

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD B. HAYES and DEPARTMENT OF THE NAVY,
MARINE CORPS LOGISTICS BASE, Barstow, Calif.

*Docket No. 97-393; Submitted on the Record;
Issued February 19, 1999*

DECISION and ORDER

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying waiver of recovery of the overpayment in compensation or in determining the rate of recovery.

The Board has duly reviewed the record on appeal and finds that the Office did not abuse its discretion.

The facts in this case, indicate that appellant sustained employment-related bilateral epicondylitis of the elbows. By decision dated September 20, 1976, the Office granted him a schedule award for a nine percent impairment of the left arm. By decision dated March 17, 1994, the Office granted him a schedule award for a total of a 13 percent impairment of the left arm.¹ On May 13, 1996 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$5,384.20, which arose because appellant previously had received schedule compensation for a 9 percent permanent impairment of the left upper extremity, and when his entitlement to an additional 4 percent impairment was established, the Office mistakenly issued a schedule award for a 13 percent total impairment instead of the additional 4 percent. This effectively paid appellant twice for the first nine percent. The Office also preliminarily found that appellant was not at fault in the creation of the overpayment.

The record indicates that appellant requested a prerecoupment conference. A June 17, 1996 memorandum of conference provides that appellant furnished a list of ordinary and necessary living expenses that totaled \$1,522.00 per month. By letter dated June 17, 1996, the Office provided appellant with a copy of the memorandum and advised that he should inform the Office of any inaccuracies within 15 days. In an undated letter received by the Office on July 30, 1996, appellant generally contested the overpayment finding but did not specifically indicate that the memorandum of conference contained a discrepancy.² By decision dated

¹ By decision dated June 16, 1982, the Office granted appellant a schedule award for 13 percent loss of use of the right arm. The record also contains a May 3, 1996 decision, in which the Office denied modification of a December 24, 1980 decision establishing appellant's wage-earning capacity. This decision has not been appealed and is, therefore, not before the Board.

² Appellant also furnished tax information that had been requested by the Office.

July 31, 1996, the Office found that appellant received an overpayment of compensation in the amount of \$5,384.20, that he was without fault in the creation of this overpayment but that waiver was not warranted as his monthly income exceeded his necessary living expenses. The Office informed appellant that \$180.00 would be withheld each payment period from his continuing compensation.

Section 8129(a) of the Federal Employees' Compensation Act provides that when an overpayment of compensation is made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.³ Section 8129(b) provides the only exception to this mandatory adjustment:

“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.”⁴

The Office has determined that appellant is without fault in the overpayment that occurred in this case. Because appellant is without fault in the matter of the overpayment, the Office must adjust later payments only if adjustment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.322(a) of Title 20 of the Code of Federal Regulations⁵ 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 Office's procedure manual states that recovery would defeat the purpose of the Act if both of the following apply:

“(a) The individual from whom recovery is sought needs substantially all of his or her current income (including [FECA monthly] benefits) to meet current ordinary and necessary living expenses; and

“(b) 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.”⁶

Under the first criterion, an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds

³ 5 U.S.C. § 8129(a).

⁴ *Id.* at § 8129(b).

⁵ 20 C.F.R. § 10.322(a).

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(a)(1) (September 1994).

available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.⁷

Under the second criterion, an individual's assets include: (a) liquid assets, such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds, certificates of deposit and the like, and (b) nonliquid assets, such as the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings or supplies therein, any vehicles above the two allowed per immediate family, jewelry and art work. Assets do not include the value of household furnishings in the primary residence, wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which the person maintains as the principal family domicile, or income-producing property if the income from such property has been included in comparing income and expenses.⁸ When an individual exceeds the limits for either disposable current income or assets, on the face of it this provides a basis for establishing a reasonable repayment schedule over a reasonable, specified period of time.⁹

Following appellant's request for waiver, the Office sought financial information and documentation to help determine whether recovery would defeat the purpose of the Act. Although appellant did not complete the overpayment recovery questionnaire, the Office did hold a conference call with appellant on June 17, 1996 to obtain the necessary information. Appellant did not dispute the expenses listed in the memorandum and, based on this information, the Office properly found that appellant's income exceeded monthly expenses by \$197.00. This exceeds the limits for disposable current income and is sufficient to support the Office's finding that recovery will not defeat the purpose of the Act.

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt, with "severe financial hardship" determined by the same criteria set forth in section 10.322 above, or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his position for the worse.¹⁰

As appellant is entitled to compensation benefits and as he has neither argued nor submitted evidence to establish that he relinquished a valuable right or changed his position for the worse in reliance on the overpaid compensation, the Office properly found that recovery of the overpayment would not be against equity or good conscience.

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines. The issue on appeal, therefore, is

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(a)(4) (September 1994).

⁹ *Supra* note 6.

¹⁰ 20 C.F.R. § 10.323. In a rare third situation, recovery is considered to be against equity and good conscience when the individual against whom the overpayment is charged derived no personal gain from the incorrect payments and had no knowledge of the compensation benefits that were paid. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(b) (September 1994). In this case, however, the incorrect payments were paid directly to the employee, who thereby derived a personal gain.

whether the Office's denial of waiver constituted an abuse of discretion.¹¹ As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion.

With regard to the amount withheld from appellant's continuing compensation payments to recover the amount of the overpayment, Section 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 any other relevant factors, so as to minimize any resulting hardship upon such individual.¹² In establishing the initial collection strategy, the Office must weigh the individual's income, ordinary and necessary expenses and assets in a manner similar to the waiver considerations above.¹³ Here the Office weighed appellant's income, expenses, and assets and determined that it was fair and reasonable to withhold \$180.00 from appellant's continuing compensation every 4 weeks as this would leave him with excess monthly income that he could apply toward other debts. As the Office gave due regard to the factors cited in section 10.321(a), the Board finds that the Office did not abuse its discretion in determining the rate of recovery.

The July 31, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
February 19, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

¹¹ *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984) and cases cited therein at note 5.

¹² 20 C.F.R. § 10.321(a).

¹³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Action*, Chapter 6.0200.4(d)(1)(a) (September 1994).