

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH L. SLOUGH and DEPARTMENT OF THE NAVY,
NAVAL SURFACE WARFARE CENTER, Crane, IN

*Docket No. 96-2640; Submitted on the Record;
Issued November 3, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of \$10,838.83 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 \$500.00 of appellant's continuing compensation and having interest accrue at the rate of the U.S. Treasury Note.

On March 10, 1976 appellant, then a 60-year-old maintenance machinist/mechanic, developed contact dermatitis as a result of exposure to dirt and grease at work. The Office accepted the claim for contact dermatitis and conjunctivitis. Appellant stopped working in August 1977 and received compensation for total disability. Beginning February 11, 1990, appellant's compensation was paid at the augmented rate of three-fourths of appellant's pay,¹ on the basis that he got married and had an eligible dependent.

By letter dated May 24, 1990, appellant notified the Office that his marriage dissolved on May 18, 1990. He requested that any future compensation paid to him for a dependent due to marriage be removed. Appellant further answered "no" to all subsequent questions about claiming dependents on his annual Form CA-1032, which requested information on dependents and earnings.

Despite appellant's timely notice, the record reflects that the Office did not make an adjustment in appellant's compensation rate until August 20, 1995, which resulted in an overpayment. Thus, from May 18, 1990 through August 19, 1995, appellant was paid at the augmented compensation rate of three-fourths of his pay.

¹ See 5 U.S.C. § 8110.

By letter dated May 30, 1996, the Office informed appellant it had made a preliminary determination that he received an overpayment of compensation in the amount of \$10,838.83 for the period May 18, 1990 through August 19, 1995 due to his changes in dependent status and the cost of health benefits family deductions for May 18, 1990 through August 16, 1995 and erroneously withheld deductions for high option insurance from September 17, 1995 to April 27, 1996. The Office set forth the specific periods in which appellant was entitled to compensation at the augmented 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 Federal Employees’ Compensation 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 advised appellant to submit information regarding his financial circumstances 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 June 22, 1996, appellant stated that he was not aware of any overpayment and that he answered correctly on the annual Form CA-1032. Since he is elderly, he receives his checks by direct deposit at the bank, and he does not get enough details on how the deposit is broken down so he could not be expected to know the correct net compensation amount. Appellant also provided the requested financial information.

By decision dated July 26, 1996, the Office found that appellant received overpayments of compensation in the amount of \$10,838.83 for the period May 18, 1990 through August 19, 1995 and that the overpayments were not subject to waiver. The Office stated that the sum of \$500.00 would be withheld from appellant’s continuing compensation starting August 18, 1996 and that interest would start accruing on the date of the letter, July 26, 1996, at the rate of the U.S. Treasury Note.

The Board finds that appellant received an overpayment of \$10,838.83 in compensation.

In its May 30, 1996 memorandum, the Office found that the period of overpayment was from May 18, 1990 through August 19, 1995 due to his change in dependent status and the cost of health benefits family deductions for May 18, 1990 through August 16, 1995 and erroneously withheld deductions for high option insurance from September 17, 1995 to April 27, 1996. The Office found that appellant was not entitled to augmented compensation for the period May 18, 1990 through August 19, 1995 as he had no qualifying dependents. The evidence in this case shows that appellant informed the Office, in a letter dated May 24, 1990, that his marriage dissolved on May 18, 1990 and requested that any future compensation paid to him for a dependent due to marriage be removed. 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. Even though appellant’s marriage dissolved May 18, 1990 and he no longer had a dependent, appellant continued to receive augmented compensation. Appellant therefore received an overpayment of compensation for the period May 18, 1990 through August 19, 1995 because he received compensation at an augmented rate when he was not entitled to it.

A review of the overpayment calculations in this case indicates that for the period commencing May 18, 1990 through August 19, 1995 appellant had received a total of \$134,568.72 in compensation at the three-quarters rate, while he should have received \$119,861.54 at the statutory two-thirds rate appropriate for no dependents. The difference between the augmented rate and the corrected two-thirds rate equates to \$14,707.18. Added to this amount is \$3,012.86 for the cost of health benefits for a family deduction for the period May 18, 1990 to April 27, 1996. Subtracted from the \$17,719.94 is \$6,881.21, which represents the difference between the cost of health benefits family deductions and a single plan for May 18, 1990 to September 16, 1996 and erroneously withheld deductions for high option insurance for September 17, 1995 to April 27, 1996. Accordingly, an overpayment of \$10,838.83 was created.

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

Section 8129 of the Act² 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.³ 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).⁴ 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 Office did not

² 5 U.S.C. § 8129(a)(6).

³ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

⁴ 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).

receive any documentation. In the overpayment recovery questionnaire, appellant claimed \$1,250.00 of undocumented expenses. The Office calculated that appellant receives monthly compensation in the amount of \$2,305.00, resulting in a finding that his monthly income exceeds expenses by \$1,055.00. 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 \$50.00.⁵ Since appellant's income exceeds his expenses by more than \$50.00 per month, he is not entitled to waiver of the overpayment.

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." The evidence in this case 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."⁶

In the July 26, 1996 decision, the Office determined that appellant should repay the overpayment by withholding the sum of \$500.00 from his continuing compensation effective August 18, 1996 and accessing interest at the rate of the U.S. Treasury Note from the date of its decision. As noted above, appellant's income exceeded his expenses by \$1,055.00. 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

⁵ 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).

⁶ 20 C.F.R. § 10.321(a).

such a withholding on those obligations.⁷ Inasmuch as appellant's income exceeded his expenses and the record does not establish any hardship, the Office properly determined that \$500.00 could be withheld from appellant's continuing compensation benefits effective August 18, 1996. Moreover, federal regulations which apply to the Office's overpayment recovery procedures under the Act, grant the director of the Office discretion to waive interest or charges in certain circumstances.⁸ The Board has held that where a claimant requests the Office to waive the interest payments on an overpayment, the Office must issue a decision addressing whether the overpayment interest should be waived.⁹ In the instant case, appellant first raised his objections on appeal and, therefore, the Board lacks jurisdiction to consider this issue.¹⁰

The decision of the Office of Workers' Compensation Programs dated July 26, 1996 is affirmed.

Dated, Washington, D.C.
November 3, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁷ 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)).

⁸ 29 C.F.R. § 20.51(a) states that the regulations of 29 CFR §§ 20.50 through 20.62 apply to the Office's overpayment recovery procedures under 5 U.S.C. § 8129. The applicable regulation provides for the mandatory waiver of interest if the debt is repaid "within 30 days after the date on which the interest began to accrue," and the discretionary authority of the director to waive the interest on overpayments in other circumstances. 29 C.F.R. § 20.61.

⁹ See *Marie D. Sinnett*, 40 ECAB 1009 (1989) (where the Board remanded the case to the Office for an appropriate decision on appellant's entitlement to waiver of the interest on the overpayment).

¹⁰ See 20 C.F.R. § 501.3(d)(2).