

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN R. METHVEN and U.S. POSTAL SERVICE,
POST OFFICE, Red Bank, N.J.

*Docket No. 96-769; Submitted on the Record;
Issued May 27, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for waiver of the recovery of an \$1,191.61 overpayment; and (2) whether the Office properly required recovery of the overpayment by withholding \$150.00 from appellant's continuing monthly compensation benefits.

On March 19, 1976 the Office accepted that appellant sustained a low back strain and a herniated disc in the performance of duty and it paid appropriate compensation benefits. Appellant returned to work part time for four hours a day, but stopped again and claimed a recurrence of disability on or after February 19, 1991, which was denied by the Office.

On October 3, 1991 the Office issued a preliminary determination that an overpayment of compensation in the amount of \$1,191.61 had occurred in appellant's case, because he had been paid augmented compensation at the three quarters rate from July 29, 1990 through September 21, 1991 when he had no dependent in his care. A finding that appellant was not at fault in the creation of this overpayment was made. His compensation was corrected September 22, 1991 to reflect proper payment at the two thirds rate. On October 9, 1991 appellant requested waiver of recovery of the overpayment. Appellant was sent an overpayment recovery questionnaire.

Appellant submitted financial information regarding consumer credit payments that were overdue. He provided a 1991 automobile insurance statement indicating that his insurance costs were \$166.70 per quarter. Appellant submitted rent and utility receipts and he completed the overpayment recovery questionnaire. In 1993 he again provided information on his monthly income and expenses.

On June 7, 1995 the Office requested that appellant provide updated financial information. He submitted figures indicating that his monthly income was \$1,680.00 and his monthly expenses were \$1,689.00, leaving him with a \$9.00 deficit each month. Included in

appellant's monthly expenses were a \$45.00 cable TV cost, a \$50.00 film cost, a \$75.00 vacation allowance, and a \$400.00 food budget. The Board also notes that appellant listed \$134.00 for monthly automobile rental costs, \$134.00 for monthly automobile insurance costs, \$140.00 for monthly gas, oil and maintenance, and \$6.00 for a license fee, but did not provide documentation for these last two expenses.

By decision dated October 6, 1995, the Office finalized the amount of the overpayment as \$1,191.61, considered appellant's request for waiver, determined that the circumstances did not warrant waiver of recovery of the overpayment, and indicated that the overpaid amount would be recouped by withholding \$150.00 every 4 weeks from appellant's continuing compensation. The Office noted that appellant did not provide any information regarding whether he had funds, such as cash on hand, checking accounts, savings accounts, or stocks and bonds, and he did not reveal the value of any other personal property. The Office calculated that, taking the figures appellant supplied, his monthly expenses were only \$1,669.00, which was less than his \$1,680.00 monthly income. The Office then further determined that cable TV, films and a vacation allowance were not ordinary and necessary living expenses, that car rental expenses could not be considered as ordinary and necessary, that the \$6.00 license fee was not a recurring monthly expense and that \$400.00 per month for food was excessive for one person without dependents. The Office reduced appellant's monthly food allowance to \$280.00, which it noted was reasonable for a single individual, and which it indicated exceeded the food expense amount listed on the Consumer Expenditure Survey compiled and published by the Bureau of Labor Statistics. The Office recalculated appellant's ordinary and necessary monthly expenses as \$1,239.00, which it found left \$441.00 per four weeks from which to recover the overpayment. The Office found that withholding \$150.00 per four weeks was reasonable and would not be against equity and good conscience and would not create severe financial hardship for appellant.

On October 18, 1995 the Office reevaluated appellant's claimed expenses and decided that automobile rental costs could be considered as monthly expenses which increased appellant's monthly expenditures by \$134.00, but which still left \$307.00 extra per 4 weeks from which to recover the overpayment. As \$150.00 per four weeks withholding was still less than one half of appellant's monthly excess income, the Office found that appellant would not suffer severe financial hardship by repaying the overpayment at that rate.

As appellant did not respond or indicate his intention to repay, the Office considered the overpayment delinquent and assessed interest, increasing the total amount of the overpayment due. On January 4, 1996 appellant responded to the Office claiming that to repay the debt would create severe financial hardship for himself.

The Board finds that the Office did not abuse its discretion in refusing to waive recovery of the \$1,191.61 overpayment.

Section 8129(a) of the Federal Employees' Compensation Act¹ provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to

¹ 5 U.S.C. §§ 8101-8193.

which an individual is entitled. Section 10.321(b) of Title 20 of the Federal Code of Regulations provides that where there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same. Section 8129(b) describes the only exception to the Office's right to adjust later payments or to recover overpaid compensation:

“Adjustment or recovery by the United States may not be made when incorrect payment had 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.”²

Appellant correctly argues that he was not at fault in the matter of the overpayment. However, the fact that an individual is without fault in the matter of an overpayment does not, by itself, preclude the Office from adjusting later payments or recovering the overpayment amount, as explained by section 8129(b) quoted above. This section prohibits adjustment or recovery when the individual is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience. Thus, because appellant is without fault in the matter of the overpayment, the Office may, in accordance with section 8129(b), adjust later payments or recover the overpaid amount only if adjustment or recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether adjustment or recovery would defeat the purpose of the Act or be against equity and good conscience are respectively set forth in sections 10.322 and 10.323 of Title 20 of the Code of Federal Regulations.

Section 10.322(a) provides that recovery of an overpayment will 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 expenses³ and if the individual's nonexempted assets do not exceed a resource base of \$3000, or \$5000 if the individual has a spouse or one dependent.⁴ Section 10.323 provides that recovery of an overpayment is considered to be against equity and good conscience if the overpaid individual would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by the same criteria set forth in section 10.322, or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his position for the worse.⁵

² *Id.* § 8129(b).

³ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.

⁴ 20 C.F.R. § 10.322(a).

⁵ *Id.* § 10.323.

The Form OWCP-20 overpayment recovery questionnaire is designed to obtain the financial information necessary to determine whether adjustment or recovery would defeat the purpose of the Act. In the instant case appellant did not submit a 1995 completed Form OWCP-20 and did not provide current information on his funds on hand, investments or property owned, but he did provide a list of his monthly expenses, which included several expenses that were not ordinary and necessary living expenses. Further, he did not argue or submit evidence to establish that recovery of the overpayment would be against equity or good conscience because, in reliance on the overpaid compensation, he relinquished a valuable right or changed his position for the worse. Although appellant is without fault in the matter of the overpayment, he nonetheless bears responsibility for providing the financial information necessary to support his request to waive recovery of the overpayment. Section 10.324 of Title 20 of the Code of Federal Regulations states in this regard:

“In requesting waiver of an overpayment, either in whole or in part, the overpaid individual has the responsibility for providing the financial documentation described in § 10.322 as well as such additional information as the Office may require to make a decision with respect to waiver. Failure to furnish the information within 30 days of request shall result in the denial of waiver and no further requests for waiver shall be entertained until such time as the requested information is furnished.”⁶

Whether to waive an overpayment of compensation is a matter that rests within the Office’s discretion pursuant to statutory guidelines.⁷ Generally, an abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, action of the kind that no conscientious person acting intelligently would reasonably have taken, prejudice, partiality, intentional wrong, or action against logic.⁸ The Board has long held that when a claimant submits insufficient financial evidence to support his request to waive recovery of an overpayment, the Office commits no abuse of discretion in denying that request.⁹ In this case, the financial evidence appellant did submit revealed that, after allowing for ordinary and necessary monthly expenses, he had \$307.00 excess monthly income. As appellant submitted no evidence in this case to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion in refusing to waive recovery of the overpayment.

With respect to the \$150.00 withheld from appellant’s continuing compensation payments to recover the amount of the overpayment, the Board notes that the amount of adjustment lies within the Office’s discretion.¹⁰ The analysis that determines the amount of

⁶ 20 C.F.R. § 10.324.

⁷ See *William J. Murphy*, 40 ECAB 569 (1989).

⁸ *Sherwood Brown*, 32 ECAB 1847 (1981).

⁹ E.g., *William J. Murphy*, *supra* note 7; *Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986); *Joseph H. Light*, 13 ECAB 358 (1962).

¹⁰ See 20 C.F.R. § 10.321(a).

adjustment is substantially the same as that used to determine waiver. After \$150.00 is added to appellant's ordinary and necessary monthly expenses, current monthly income still exceeds expenses by more than \$50.00. Therefore, the Board finds that the Office did not abuse its discretion by withholding \$150.00 from appellant's continuing compensation payments.

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 6, 1995 is hereby affirmed.

Dated, Washington, D.C.
May 27, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member