

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN E. SACHS and DEPARTMENT OF THE AIR FORCE,
GRAND FORKS AIR FORCE BASE, N.D.

*Docket No. 97-750; Submitted on the Record;
Issued February 12, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment in the amount of \$1,898.36 was created; and (2) whether the Office properly denied waiver of the overpayment.

On August 8, 1991 appellant, then a 47-year-old firefighter, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on August 6, 1991 he injured his lower back, left leg, foot and hip when he tripped on a curb and fell to the ground while pulling a 1¾ inch hoseline from an engine during an exercise. The Office accepted the claim for contusion to the back and lumbar strain on September 26, 1991. By decision dated March 23, 1993, the Office determined that appellant's reemployment as a fire communications operator fairly and reasonably represented his wage-earning capacity. The Office also determined that appellant's loss of wage-earning was \$398.68 for each four-week period effective August 2, 1992. Appellant elected to receive retirement benefits under the Civil Service Retirement System effective September 30, 1994.

In a January 23, 1996 letter, the Office informed appellant that it had made a preliminary determination that he had received an overpayment in the amount of \$1,898.36 in compensation as he was paid for temporary total disability and also received payment at the loss of wage earning adjusted rate for the period August 2 to November 14, 1992. The Office indicated that it had found appellant at fault in the creation of the overpayment. The Office informed appellant of his rights.

On January 30, 1996 appellant requested a hearing on the issue of fault and waiver. Appellant submitted an overpayment recovery questionnaire dated January 30, 1996 with supporting documentation describing his financial status. In the overpayment recovery form, appellant indicated that he and his wife together had assets of \$20,218.10 and monthly income of \$2,215.11. He listed monthly expenses of \$300.00 for rent, \$300.00 for food, \$60.00 for clothing, \$235.00 for utilities, \$213.00 for car payment, \$80.00 for gas and oil, \$30.00 for car

maintenance, \$41.00 for car insurance, \$344.00 for miscellaneous expenses, \$150.00 for discover card, \$367.00 credit union accounts, \$400.00 for consolidated loan for a total monthly expenditure of \$2,520.00.

In an October 2, 1996 decision, the Office hearing representative reversed the Office's preliminary determination that appellant was at fault in the creation of the overpayment. The hearing representative, however, affirmed the Office's preliminary finding that appellant received an overpayment of \$1,898.36. The hearing representative further determined that appellant was not entitled to waiver as recovery would not defeat the purpose of the Federal Employees' Compensation Act or be against equity and good conscience. In the attached memorandum, the hearing representative determined that appellant and his wife's monthly income totaled \$2,215.11, that appellant had monthly living expenses of \$2,520.00. The hearing representative then determined that appellant required substantially all of his income for his ordinary and necessary living expenses. The hearing representative found that recovery would not defeat the purpose of the Act as appellant and his wife had assets totaling \$20,218.10. Lastly, the hearing representative determined that appellant could repay the overpayment in monthly installments of \$55.00 until the debt was repaid in full.

The Board finds that appellant received an overpayment of compensation in the amount of \$1,898.36.

The hearing representative affirmed the Office's preliminary letter dated January 23, 1996 that appellant received an overpayment of \$1,898.36 because the Office erroneously paid appellant compensation for temporary total disability and loss of wage-earning adjusted rate from August 2 through November 14, 1992. Appellant did not refute this fact of overpayment and there is no evidence to the contrary.

Next, the Board finds that the Office properly denied appellant's request for waiver of recovery of the overpayment.

Section 8129(a) of the Act¹ 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 have 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."²

¹ 5 U.S.C. § 8129(a).

² 5 U.S.C. § 8129(b).

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.³ 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 10.322-10.323 of the implementing federal regulations.

Section 10.322⁴ 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 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 \$3,000.00.⁵

In the present case, appellant completed a financial questionnaire reporting assets for himself and his spouse totaling \$20,218.10 in certificate of deposits, savings account and checking accounts. Appellant argues that the money in the certificate of deposits is held in trust for his children, but appellant’s wife has deducted the interest on their income tax return and has used it as collateral to secure a loan. As noted above, waiver of an overpayment is not permitted if the nonexempt assets of a claimant and spouse exceed \$5,000.00. Since the assets of both appellant and his wife exceed the \$5,000.00 limit, he is not entitled to a waiver of the overpayment in this case under section 10.322. With regard to section 10.322, there is no indication that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpayment.⁶ Accordingly, the Board finds that the Office properly concluded that appellant was not entitled to waiver of the overpayment.

³ *James Lloyd Otte*, 48 ECAB ____ (Docket No. 95-672, issued February 24, 1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

⁴ 20 C.F.R. § 10.322.

⁵ *James Lloyd Otte*, *supra* note 3; *Jesse T. Adams* 44 ECAB 256, 260 (1992).

⁶ An example of such “detrimental reliance” would be a decision to enroll in college based on the award of benefits; see 20 C.F.R. § 10.323(b).

The decision of the Office of Workers' Compensation Programs dated October 2, 1996 is hereby affirmed.⁷

Dated, Washington, D.C.
February 12, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ The Board notes that the record file also contains evidence that appellant is seeking a schedule award for his employment-related back injury. As the record file does not contain the Office's final decision regarding appellant's eligibility for a schedule award, the Board has no jurisdiction over this issue. 20 C.F.R. § 501.2(c).