

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAN O. LINNVILLE and DEPARTMENT OF THE NAVY,
MARINE CORPS LOGISTICS BASE, Barstow, Calif.

*Docket No. 96-1329; Submitted on the Record;
Issued November 10, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of \$6,540.25 was created due to the payment of augmented compensation during a period when appellant had no dependents; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly determined that appellant should repay the overpayment by withholding the sum of \$100.00 of appellant's continuing compensation and having interest accrue at the rate of the U.S. Treasury Note.

On May 16, 1988 appellant, then a 37-year-old inspector, sustained injury to his back and right leg in the performance of duty. The Office accepted the claim for a herniated disc at L5-S1. Appellant stopped work on May 17, 1988. The Office began payment of compensation at the augmented rate of three-fourths of appellant's pay,¹ on the basis that he had eligible dependents.

By EN1615-0189 form dated July 1992 appellant notified the Office that his youngest son, born on February 25, 1974, was not regularly pursuing a full-time course of study or training.

By CA-1032 form dated May 10, 1993 appellant notified the Office that he got married on January 28, 1993 and was claiming his wife as a dependent. By Form CA-1032 dated March 1, 1994, appellant notified the Office that he was in the process of getting divorced, but that he was claiming his stepchild as a dependent. Appellant was divorced May 12, 1994.

By CA-1032 form dated June 16, 1995 appellant notified the Office that he was getting remarried in July 1995. Appellant did not claim any dependents for that reporting period. Appellant got remarried on July 10, 1995 and changed his health benefits deduction to indicate his new family status.

¹ See section 8110 of the Federal Employees' Compensation Act.

By letter dated September 18, 1995, the Office informed appellant it had made a preliminary determination that he received an overpayment of compensation in the amount of \$6,540.25 for the period June 15, 1992 through August 19, 1995 due to his changes in dependent status and health benefits deductions. The Office set forth the specific periods during the relevant time frame in which appellant was entitled to the augmented compensation rate and found that he was not at fault in creating the overpayment. The Office informed appellant that the overpayments may be waived “when it can be shown that [he] was not at fault and that recovery of the overpayments would defeat the purpose of the Act or the recovery would be against equity and good conscience” and described the circumstances under which recovery may be considered to defeat the purpose of the Act or would be against equity and good conscience. The Office also informed appellant that information regarding his financial circumstances was “important” and requested that he complete and submit the enclosed “Overpayment Recovery Questionnaire” with supporting documents, as well as any other relevant information.

In an Overpayment Recovery Questionnaire dated September 22, 1995 appellant stated that he felt the full compensation was due him, he was still paying medical bills for dependents that were not taken off his health plan, and because the judge in his divorce allowed his ex-wife to stay in their home and she did not pay the mortgage, he had to pay the mortgage plus pay his rent. Appellant stated that he did not know that he was being overpaid as he has always tried to live up to his responsibilities by reporting the various changes in his life. He further stated that because he did not realize he was being overpaid, he would never have entered into certain transactions like buying his house. Appellant stated that he would suffer a great financial loss if he had any recovery of overpayments taken out of his income. He wrote down expenses claimed did not provide any supporting documentation other than a copy of his real estate transaction entered into on July 19, 1995 (not labeled, but received by the Office on 10/25/95) and his mortgage application.

By decision dated February 14, 1996, the Office found that appellant received overpayments of compensation in the amounts of \$6,540.25 for the period June 15, 1992 through August 19, 1995 and that the circumstances did not warrant waiver. The Office stated that the sum of \$100.00 would be withheld from appellant’s continuing compensation starting February 4, 1996 and that interest would start accruing on February 14, 1996 at the rate of the U.S. Treasury Note.

The Board finds that appellant received an overpayment of \$6,540.25 in compensation.

In its September 18, 1995 memorandum, the Office stated that the period of overpayment was from June 15, 1992 to August 19, 1995. The Office found that appellant was not entitled to augmented compensation for the period June 15, 1992 through January 27, 1993 as he had no qualifying dependents. The evidence in this case shows that appellant informed the Office in July 1992 that his youngest son, who was born on February 25, 1974, and thus had reached 18 years of age was not regularly pursuing a full-time course of study or training. The Act provides that compensation payments that would otherwise end for a child who has reached 18 years of age shall continue if he is a student by the time he reaches 18 years of age for so long as he continues to be a student or until he marries.² In this case, appellant’s son became 18 years old

² 5 U.S.C. § 8110(a)(3).

on February 25, 1992 and thereafter did not become a student as defined by the Act. Appellant's son therefore could not be considered a dependent under the Act. The Office found that appellant's son was no longer considered a dependent on June 15, 1992. Even though his son ceased to be a dependent by June 15, 1992, appellant received augmented compensation on the basis that he had a dependent. Appellant therefore received an overpayment of compensation for the period June 15, 1992 until January 27, 1993 because he received compensation at an augmented rate when he was not entitled to it.

The Office found that for the period of January 28, 1993 through May 13, 1994, appellant was entitled to augmented compensation as he was married and had dependent children. The record reflects that appellant got married on January 28, 1993 and divorced on May 13, 1994.³ The record additionally indicates that there were dependent stepchildren as a result of the marriage. Thus, appellant was properly entitled to augmented compensation during the period of January 28, 1993 through May 13, 1994 as he had qualifying dependents under the Act.

For the period May 14, 1994 through July 9, 1995, the Office found that appellant was not entitled to augmented compensation as he was divorced and had no children that qualified as a dependent. Dependents under the Act include a spouse who is a member of the same household, receiving regular contributions from the claimant for her support or is receiving contributions to her support from the claimant pursuant to a court order. The record does not contain any evidence that appellant was under a court order to contribute to the support of his former wife or the stepchildren.⁴ Therefore appellant was not entitled to augmented compensation after May 13, 1994. Since he received augmented compensation until July 9, 1995, appellant received an overpayment of compensation.

The Office then found that for the period July 10 through August 19, 1995, appellant was entitled to the augmented compensation rate as he had remarried and had changed his health benefits plan. As this is supported by the evidence of record, appellant is properly entitled to augmented compensation from July 10, 1995 onward.

A review of the overpayment calculations in this case indicates that on the period commencing June 15, 1992 through August 19, 1995 appellant had received a total of \$79,563.60 in compensation at the three-quarters rate, while he should have received \$73,023.35 due to his fluctuating dependent status. The amount of \$73,023.35 appellant should have received encompasses \$13,203.06 compensation at the corrected two-thirds rate appropriate for no dependents for the period June 15, 1992 through January 27, 1993; \$31,458.85 in compensation at the three-quarters rate for the period January 28, 1993 through May 13, 1994; \$25,680.15 compensation at the corrected two-thirds rate appropriate for being divorced with no dependents under the period from May 14, 1994 through July 9, 1995, and \$2,861.29 in compensation at the three-quarters rate for the period July 10 through August 19, 1995. Accordingly, an overpayment of \$6,540.25 was created.

³ The divorce decree is date stamped May 12, 1994 by the clerk, but contains the handwritten date of May 13, 1994 on the body of the divorce decree.

⁴ *William G. Dimick*, 38 ECAB 751 (1987).

The Board further finds that the Office properly denied waiver of the overpayment.

Section 8129 of the Act⁵ provides that an overpayment 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 the Act or would be against equity and good conscience.” (Emphasis added.) Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience.⁶ The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth, respectively, in sections 10.322 and 10.323 of Title 20 of the Code of Federal Regulations.

Section 10.322(a) provides, generally, that recovery of an overpayment would 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 expenses and, also, if the individual’s assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000 (or \$5,000 if the individual has a spouse or one dependent).⁷ Section 10.323 provides that recovery of an overpayment would be against equity and good conscience if:

(1) The overpaid individual would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by using the same criteria set forth in 20 C.F.R. § 10.322; or the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.

In the present case, appellant provided information regarding his monthly income and expenses in an overpayment recovery questionnaire (Form OWCP-20). The only documentation the Office received was a copy of appellant’s real estate transaction and mortgage application. In the overpayment recovery questionnaire, appellant claimed \$2,043.00 of undocumented expenses. The Office calculated that appellant receives monthly compensation in the amount of \$2,127.62, resulting in a finding that income exceeded expenses by \$84.62. As appellant failed to provide documentation pertaining to his expenses, the Board finds that the Office adequately considered the financial evidence submitted.

The Office’s procedures provide that 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 \$50.00.⁸ Since appellant’s income exceeds his expenses by more than \$50.00 per month, he is not entitled to waiver of the overpayment.

⁵ 5 U.S.C. § 8129(a)(6).

⁶ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

⁷ To establish that recovery would defeat the purpose of the Act, appellant must show both that he needs substantially all his income to meet ordinary and necessary living expenses, and that his assets do not exceed the established resource base; see *Robert E. Wenholz*, 38 ECAB 311 (1986).

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994); see also *Linda D. Lane*, 46 ECAB 727 (1995).

With respect to whether recovery would be against equity and good conscience, section 10.323(b) of the federal regulations provides that “[r]ecovery 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.” Appellant has alleged that he would have never bought his home had he realized he was being overpaid. The evidence shows that appellant entered into the real estate transaction on July 19, 1995, which is after appellant had remarried on July 10, 1995 and was properly receiving augmented benefits. However, the conversion of overpayment to real estate is not a loss and, therefore, is not relinquishing a valuable right or a change of position for the worse.⁹ Thus, the evidence does not show that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpayments.

As appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience,” the Board finds that the Office did not abuse its discretion in denying waiver of the overpayment.

The Board further finds that the Office properly determined the rate of recovery of the overpayment.

Section 10.321(a) of the Code of Federal Regulations states in relevant part:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other factors so as to minimize any resulting hardship upon such individual.”¹⁰

In the February 14, 1996 decision, the Office determined that appellant should repay the overpayment by withholding the sum of \$100.00 from his continuing compensation effective February 4, 1996. The Board has held that the Office cannot simply deduct a fixed amount of the continuing compensation without considering the extent of appellant’s financial expenses and obligations and the effect of such a withholding on those obligations.¹¹ However, appellant did not provide any financial documentation reflecting that the amount of repayment would impose any hardship, the Office properly determined that \$100.00 could be withheld from appellant’s continuing compensation benefits effective February 4, 1996.

The decisions of the Office of Workers’ Compensation Programs dated February 14, 1996, is hereby affirmed.

⁹ *Stanley K. Hendler*, 44 ECAB 698 (1993).

¹⁰ 20 C.F.R. § 10.321(a).

¹¹ *See Otilio Leon*, 39 ECAB 652 (1988), and *Donald R. Schueler*, 39 ECAB 1056 (1988)(the Office deducted 10 percent of appellant’s continuing compensation pursuant to FECA Bulletin No. 87-19, which provided 10 percent as a minimal acceptable offset, and the Board found that the Office must consider appellant’s financial circumstances in accordance with 20 CFR § 10.321(a)).

Dated, Washington, D.C.
November 10, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member