

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID V. RODRIGUEZ and U.S. POSTAL SERVICE,
POST OFFICE, West Covina, CA

*Docket No. 97-820; Submitted on the Record;
Issued December 28, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant received a \$1,344.36 overpayment of compensation; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment; and (3) whether the Office properly denied appellant's September 30, 1996 request for a hearing made after issuance of a final overpayment decision.

The Board finds that appellant received a \$1,344.36 overpayment of compensation.

In November 1989, appellant, then a 28-year-old supervisor of mails and delivery, filed a claim alleging that he sustained depression due to harassment at work. The Office accepted that appellant sustained a depressive reaction and paid compensation for disability beginning November 1989. On August 2, 1996 appellant returned to work for the employing establishment at a different work site as a garageman with no loss of wages. However, the Office did not delete appellant from the periodic compensation rolls until August 18, 1996. By decision dated September 24, 1996, the Office determined that appellant received a \$1,344.36 overpayment, that he was without fault in the creation of the overpayment and that the overpayment was not subject to waiver.¹ By decision dated October 9, 1996, the Office determined that appellant's actual earnings beginning August 2, 1996 fairly and reasonably represented his wage-earning capacity and that he had no employment-related wage loss after that date.² Appellant requested a hearing in connection with the Office's overpayment decision and, by decision dated October 30, 1996, the Office denied appellant's request on the grounds that it was made after the issuance of a final overpayment decision.

¹ The Office determined that appellant should repay the overpayment through monthly payments of \$200.00.

² Appellant has not requested an appeal of the October 9, 1996 decision and this matter is not currently before the Board.

Appellant received compensation from August 2 to 17, 1996 despite the fact that he was not entitled to compensation for this period. The record contains evidence which shows that appellant received \$1,344.36 in compensation from August 2 to 17, 1996 but had returned to work for the employing establishment on August 2, 1996 with no loss of wages. Therefore, the Office properly determined in its September 24, 1996 decision that appellant received a \$1,344.36 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.³ 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."⁴ 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 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 spouse or one dependent, plus \$600.00 for each additional dependent).⁵ 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

³ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁴ 5 U.S.C. § 8129(b).

⁵ 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). An individual is deemed to need substantially all of his current income to meet ordinary and necessary living expenses if his monthly income does not exceed monthly expenses by more than \$50.00; see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1) (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991); 20 C.F.R. § 10.323.

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.⁶

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, the overpaid individual has the responsibility for providing the financial information described in section 10.322 as well as additional information as the Office may require to make a decision with regard to the waiver of an overpayment of compensation. Failure to furnish the information within 30 days of the request shall result in the denial of waiver and no further requests for waiver shall be entertained by the Office until such time as the requested information is furnished.”⁷

In the present case, appellant has failed to meet his responsibility for providing the requisite information to support waiver of the overpayment. The Office advised appellant regarding this responsibility in a preliminary determination dated August 21, 1996, but appellant failed to submit the requested financial information.⁸ 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. Appellant 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 or changed his position for the worse in reliance on the payment which created the overpayment.⁹

⁶ 20 C.F.R. § 10.323.

⁷ 20 C.F.R. § 10.324; *see John B. Moore*, 41 ECAB 804, 813-14 (1990).

⁸ Appellant did not provide any response within the 30-day period provided by the Office.

⁹ *See William J. Murphy*, 41 ECAB 569, 571-72 (1989). On appeal appellant suggested that he was entitled to waiver of the overpayment the creation of the overpayment was not his fault. However, as noted above, a claimant who requests waiver 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.

Because appellant has failed to establish that recovery of the 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.¹⁰

The Board further finds that the Office properly denied appellant's September 30, 1996 request for a hearing made after issuance of a final overpayment decision.

Section 10.321(h) of Title 20 of the Code of Federal Regulations clearly establishes that the only appellate remedy available to a claimant after a final overpayment decision has been issued is an appeal to the Board. This section states as follows:

“If additional written evidence is not submitted, or a hearing requested, within the 30-day period [after issuance of the preliminary overpayment decision], the Office will issue a final decision based on the available evidence and will initiate appropriate collection action. The final decision concerning an overpayment, whether rendered subsequent to a preresoupment hearing or in the absence of the submission of additional written evidence, is not subject to the hearing provision of 5 U.S.C. [§] 8124(b) nor the reconsideration provision of section 8128(a). An individual aggrieved or adversely affected by a decision concerning an overpayment may request review by the Employees' Compensation Appeals Board.”¹¹

In a letter dated September 30, 1996, appellant requested a hearing before an Office hearing representative in connection with the Office's determination that he received an overpayment. Therefore, appellant's hearing request was effectuated after the Office's final decision dated September 24, 1996 concerning appellant's overpayment. Accordingly, in view of the limitation on appeals rights set forth in section 10.321(h) of Title 20 of the Code of Federal Regulations, the Office, in its October 30, 1996 decision, properly denied appellant's request for a hearing made after issuance of the final overpayment decision.

¹⁰ Appellant submitted additional evidence in connection with the present appeal before the Board, but the Board cannot consider such evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c). As recovery from continuing compensation benefits under the Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

¹¹ 20 C.F.R. § 10.321(h).

The decisions of the Office of Workers' Compensation Programs dated October 30 and September 24, 1996 are affirmed.

Dated, Washington, D.C.
December 28, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member