

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of ROBERT G. SHUMAN and DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE, Clovis, CA

*Docket No. 97-1276; Submitted on the Record;  
Issued August 17, 1999*

---

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that overpayments of compensation exist in the amount of \$1,753.89 and \$1,336.51; (2) whether the Office properly determined that appellant is not entitled to waiver of these overpayments; and (3) whether the Office properly determined that repayments should be made by withholding \$150.00 from each continuing compensation payment until the overpayments are absorbed.

In the present case, the Office accepted that appellant sustained cervical and left knee conditions as a result of a fall in the performance of duty on August 5, 1985.<sup>1</sup> The Office has also accepted that appellant sustained a right shoulder injury as a result of a fall at work on February 8, 1989<sup>2</sup> and that appellant sustained a wrist sprain and a right shoulder contusion as a result of a November 28, 1989 injury.<sup>3</sup>

On December 19, 1996 the Office issued a preliminary decision, regarding the August 5, 1985 claim, that an overpayment of compensation had occurred in this case in the amount of \$1,753.89 because appellant received wage-loss compensation at the augmented with dependent rate, after he was officially divorced on November 29, 1993. The Office advised appellant that a finding had been made that he was without fault in the matter of the overpayment, therefore, if appellant wanted to pursue waiver of the overpayment, he should submit evidence verifying his income and expenses so that a determination could be made whether recovery of the overpayment would "defeat the purpose of the Federal Employees' Compensation Act" or would be "against equity and good conscience." By decision dated February 13, 1997, regarding the

---

<sup>1</sup> Office file # A13-77605.

<sup>2</sup> Office file # A13-88157.

<sup>3</sup> Office file # A13-09068.

August 5, 1985 claim, the Office finalized the overpayment decision. The Office found that an overpayment had occurred in the amount of \$1,753.89 because appellant was paid at an augmented compensation rate for the period of November 29, 1993 through July 22, 1995, although he was not married during this time period and therefore not entitled to the augmented rate. Appellant was also advised that he had been found to be not at fault in the creation of the overpayment, but that waiver was not warranted in this case. The Office advised that waiver would be denied because appellant owned land in Utah, which he purchased in 1996, valued at \$14,000.00 and which therefore exceeded the allowable resource base of \$5,000.00 for waiver under the “defeat the purpose of this subchapter” clause. The Office also noted that appellant did not meet the criteria for waiver under the “against equity and good conscience” clause.

Regarding appellant’s November 28, 1989 claim, the record reflects that the Office granted appellant a schedule award on April 5, 1994 for the period February 19, 1993 to August 18, 1994 for 25 percent permanent impairment of the right arm. By preliminary decision dated December 17, 1996, regarding the November 28, 1989 claim, the Office advised appellant that a preliminary determination had been made that he received an overpayment of compensation in the amount of \$1,336.51 because he received payment of his schedule award at the augmented rate for the period November 29, 1993 until August 18, 1994 even though he was divorced on November 29, 1993. The Office again advised appellant that he had been found to be not at fault in the creation of the overpayment and requested that appellant submit documentation for consideration of waiver. The Office finalized the overpayment decision regarding the \$1,336.51 overpayment on February 13, 1997.

The Board finds that overpayments of compensation do exist in this case in the amount of \$1,753.89 and \$1,336.51.

In the present case, appellant does not dispute that he received overpayments of compensation. Appellant was divorced on November 29, 1993, however, continued to receive loss of wage-earning capacity compensation at an augmented rate for a dependent wife until July 22, 1995, as well as a schedule award for a different injury at the augmented rate. He was clearly not entitled to augmented compensation pursuant to section 8110 of the Act<sup>4</sup> while having no eligible dependents.<sup>5</sup> Regarding the August 5, 1985 claim, the Office properly explained that while the actual overpayment created during the period November 29, 1993 to July 22, 1995 was \$1,795.35, because appellant remarried on October 21, 1995 and did not receive compensation at the three-fourths rate again until November 10, 1995, appellant was owed additional compensation in the amount of \$41.46, which subtracted from the \$1,795.35 overpayment, yielded a net overpayment of \$1,753.89. Regarding the second overpayment, appellant was not receiving payment of the scheduled award on October 21, 1995, therefore, appellant’s remarriage was not at issue. The Board affirms the Office’s findings that overpayments of compensation did occur in this case in the amounts set forth.

---

<sup>4</sup> 5 U.S.C. § 8110.

<sup>5</sup> See *George A. Hirsch*, 47 ECAB 520 (1996).

The Board also finds that the Office properly denied waiver of the overpayments.

Section 8129 of the Act provides that an overpayment of compensation shall be recovered by the Office 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.”<sup>6</sup> The Office did determine that appellant was without fault because appellant believed he was entitled to augmented compensation following his divorce, while his ex-wife continued to reside in his household.

Section 8129(b)<sup>7</sup> describes the 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.”

In the present case, the Office determined that appellant was without fault in the creation of the overpayment. The Office therefore proceeded to evaluate whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.

Regulations which codify the guidelines for determining whether adjustment or recovery would defeat the purpose of the Act or would 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) of Title 20 of the Code of Federal Regulations provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary and necessary living expenses. The regulation further provides that that recovery would defeat the purpose of the Act if --

“(1) the individual from whom recovery is sought needs substantially all of his/her current income (including compensation benefits) to meet current ordinary and necessary living expenses and

“(2) the individual’s assets do not exceed the resource base of \$3,000.00 for an individual and \$5,000.00 for and individual with a spouse or one dependent...”<sup>8</sup>

---

<sup>6</sup> 5 U.S.C. § 8129.

<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> 20 C.F.R. § 10.322.

The Board has previously noted that both conditions in (a) and (b) above must be met to defeat the purpose of the Act.<sup>9</sup>

In the present case, appellant's income and expense documentation which he presented to the Office established that he had purchased, with payment in full, a parcel of land in 1996 valued at \$14,000.00. Section 10.322 (d)(2) clarifies that an individual's assets include nonliquid assets such as the fair market value of property such as a second home. In a similar case, *Robert E Wenholz*,<sup>10</sup> appellant stated that he was the owner of 10 acres of land valued in excess of \$28,000.00. The Board found that as appellant's assets exceeded the \$5,000.00 resource base, appellant had not met both criteria outlined in sections 10.322(a)(1) and (2) and therefore, waiver of the overpayment was not warranted under the "defeat the purpose of the Act" clause. In this case, therefore, as appellant's assets do exceed the \$5,000.00 resource base, appellant did not meet both criteria and waiver was not warranted under this section.

If the claimant is not entitled to waiver under the defeat the purpose of the Act clause, the "against equity and good conscience clause" must be considered. This clause is divided into two parts, financial hardship and detrimental reliance. Section 10.323 of the implementing regulations<sup>11</sup> provides that recovery of an overpayment would be against equity and good conscience if: (a) 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 (b) 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 has stated that he purchased the property in Utah in 1996 for future retirement purposes, as well as a motor home; and that he would not have incurred the expense if he had known of the overpayment. Appellant is essentially alleging detrimental reliance. The evidence does not, however, establish a legal basis for appellant's allegations of detrimental reliance. This provision contemplates that a claimant made a decision he otherwise would not have made in reliance upon the receipt of benefits and that this decision resulted in a loss. The Board has previously explained that the detrimental reliance provision is not applicable to conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit.<sup>12</sup> Any purchase of personal property or consumer goods which appellant made in expectation of the augmented compensation rate does not establish detrimental reliance. In this case, as appellant has stated that he detrimentally relied upon the overpayment of compensation to purchase a motor home and real estate, which are consumer goods and real estate from which appellant derived benefit, appellant had not established a loss and has not established detrimental reliance as contemplated by the applicable regulation.

---

<sup>9</sup> See *Gail M. Roe*, 47 ECAB 268 (1995).

<sup>10</sup> 38 ECAB 311 (1986).

<sup>11</sup> 20 C.F.R. § 10.323.

<sup>12</sup> *Robert Crow*, 38 ECAB 253 (1986).

The Board finds that this case is not in posture for decision regarding recovery of the overpayment.

In the present case, the record indicates that appellant was in receipt of continuing compensation benefits for loss of wage-earning capacity. With regard to the amount to be withheld from appellant's continuing compensation payments to recover the amount of the overpayment, 20 C.F.R. § 10.321(a) provides that 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 other relevant factors so as to minimize any resulting hardship upon the individual. Each of the Office's February 13, 1997 decisions held that recovery of the overpayment would be made by withholding \$75.00.00 from appellant's continuing disability payments until the overpayment was fully absorbed. While the Office properly noted that pursuant to 20 C.F.R. § 10.322(b), the income of appellant's present wife would not be included in the calculation of his present income since she was not married to and living with appellant at the time the overpayment was incurred, and that appellant's current monthly income therefore totaled \$1,845.00 while, his ordinary and necessary living expenses totaled \$2,745.63, no explanation was provided in the Office's decision as to how the factors of section 10.321 (a) had been considered and resulted in the determination that \$150.00 should be withheld from subsequent payments of compensation until the overpayments were absorbed. This case will therefore be remanded to the Office for evaluation of recovery of the overpayment pursuant to 20 C.F.R. § 10.321 (a), to be followed by a *de novo* decision.

The decisions of the Office of Worker's Compensation Programs dated February 13, 1997 are affirmed regarding the findings that appellant received overpayment of compensation in the amounts of \$1,753.89 and \$1,336.51 and that he is not entitled to waiver of these overpayments. The decisions are set aside regarding recovery of overpayment and the case is remanded to the Office for an appropriate decision regarding this issue.

Dated, Washington, D.C.  
August 17, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member