

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL K. MONTGOMERY, II and SMITHSONIAN INSTITUTION,
NATURAL HISTORY BUILDING, Washington, D.C.

*Docket No. 97-2882; Oral Argument Held December 2, 1998;
Issued March 10, 1999*

Appearances: *Michael K. Montgomery, pro se; Paul J. Klingenberg, Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found an overpayment of compensation of \$19,176.28 for the period of January 25, 1995 to July 20, 1996; and (2) whether the waiver of recovery of overpayment was properly denied pursuant to section 8129(b) of the Federal Employees' Compensation Act.

On May 31, 1991 a notice of traumatic injury and claim was filed on behalf of appellant, then a 26-year-old painter, for injuries he sustained on May 30, 1991 when scaffolding collapsed. On July 31, 1991 the Office accepted appellant's claim for cervical and lumbar strain, a fractured calcaneus in the right foot and contusion of the left thigh. Subsequently, the Office approved arthroscopic surgery for appellant's right shoulder.

On January 24, 1992 appellant was referred for participation in the rehabilitation service program. In July 1992 appellant enrolled in training courses for electronic and computer technology work. In July 1994 appellant completed a 91-week course in electronics technology. By letter dated February 22, 1995, Charles Terry, appellant's rehabilitation specialist indicated that appellant had been accepted for participation in an assisted reemployment program with Patuxent Business Machines, Incorporated as an office machine repair technician. In a letter dated January 19, 1995, appellant, his rehabilitation counselor, a rehabilitation specialist, the District Director and employer entered into an agreement wherein the Office agreed to reimburse Patuxent Business Machines for part of appellant's wages for the first two years he worked. In CA-1032 forms dated July 1, 1995 and May 8, 1996, appellant indicated that he worked from January 27, 1995 to May 8, 1996 in an assisted reemployment program with the Patuxent Business Machines. On June 3, 1996 appellant began employment with the T. Talbot Bond Company as an office machines repair technician and his assisted reemployment with Patuxent Business Machines was canceled effective May 31, 1996.

In a decision dated August 7, 1996, the Office determined that appellant had been reemployed effective June 3, 1996 as an office machines repair technician and that this position with weekly wages of \$484.80 fairly and reasonably represented appellant's wage-earning capacity. Accordingly appellant's compensation was reduced effective June 3, 1996 by this amount of wages.

On August 26, 1996 the Office advised appellant that it had made a preliminary determination that he had received and was at fault in the creation of a \$19,176.28 overpayment in compensation for the period of January 27, 1995 to July 20, 1996. Applying the *Shadrick* formula,¹ the Office found that there was a \$12,482.93 overpayment for the period of January 25, 1995 to January 26, 1996, a \$4,615.45 overpayment for the period of January 27 to June 2, 1996 and a \$2,076.00 overpayment for the period of June 3 to July 20, 1996, for a total of \$19,176.28. The Office advised appellant to submit additional evidence or argument if he disagreed with the preliminary determination and requested that he complete an overpayment questionnaire.

On September 23, 1996 appellant requested a precoupment hearing and submitted documentation he believed demonstrated he was not at fault in the creation of the overpayment.² In a decision dated June 19, 1997, an Office hearing representative reversed the Office's determination that appellant was at fault in the creation of the overpayment but further found that appellant was not entitled to waiver of the overpayment

The Board finds that the Office properly found that there was an overpayment in compensation in the amount of \$19,176.28 due to appellant's acceptance of compensation checks for temporary total disability after he returned to work.

In the present case, appellant filled out CA-1032 forms which indicated that he returned to work on January 27, 1995 with Patuxent Business Machines under an assisted reemployment program and received wages of \$355.00 per week in said employment. While appellant has urged that the time period during which he worked for Patuxent Business Machines should not be included in a calculation of his overpayment amount because it was assisted reemployment, there is nothing in the Act, regulations or the Federal Procedure Manual which supports appellant's contention. Specifically, appellant submitted a portion of a claims manual he received which indicated that "Compensation for total disability will continue during an [Office] approved program of placement with the previous employer, placement with a new employer or training." While this section of the manual clearly covers appellant's receipt of compensation for temporary total disability while he completed the 91-week training course for electronic and computer technology work, it is ambiguous with respect to whether appellant is covered once he was reemployed, whether in an assisted reemployment program or otherwise. A review of the Federal Procedure Manual indicates that appellant may receive benefits for temporary total disability while participating in an authorized rehabilitation program; however, there is no

¹ *Albert C. Shadrick*, 5 ECAB 376 (1953).

² By decision dated November 13, 1996, the Office finalized its preliminary determination that appellant was at fault in the creation of a \$19,176.28 overpayment in compensation and, therefore, found that the overpayment was not subject to waiver. This decision was vacated by letter decision dated December 1, 1996 from the Branch of Hearings and Review as appellant had filed a timely request for a hearing.

indication that appellant would be entitled to said benefits once he is reemployed.³ Thus, the Office properly determined that once appellant began employment with Patuxent Business Machines, he was no longer entitled to compensation for temporary total disability and appellant's receipt of this compensation was an overpayment. The Office hearing representative also properly determined that appellant was not at fault in the creation of this overpayment since the Office made a number of errors in continuing to pay appellant compensation after January 27, 1995, appellant's interpretation of the claims handbook was "plausible" and he had properly reported his earning via the CA-1032 reporting forms. Nonetheless, any overpayment resulting from the Office's negligence does not permit an employee to accept compensation.⁴

The Board also finds that this case is not in posture for review with respect to whether the Office properly denied waiver of recovery of the overpayment pursuant to section 8129(b) of the Act.

Section 8129 of the Act⁵ provides that an overpayment of compensation 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 this subchapter [Act] or would be against equity and good conscience."⁶ Thus, the fact that appellant is without fault in creating the overpayment of compensation does not, under the Act, automatically preclude the Office from recovering all or part of the overpayment.⁷ The Office must exercise its discretion to determine whether waiver is warranted under either the "defeat the purposes of the Act" or the "against equity and good conscience" standards⁸ pursuant to the guidelines set forth in sections 10.322 and 10.323 of the regulations.⁹

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.6(b) (June 1992).

⁴ See generally *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8129)

⁷ *George E. Dabdoub*, 39 ECAB 929 (1988).

⁸ See *William J. Murphy*, 40 ECAB 569 (1989); *James M. Albers*, 36 ECAB 340 (1984).

⁹ 20 C.F.R. §§ 10.322-323.

Section 10.322 of the regulations¹⁰ provides in pertinent part:

“(a) ... 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 (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....”

The terms “income,” “expenses” and “assets” are defined in section 10.322(b), (c) and (d).¹¹ For waiver to “defeat the purpose of the Act” standard, appellant must show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base.¹²

Section 10.323 of the regulations¹³ provides in pertinent part:

“(a) Recovery of an overpayment is considered to be ‘against equity and good conscience’ when an individual presently or formerly entitled to benefits would experience severe financial hardship in attempting to repay the debt. The criteria to be applied in determining severe financial hardship are the same as in section 10.322.

“(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....”

The Office hearing representative found that recovery of the overpayment would not defeat the purpose of the Act nor be against equity or good conscience. He indicated that appellant reported that his income varies between \$2,540.00 and \$2,940.00 per month depending

¹⁰ 20 C.F.R. § 10.322

¹¹ *Id.*

¹² See *George E. Dabdoub, supra note 7; Robert E. Wenholz, 38 ECAB 311 (1986).*

¹³ 20 C.F.R. § 10.323.

on his wife's hours and overtime. The Office hearing representative determined that based on appellant testimony that his wife earned \$22,000.00 in the prior year and failure to show a substantial reduction in her earnings during the current year,¹⁴ the household income was \$45,000.00 annually or \$3,700.00 per month minus appellant's compensation of \$296.54 per month for a total of \$3,236.54 per month in household income. The Office hearing representative reduced appellant's reported expenses in the following manner: telephone bill of \$120.00 per month reduced to \$40.00 per month as the basic ordinary and necessary expense; and \$55.00 for clothing disallowed as duplicative of clothing included on several department store accounts. The Office hearing representative calculated that appellant had allowable expenses of \$3,106.00 per month based on the following allowed expenses: \$700.00 rent; \$250.00 for electricity; \$40.00 for telephone; \$600.00 for food; \$560.00 for day care; \$35.00 for health expenses; \$15.00 for life insurance; \$200.00 for gas and car maintenance; and \$215.00 for credit card payments. The Office hearing representative concluded that appellant's household income exceeded his household expenditures by \$130.00 per month. The Office hearing representative then found that recovery of the overpayment by deductions of \$100.00 per month from his continuing compensation payments would not deprive appellant of income and resources needed for ordinary and necessary living expenses.

The expenses the Office hearing representative allowed were based on a one page expense log that appellant submitted at the hearing. Although appellant indicated that he did not receive the overpayment questionnaire the Office sent with its preliminary determination of overpayment, a review of the record indicates that it was enclosed with that determination dated August 26, 1996. However, the Office hearing representative accepted that appellant had not received the questionnaire and indicated that if he had any questions concerning appellant's itemized expenses, he would request further information. The Office hearing representative's failure to request such further information is troublesome in the instant case wherein he increased appellant's monthly household income based on an approximation of appellant's wife's salary despite testimony indicating that a quarter of her salary was derived from overtime hours. As evidence concerning appellant's wife's income was not requested, the Office hearing representative determination of the household income is not supported by the record and the case must be remanded for further development of this point. In addition, although the Office hearing representative determined that \$40.00 was the basic monthly telephone rate and reduced appellant's monthly expense for the telephone by \$80.00, there is no evidence in the record which establishes the monthly rate set forth by the Office hearing representative. Thus, on remand the Office should request copies of appellant's telephone bills to determine the basic rate and allow appellant to substantiate why his monthly bill exceeds the ordinary basic rate for this service. Similarly, the reduction of appellant's clothing expenses based on a finding that it duplicated appellant's expenditures to department stores is not appropriate in this case where there is no evidence that the expense for clothing was duplicative. The Board also finds that none of the expenses allowed by the Office hearing representative were substantiated by any evidence other than the expense log submitted by appellant, *i.e.*, copies of checks, bills, credit card invoices, etc. for the year preceding the hearing. Thus, the case must be remanded for the Office to determine the monthly household income for appellant, to allot reasonable amounts for

¹⁴ The Office hearing representative also noted that appellant testified that a quarter of his wife's earnings for the prior year were due to overtime which was not guaranteed.

his household expenses and to determine whether waiver of recovery of the overpayment is appropriate.¹⁵

The decision of the Office of Workers' Compensation Programs dated November 12, 1996 is hereby affirmed in part with respect to the finding that there was an overpayment in compensation; and is reversed as appellant was not at fault in the creation of the overpayment; and the June 19, 1997 decision is affirmed and set aside in part with regard to whether waiver of the overpayment was properly denied. The case is remanded for further development consistent with this decision of the Board.

Dated, Washington, D.C.

March 10, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁵ See *Linda D. Lane*, 46 ECAB 727 (1995).