

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMIE L. CONNELL and DEPARTMENT OF THE ARMY,
ROCK ISLAND ARSENAL, Rock Island, Ill.

*Docket No. 96-1285; Submitted on the Record;
Issued July 28, 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 found that there was an overpayment of compensation in the amount of \$663.47 as appellant received a schedule award based on an incorrect rate of pay due to an Office clerical error; and (2) whether the Office abused its discretion by failing to waive recovery of the overpayment.

Appellant, then a 46-year-old artillery hydropneumatic systems mechanic, filed a claim for head injury caused by a piston on April 18, 1985. The Office accepted the claim for comminuted open depressed skull fracture left parietal region on June 4, 1985. The Office approved surgery. The Office placed appellant on the temporary total disability rolls on August 16, 1985. Appellant was assigned to the position of production controller on July 26, 1987 earning a salary of \$12.42 per hour. Appellant also received schedule awards for loss of use of the right arm and an award for disfigurement.

In a decision dated July 11, 1994, the Office awarded appellant \$663.47 for loss of wage-earning capacity for the period September 17, 1992 through June 2, 1993. The Office noted that appellant had been reemployed with the employing establishment as a production controller with weekly wages of \$545.60 per week.

In a preliminary decision dated November 20, 1995, the Office determined that there was an overpayment of compensation in the amount of \$663.47. The Office noted that the overpayment occurred as a result of appellant's being paid an adjusted loss of wage-earning capacity for the period September 17, 1992 through June 2, 1993 when no payment was actually due. The Office noted that appellant's salary for his date-of-injury position as of July 26, 1987, when he returned to work as a production controller, was \$11.62 per hour or \$464.80 per week. At the time, appellant was earning \$12.42 per hour or \$496.80 per week so there was no loss of wage-earning capacity. A subsequent decision dated July 11, 1994 erroneously modified the previous loss of wage-earning capacity decision.

Appellant submitted the Form OWCP-20 showing that he had a total monthly income of \$1,688.12. He listed monthly expenses for rent, food, clothing, utilities and other expenses totaling \$1,227.00. Appellant noted two debts: Thrift Savings Loan, with an amount owed of \$6,220.00 and monthly payment of \$169.00 and Rock Island Arsenal Credit Union, with an amount owed of \$1,322.00 and monthly payment of \$226.35. Appellant listed other funds as \$39.00 cash on hand; \$29.30 checking account balance and \$953.00 savings account balance for a total of \$1,021.30. He listed no other valuable property or realty.

By decision dated January 31, 1996, the Office finalized its preliminary decision of overpayment, finding that a \$663.47 overpayment had been created in this case because appellant had been issued a payment for the period September 17, 1992 through June 2, 1993 when none was due. The Office found that the circumstances of appellant's case did not warrant waiver of recovery of overpayment. The Office noted that appellant's monthly expenses do not exceed his monthly income. The Office then noted that appellant had a \$66.00 surplus each month and concluded that recovery at the rate of \$50.00 every month would not defeat the purpose of the Federal Employees' Compensation Act as appellant's income exceeded his expenses.

The Board finds that the Office did not abuse its discretion by denying waiver 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.¹

Section 8129 of the Act² 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 [Act] or would be against equity and good conscience."³ Thus, the fact that appellant is without fault in creating the overpayment of compensation does not, under the Act, automatically preclude the Office from recovering all or part of the overpayment. The Office must exercise its discretion to determine whether waiver is warranted under either the "defeat the purpose of the [Act]"⁴ or the "against equity and good conscience" standards pursuant to the guidelines set forth in sections 10.322 and 10.323 of the Office's regulations respectively.

¹ *Ronald E. Smith*, 36 ECAB 652, 654 (1985)

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8129.

⁴ *Ella M. Moore*, 41 ECAB 1012, 1014-15 (1990). 20 C.F.R. §§ 10.322-23.

With regard to the “defeat the purpose of the Act” standard, section 10.322(a) of the regulations 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:

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.”⁵

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.⁶ 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 \$50.00.⁷

Appellant submitted an overpayment recovery questionnaire and supporting documentation showing ordinary and necessary living expenses of approximately \$1,622.35 per month, including two debts which will be paid off, and a monthly income of \$1,688.12. By decision dated July 7, 1994, the Office found that a payment of \$50.00 every month by appellant would recover the amount of the overpayment in a fair and reasonable manner, as appellant’s monthly income was \$1,688.12 and his monthly expenses were \$1,622.35. The difference between appellant’s monthly income and expenses is approximately \$66.00, more than the \$50.00 provided by the Office’s regulations. In addition the Board notes that appellant’s expenses will lessen by \$226.35 when his loan to Rock Island Arsenal Credit Union is paid off.

With regard to the “against equity and good conscience” standard, section 10.323(b) of the regulations provides:

“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

⁵ 20 C.F.R. § 10.322(a).

⁶ *Forrest E. Brown, II*, 44 ECAB 278, 284 (1992); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, Chapter 6.200.6(a), *Initial Overpayment Actions* (September 1994).

⁷ Federal (FECA) Procedure Manual, Part 6 -- Chapter 6.200.6(a)(1) (September 1994).

position for the worse. In making such a decision, the individual's present ability to repay the overpayment is not considered...."⁸

The evidence in this case does not establish that appellant relinquished a valuable right or changed his position for the worse in reliance on the payment of compensation. To show detrimental reliance under section 10.323(b), appellant must show that he made a decision he otherwise would not have made in reliance on the overpaid compensation and that this decision resulted in a loss.⁹ Appellant did not allege any substantial reliance on the overpayment of compensation in this case, nor was detrimental reliance shown.

The Board therefore finds that the Office did not abuse its discretion in denying waiver of the overpayment of compensation in this case.

The decision of the Office of Workers' Compensation Programs dated January 31, 1996 is hereby affirmed.

Dated, Washington, D.C.

July 28, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

⁸ 20 C.F.R. § 10.323.

⁹ *Forest E. Brown, II, supra* note 6 at 285-86; Federal (FECA) Procedure Manual, Part 6 -- Chapter 9.200.6(b)(3) (September 1994).