murphy*, *supra* note 4.

<sup>11</sup> 20 C.F.R. § 10.321(a); *Gail M. Roe*, 47 ECAB \_\_\_\_ (Docket No. 94-764, issued December 12, 1995).

<sup>12</sup> *See Nina D. Newborn*, 47 ECAB \_\_\_\_ (Docket No. 93-2445, issued October 12, 1995) (finding that recovery of the overpayment in a lump sum was proper because appellant failed to complete the recovery questionnaire).

show that the right was valuable, that it cannot be regained, and the action taken was based chiefly or solely on the payments or notice of such payments.<sup>13</sup>

To establish a change in position for the worse, the individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amounts and that this decision resulted in a loss; conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose.<sup>14</sup> In making such a decision, the individual's present ability to repay the overpayment is not considered.<sup>15</sup>

There is no evidence in this case, nor did appellant allege, that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received while working. The Board, therefore, finds that the Office did not abuse its discretion in denying waiver of recovery of the overpayment.

The June 4, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
August 25, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>13</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (September 1989).

<sup>14</sup> *John B. Moore*, 44 ECAB 709, 711 (1993).

<sup>15</sup> *Stanley K. Hendler*, 44 ECAB 698, 707 (1993).