

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES D. HARRIS and TENNESSEE VALLEY AUTHORITY,
Stevenson, Ala.

*Docket No. 96-1407; Submitted on the Record;
Issued February 10, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$5,207.85 for the period May 21, 1993 through February 4, 1995 because the Office failed to reduce his compensation from the augmented 3/4 rate to the statutory 2/3 rate during this period when it was informed by appellant that he no longer had a dependent; (2) whether the Office abused its discretion in denying waiver of the overpayment after finding that appellant was without fault with respect to the creation of the overpayment; and (3) whether the Office properly required repayment by withholding \$250.00 every 4 weeks from his continuing compensation.

On July 4, 1984 appellant, a 47-year-old asbestos worker, filed a Form CA-2 claim for occupational disease, claiming that he suffered from asbestosis and that he first became aware that this condition was caused by employment factors on January 29, 1980. By decision dated June 19, 1985, the Office granted appellant a schedule award for permanent disability for a 19 percent loss of use of his right lung and a 19 percent loss of use of his left lung.

On December 20, 1991 appellant filed a Form CA-8 claim for continuing compensation, requesting an increase in his schedule award for partial loss of use of his lungs.

In a decision dated June 12, 1992, the Office awarded appellant an additional 21 percent to his award of partial loss of use of his lungs, which amounted to a total 40 percent award for partial loss of use of his right and left lungs.

Following the expiration of his schedule award, the Office placed appellant on the periodic compensation rolls. In interoffice payroll rate worksheets dated August 30, September 8 and 13, 1993, the Office calculated that appellant should be paid weekly compensation benefits as of October 30, 1992 and continuing at the augmented compensation rate, 3/4 of his weekly pay rate of \$690.00

On February 28, 1995 the Office issued a proposed notice of reduction of compensation, indicating that appellant was no longer totally disabled because it had located suitable alternate employment as a gate attendant or parking lot attendant, which fairly and reasonably represented his wage-earning capacity.

On March 1, 1995 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$5,207.85 for the period May 21, 1993 through February 4, 1995. The Office found that the overpayment occurred because appellant should have been paid compensation at the 2/3 statutory rate of his average weekly wage, the rate applicable to employees with no dependents, because of his divorce on May 21, 1993. Instead, appellant was paid at the 3/4 augmented compensation rate of his average weekly wage from May 21, 1993 through February 4, 1995, the date the Office became aware that it had made an administrative error. In light of this administrative error, the Office found that appellant was without fault in the creation of the overpayment because he had twice notified the Office that he had been divorced and it failed to take action to reduce his compensation until February 4, 1995. The Office advised appellant that if he disagreed with the fact or amount of the overpayment he could submit new evidence in support of his contention. The Office further advised appellant that when he was found without fault in the creation of the overpayment, recovery might not be made if it can be shown that such recovery would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience. In addition, the Office informed appellant that if he felt entitled to a waiver instead of repaying the overpayment, he could request a preresumption hearing with the Branch of Hearings and Review, or he could make his request directly with the Office. The Office further informed appellant that he should submit a detailed explanation of his reasons for seeking waiver, fully complete and submit the enclosed overpayment recovery questionnaire and attach any supporting documents in his possession. The Office specifically requested appellant to submit any relevant financial documents, including income tax returns, bank account statements, bills and canceled checks reflecting payments, pay slips and other records to support income and expenses listed on the enclosed questionnaire. The Office also noted that pursuant to 20 C.F.R. § 10.324, the failure to furnish the financial information requested on the questionnaire within 30 days would result in a denial of waiver of the overpayment and that no further request for waiver would be considered until the requested information was furnished.

In his response to the above questionnaire, which he signed and returned to the Office on May 9, 1995, appellant requested a waiver of the overpayment and an oral hearing.

By decision dated October 13, 1995, the Office finalized its proposed reduction of compensation and found that appellant was capable of earning wages as a gate attendant or parking lot attendant at a weekly rate of \$186.30.

A hearing regarding appellant's overpayment was held on November 2, 1995, at which appellant and his representative appeared.

In a decision dated February 8, 1996, the Office found that appellant was without fault in the creation of the overpayment, but that he was not entitled to waiver. The hearing representative found that that the overpayment would be recovered from appellant's continuing compensation. The hearing representative found that waiver of the overpayment in the present

case was not justified on the basis that recovery would defeat the purpose of the Act pursuant to 20 C.F.R. § 10.322. The hearing representative stated that appellant's overpayment recovery questionnaire, dated March 9, 1995, indicated that his income from private pension annuity and social security benefits totaled \$1,179.00 and that appellant received monetary compensation amounting to \$1,591.00 every 28 days, which would give him a total monthly income of approximately \$2,499.55. Based on these figures, the hearing representative determined that appellant would not sustain a financial hardship if the Office did not waive recovery of overpayment, as recovery would not deprive him of income and resources needed for ordinary and necessary living expenses. The hearing representative, therefore, determined that the amount of \$250.00 would be withheld from his continuing compensation payments.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$5,207.00 for the period May 21, 1993 through February 4, 1995.

The record shows that appellant notified the Office that he was divorced May 21, 1993 in letters dated September 28, 1993, and September 26, 1994 and that the overpayment occurred because appellant was consequently paid compensation at the augmented rate when he should have been paid compensation at the statutory 2/3 rate during this period, because as of May 21, 1993 he no longer had a dependent. Because the Office failed to take action to reduce his compensation as of May 21, 1993 appellant received augmented compensation until February 4, 1995. The Office properly found that he received an overpayment of compensation in the stated amount during that period.

The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment in the amount of \$5,207.88 after finding that appellant was without fault with respect to that overpayment.

Section 8129 of the Act¹ 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." Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would "defeat the purpose of the Act or would be against equity and good conscience," pursuant to the guidelines provided in sections 10.322-323 of the implementing federal regulations.²

¹ 5 U.S.C. § 8129(a)-(b).

² 20 C.F.R. §§ 10.322-23; see *William J. Murphy*, 40 ECAB 569 (1989); *James M. Albers*, 36 ECAB 340 (1984).

With regard to the “defeat the purpose of the Act” standard, section 10.322 of the regulations³ provides:

“(a) General. 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 under the criteria set out in this section. Recovery will defeat the purpose of this subchapter to the extent that:

(1) The individual from whom recovery is sought needs substantially all of his or her current income 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. This base includes all of the claimant’s assets not exempted from recoupment in paragraph (d) of this section. The first \$3,000[.00] or more depending on the number of the claimant’s dependents is also exempted from recoupment.”

With regard to the “against equity and good conscience” standard, section 10.323 of the regulations⁴ provides:

“(b) 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. In making such a decision, the individual’s present ability to repay the overpayment is not considered....”

Section 10.324 of the Office’s regulations⁵ provides that in requesting waiver of an overpayment, the overpaid individual has 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 on waiver; that failure to furnish the information within 30 days of request shall result in denial of waiver; and that no further requests for waiver shall be entertained until such time as the requested information is furnished.

In the instant case, appellant failed to submit any evidence showing that he needs substantially all of the current monthly income to meet living expenses or that the amount of the overpayment was wrongly computed pursuant to sections 10.322-324. Therefore, he does not qualify for waiver under the “defeat the purpose of the Act” standard. Further, there is no

³ 20 C.F.R. § 10.322.

⁴ 20 C.F.R. § 10.323.

⁵ 20 C.F.R. § 10.324.

evidence in this case, nor did appellant allege, that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received from May 21, 1993 through February 4, 1995. Recovery of appellant's overpayment, therefore, would not violate the "against equity and good conscience" provision of section 10.323. Pursuant to its regulations, therefore, the Office did not abuse its discretion by issuing its February 8, 1996 final decision denying waiver of recovery of the overpayment in the amount of \$5,207.88.

The decision of the Office of Workers' Compensation Programs dated February 8, 1996 is hereby affirmed.

Dated, Washington, D.C.
February 10, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member