

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MATHEW S. DIXON and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Mountain Home, TN

*Docket No. 98-696; Submitted on the Record;
Issued December 15, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of an overpayment of compensation in the amount of \$1,306.00.

The Office accepted that appellant sustained a temporary aggravation of asthma that ceased when he was removed from exposure to chemicals on July 26, 1981. On that date appellant was reassigned from his position of radiologic technologist to the lower-graded position of recreation assistant. The Office authorized leave buy-back for leave used by appellant from November 5, 1979 to May 29, 1980, and paid appellant compensation for temporary total disability from May 29, 1980, when he stopped work, until January 26, 1981 when he returned to work. On June 16, 1992 the Office issued appellant a schedule award for a 20 percent permanent loss of both lungs; this award was paid from March 20, 1991 to May 29, 1992. By decision dated June 16, 1992, the Office found that the position of recreation assistant fairly and reasonably represented his wage-earning capacity. Pursuant to this decision the Office began payment of compensation for loss of premium pay in the amount of \$79.75 each four weeks, later increased by cost-of-living increases to \$81.00, then \$83.00 each four weeks.

Appellant was removed from his employment at the employing establishment effective April 30, 1994. His application for disability retirement was disapproved, but the Office of Personnel Management (OPM) approved his optional retirement and began paying him an annuity effective May 1, 1994. By letters dated July 28, 1995, the Office advised appellant that he could not receive benefits from OPM and the Office for the same period, that he had to elect which benefits he would receive and that his compensation for wage loss was terminated on July 22, 1995. On September 10, 1995 appellant elected to receive benefits under the Civil Service Retirement System in preference to those under the Federal Employees' Compensation Act.

On March 1, 1996 the Office issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$1,306.00 which arose because he received compensation for wage loss and retirement benefits from OPM during the period May 1, 1994 to July 22, 1995. The Office further preliminarily found that appellant was at fault in the matter of the overpayment for accepting a payment he should have known was incorrect.

Appellant requested a hearing, which was held before an Office hearing representative on May 14, 1997. At this hearing the Office hearing representative advised appellant that he was “going to make a preliminary finding that you were without fault in creation of this overpayment.” The Office hearing representative the elicited testimony from appellant as to his monthly income and expenses, and invited appellant to submit any evidence on other expenses following his receipt of the transcript of the hearing.

By decision dated October 14, 1997, the Office hearing representative found that appellant was without fault in the matter of the overpayment of compensation in the amount of \$1,306.00, but refused to waive recovery of the overpayment on the basis that appellant’s monthly income exceeded his monthly expenses by \$265.00.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery 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 the Act or would be against equity and good conscience.”¹

Section 10.322(a) of the Office’s regulations² provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses. Recovery will defeat the purpose of the Act to the extent that: (1) the individual from whom recovery is sought needs substantially all of his or 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 or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent.

Section 10.322(c) of the Office’s regulations³ states that an individual’s ordinary and necessary living expenses include: (1) fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, transportation, insurance; (2) medical, hospitalization and other similar expenses; (3) expenses for the support of others for whom the individual is responsible; (4) church and charitable contributions made on a regular basis; and (5) miscellaneous expenses (*e.g.*, newspaper, haircuts) not to exceed \$25.00 per month.

¹ 5 U.S.C. § 8129.

² 20 C.F.R. § 10.322(a).

³ 20 C.F.R. § 10.322(c).

The Board finds that the Office did not abuse its discretion by refusing to waive recovery of an overpayment of compensation in the amount of \$1,306.00.

At the hearing held before an Office hearing representative on May 14, 1997, appellant testified that his monthly income was approximately \$2,500.00: \$1,200.00 in benefits from OPM, \$300.00 in retirement benefits from the U.S. Army and \$1,000.00 earned by his wife. Appellant testified that his monthly expenses were \$525.00 for the mortgage on his home, an automobile payment of \$250.00 per month, \$100.00 to \$150.00 for electricity, \$30.00 for water, \$100.00 for automobile insurance, \$80.00 for telephone service, \$160.00 to \$200.00 for yard maintenance, \$29.00 for life insurance, \$80.00 to \$100.00 for diabetes medication, \$100.00 for doctor's visits for diabetes and \$75.00 to \$100.00 to hire others to do tasks he could no longer do. To these amounts the Office hearing representative added \$600.00 per month for food, an expense appellant was unable to estimate at the hearing, for total monthly expenses of \$2,235.00.⁴ As appellant's monthly income exceeded his monthly expenses by \$265.00, the Office did not abuse its discretion by refusing to waive recovery of the overpayment. Appellant did not allege that recovery of the overpayment would be against equity and good conscience as defined in the Office's regulations.⁵

The decision of the Office of Workers' Compensation Programs dated October 14, 1997 is affirmed.

Dated, Washington, D.C.
December 15, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

⁴ In each instance where appellant gave a range for an expense, the Office hearing representative used the high end of the range.

⁵ With respect to whether recovery of an overpayment would be against equity and good conscience, section 10.323(b) of the Office's regulations provides "Recovery 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."