

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WALTER F. MITZEL and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Fort Howard, Md.

*Docket No. 97-697; Submitted on the Record;  
Issued February 22, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$49,297.60 occurred; (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; (3) and whether the Office abused its discretion in denying waiver of recovery of the overpayment.

The Office accepted appellant's claim for an inguinal hernia. Appellant began receiving temporary total disability benefits on November 3, 1986. By decision dated February 24, 1993, the Office terminated appellant's disability benefits effective March 7, 1993, stating that the weight of the medical evidence established that appellant had no continuing disability resulting from the October 23, 1983 employment injury.

By letter dated March 4, 1993, appellant requested an oral hearing before an Office hearing representative.

By preliminary determination dated January 12, 1995, the Office advised appellant that an overpayment had occurred in the amount of \$49,297.60 because he was entitled to compensation for temporary partial disability from January 1, 1987 to December 31, 1992 but he received compensation for temporary total disability. The Office found that appellant was without fault in the matter of the overpayment. The Office informed appellant that if he disagreed with the fact or the amount of the overpayment, he had the right to submit new evidence to support his contention or he could request a waiver or recoupment within 30 days of receipt of the letter and submit appropriate evidence to justify his request. The Office enclosed an overpayment recovery questionnaire for review in determining whether the overpayment should be waived.

On January 20, 1995 appellant requested a waiver of the overpayment and requested an oral argument before an Office hearing representative. Appellant enclosed the completed

overpayment recovery questionnaire on which he indicated that his total monthly income was \$2,924.90, his total monthly expenses were \$2,123.83, and he had funds of \$40,906.60. The hearing was held on April 21, 1995. The issue addressed at the hearing was whether the overpayment of compensation should be waived. Appellant testified that he was “shocked” when he heard the amount of the overpayment as he had filled out all the forms as requested and the most he ever earned in a year since his employment injury was \$13,500.00 in 1994. Appellant stated that he did not understand the difference between the two kinds of compensation, partial and total disability, and when the employing establishment informed him he could no longer perform his job as a pipefitter and must either choose workers’ compensation or retirement, he completed the forms that they sent him. Appellant stated that he chose workers’ compensation as that option enabled him to work and he “was not a person who could just sit around and do absolutely nothing.” Appellant further stated that he honestly completed the reports and reported his earnings from his plumbing and heating business to the Office. Appellant stated that he had no idea that he was receiving more disability benefits than he was entitled to receive and figured that the Office “knew what it was doing.” He reiterated that his family’s monthly expenses were \$4,2924.90 and stated that he tried to be very careful with his family’s money.

By decision dated February 23, 1996, the Office finalized its preliminary determination of an overpayment in the amount of \$49,297.60. In making this determination, the Office considered appellant’s Forms CA-1032 and tax records from January 1, 1987 to December 31, 1992 and found that appellant reported his earnings received from his plumbing and heating business during this time period. During that same time period, the Office paid appellant temporary total disability benefits. The Office therefore found that the overpayment resulted from the difference between the amount of temporary total disability benefits that was paid and the amount of temporary partial disability benefits which should have been paid to appellant in the relevant time period. The Office found that appellant was without fault in the creation of the overpayment. The Office found, however, that appellant was not entitled to a waiver of the overpayment because appellant’s monthly income exceeded his monthly expenses by \$981.00, and he had assets of over \$40,000.00 which greatly exceeded the \$5,000.00 base. The Office therefore concluded that recovery of the overpayment would not defeat the purpose of the Federal Employees’ Compensation Act or be against equity and good conscience. The Office also found that appellant had not shown that he relinquished a valuable right or changed his position for the worse by reliance on the compensation payments. The Office found that \$200.00 a month was a reasonable amount for appellant to repay the overpayment, and directed that \$200.00 be deducted from appellant’s continuing compensation payments.

The case record was subsequently returned to the district director’s office who, by letter dated March 12, 1996, stated that because appellant was no longer receiving compensation pursuant to the February 24, 1993 decision terminating benefits, it required instructions from the Branch of Hearings and Review on how to respond to the hearing representative’s decision. The Office also noted that the Branch had not responded to appellant’s March 4, 1993 hearing request challenging the termination of his benefits.

By decision dated November 18, 1996, the Branch stated that in the February 23, 1996 decision it erroneously stated that the overpayment would be recovered by deducting \$200.00

from appellant's continuing compensation payments as appellant was not receiving compensation benefits from the Office. The Branch noted that appellant had over \$40,000.00 in assets and his monthly income exceeded his monthly expenses by \$981.00 and determined that appellant should make an initial payment of \$10,000.00 by January 1, 1997 and make a monthly payment of \$500.00 commencing February 1, 1997 until the balance was repaid.

By letter dated November 18, 1996, the Branch noted that appellant had requested a hearing of the Office's February 24, 1993 decision and that he still had the right to a hearing on the issue of his termination of benefits, the issue that was addressed in that decision. The Office gave appellant 30 days within which to inform the Branch whether he still wished to have a hearing on the termination issue. Appellant did not respond.

The Board finds that appellant received an overpayment of compensation in the amount of \$49,297.60 from January 1, 1987 to December 31, 1992.

Appellant began receiving temporary total disability benefits on November 3, 1996. The Forms CA-1032 appellant completed, his W-2 Forms and the Social Security Administration records reveal that he had earnings from his plumbing and heating business during the relevant time period and therefore should only have received temporary partial disability benefits. In its January 12, 1995 preliminary determination of overpayment, the Office explained at great length how it made its calculation of appellant's overpayment. The Office specified the data on which it relied from the Forms CA-1032 appellant completed, the W-2 Forms from 1987 through 1992 and the Social Security Administration records showing appellant's annual earnings from October 1983 through March 1992. The Office demonstrated its calculations both on computer printouts and disability benefits payment worksheets pursuant to the *Shadrick* formula,<sup>1</sup> and determined that the total overpayment was \$49,297.60. This figure is supported by the documentation of record. Moreover, appellant does not dispute the amount of the overpayment.

The Board further finds that appellant was without fault in the creation of the overpayment.

Section 8129(b) of the Act<sup>2</sup> 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 be against equity and good conscience.<sup>3</sup> Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.<sup>4</sup>

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<sup>1</sup> See *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>2</sup> 5 U.S.C. § 8129(b).

<sup>3</sup> *Philip G. Arcadipane*, 48 ECAB \_\_\_\_\_ (Docket No. 95-1024, issued June 6, 1997); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>4</sup> *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

The implementing regulation<sup>5</sup> provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.

The Office found in its January 12, 1995 preliminary determination that appellant properly reported the earnings from his plumbing and heating business in all of the Forms CA-1032 he submitted and that the Office overlooked the information. Further, appellant testified at the hearing that he did not understand the difference between compensation payments for temporary and partial disability and presumed that the Office knew what it was doing in making his compensation payments. Appellant therefore properly and accurately reported his earnings and did not know or have reason to know that any of the compensation payments he received in the relevant time period were incorrect.

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

Section 8129(a) of the Act<sup>6</sup> provides that, where an overpayment of compensation has been made “because of an error of fact or law” adjustments 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): “Adjustments or recovery by the United States may not be made when incorrect payments 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>7</sup>

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.<sup>8</sup> The Office must 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.

Section 10.322<sup>9</sup> provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a beneficiary of income and resources needed for ordinary and necessary living expenses when the individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet his

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<sup>5</sup> 20 C.F.R. § 10.320(b).

<sup>6</sup> 5 U.S.C. § 8129(a).

<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> *James Lloyd Otte*, 48 ECAB \_\_\_\_\_ (Docket No. 95-672, issued February 24, 1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

<sup>9</sup> 20 C.F.R. § 10.322.

current ordinary and necessary living expenses, and 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. For waiver under the "defeat the purpose of the Act" standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base of \$3,000.00.<sup>10</sup>

In the present case, the Office hearing representative properly found that appellant's monthly income exceeded his monthly expenses by \$981.00 as that is the difference between appellant's total monthly income of \$2,924.90 and his total monthly expenses of \$2,123.83 which appellant listed on the overpayment recovery questionnaire. The Office hearing representative also properly determined that appellant had assets of over \$40,000.00 which appellant also listed on the questionnaire. The Office therefore properly determined that appellant did not need substantially all of his income to meet his current ordinary and necessary living expenses and therefore recovery of the overpayment would not defeat the purpose of the Act. Appellant did not make any argument that he was entitled to waiver on the grounds of equity and good conscience.

As the Branch stated in its November 18, 1996 decision, it erroneously determined in its February 23, 1996 decision that amounts to recover the overpayment should be withheld from appellant's continuing compensation benefits because appellant was no longer receiving compensation. In its November 18, 1996 decision, the Office required that appellant make an initial repayment of \$10,000.00 on January 1, 1997 and thereafter a monthly payment of \$500.00 commencing February 1, 1997 until the balance was repaid. The Board, however, does not have jurisdiction over repayments where, as here, there are no continuing payments of compensation being made.

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<sup>10</sup> *James Lloyd Otte, supra* note 8; *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

The decision of the Office of Workers' Compensation Programs dated February 23, 1996 is affirmed except for the repayment provision which is vacated.

Dated, Washington, D.C.  
February 22, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member