

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of JIMMY R. GRIFFITH and DEPARTMENT OF THE INTERIOR,  
FISH & WILDLIFE SERVICE, Portland, Oreg.

*Docket No. 96-1827; Submitted on the Record;  
Issued September 3, 1998*

---

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
DAVID S. GERSON

The issues are: (1) whether appellant received a \$1,657.50 overpayment in compensation; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment.

The Office accepted that appellant sustained employment-related head laceration, post-concussion syndrome, and cervical sprain on August 23, 1985 and paid compensation for periods of total disability. Appellant returned to work on October 25, 1993 for the Department of Defense in a temporary position at a lower pay rate than his date-of-injury pay rate. The Office continued to pay appellant for his loss of wage-earning capacity. On April 7, 1995 appellant was promoted and converted to a career appointment, with earnings exceeding the pay rate of the date-of-injury position. The employing establishment and appellant timely apprised the Office of appellant's promotion on April 7, 1995. The Office continued to pay appellant wage-loss benefits until January 6, 1996.

By notice dated March 18, 1996, the Office advised appellant of its preliminary determination that he received a \$1,657.50 overpayment of compensation which occurred when he received wage-loss compensation for the period April 7, 1995 to January 6, 1996 despite the fact he was not entitled to such compensation after his promotion to a position with no wage loss. The Office further advised appellant that a preliminary determination had been made that he was without fault in the creation of the overpayment. The Office requested that appellant indicate whether he wished to contest the existence or amount of the overpayment or to request waiver of the overpayment and asked him to complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. The Office informed appellant that the financial information would be used to determine whether he was entitled to waiver and that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment.

On April 25, 1995 the Office claims examiner noted that appellant had not responded to the March 18, 1996 preliminary notice.

By letter decision dated April 26, 1996, the Office finalized its preliminary determination that appellant had received a \$1,657.50 overpayment and that he was without fault in the creation of the overpayment. The Office determined that the circumstances of appellant's case did not warrant waiver of recovery of the overpayment as appellant had not responded to the preliminary notice and had not submitted the requested financial documentation.

The Board finds that appellant received a \$1,657.50 overpayment in compensation.

The record contains evidence which shows that appellant received \$1,657.50 in compensation between April 7, 1995 and January 6, 1996, but was not entitled to receive compensation for this period due to his promotion and increased earnings, which exceeded his date-of-injury pay rate. Appellant did not allege or submit evidence to show that he did not receive a \$1,657.50 overpayment for this period and the Office properly found that he received such an overpayment.

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.<sup>1</sup> These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which states: "Adjustment or recovery [of an overpayment] 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 this subchapter or would be against equity and good conscience."<sup>2</sup> Since the Office found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it is determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

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 in sections 10.322 and 10.323, respectively, 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 \$3,000.00 (or \$5,000.00 if the individual has a

---

<sup>1</sup> See *Robert Atchison*, 41 ECAB 83 (1989).

<sup>2</sup> 5 U.S.C. § 8129(b).

spouse or one dependent, plus \$600.00 for each additional dependent).<sup>3</sup> Section 10.323 provides, generally, 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 section 10.322; or (2) the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.<sup>4</sup>

Although appellant was found to be without fault in the matter of the overpayment, he nevertheless bears responsibility for providing the requisite information to support waiver of the overpayment. In this regard, section 10.324 of Title 20 of the Code of Federal Regulations provides:

“In requesting waiver of an overpayment, either in whole or in part, the overpaid individual has the responsibility for providing the financial information described in section 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 denial of waiver and no further requests for waiver shall be entertained until such time as the requested information is furnished.”<sup>5</sup>

In the present case, appellant failed to meet his responsibility for providing the requisite financial information to support waiver of the overpayment. The Office requested that appellant submit a Form OWCP-20 for the purpose of determining his entitlement to waiver of the overpayment, but he failed to submit such information within the 30 days allotted by the Office. The Office clearly advised appellant of his responsibility to submit such information and of the consequences of not doing so. Appellant submitted additional evidence after the Office’s April 26, 1996 decision but the Board cannot consider such evidence for the first time on appeal.<sup>6</sup>

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has failed to submit financial information showing that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base. He also has not established that recovery of the overpayment would be against equity and good conscience because he has failed to submit financial information showing that he would experience severe financial hardship in attempting to repay the debt and has failed to submit evidence showing that he relinquished a valuable right

---

<sup>3</sup> 20 C.F.R. § 10.322(a). Section 10.322 defines the terms “income,” “expenses” and “assets.” 20 C.F.R. § 10.322(b), (c) and (d). For waiver under the “defeat the purpose of the Act” standard, a claimant must show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base; *see George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986).

<sup>4</sup> 20 C.F.R. § 10.323.

<sup>5</sup> 20 C.F.R. § 10.324.

<sup>6</sup> *See* 20 C.F.R. § 501.2(c).

or changed his position for the worse in reliance on the payment which created the overpayment.<sup>7</sup>

Because appellant has failed to establish that recovery of the \$1,657.50 overpayment would defeat the purpose of the Act or be against equity and good conscience, he has failed to show that the Office abused its discretion by refusing to waive recovery of the overpayment.<sup>8</sup>

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

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

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member

---

<sup>7</sup> See *William J. Murphy*, 41 ECAB 569 (1989).

<sup>8</sup> Appellant has alleged that he should not be required to repay the overpayment because the creation of the overpayment was not his fault. However, as noted above, a claimant who requests waiver of recovery of an overpayment must show not only that he was without fault in the creation of the overpayment, but also that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.