

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUAN A. MARTINEZ and DEPARTMENT OF THE ARMY,
COMMANDER CORPUS CHRISTI ARMY DEPOT, Corpus Christi, TX

*Docket No. 97-1472; Submitted on the Record;
Issued November 18, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$2,658.95 occurred; (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office properly determined that \$50.00 per month should be withheld from appellant's continuing compensation checks to recover the overpayment.

The Office accepted appellant's claim for a lumbar strain, knee strain, spinal fusion and aggravation of preexisting pseudarthrosis of fusion at L4-5. Appellant worked intermittently after his September 14, 1992 employment injury but stopped working on February 21, 1995 and has not worked since that date. He received temporary total disability benefits.

By letter dated September 14, 1992, appellant inquired as to why had not received a cost-of-living increase and by letter dated December 13, 1996 his Congressman made a follow-up inquiry.

In a preliminary decision dated January 16, 1997, the Office found that, in researching appellant's inquiry, an overpayment in the amount of \$2,658.95 had occurred from February 21, 1995 through January 4, 1997 because the Office paid appellant compensation at an incorrect rate.¹ The Office found that appellant was without fault in the creation of the overpayment. The Office informed appellant that if he disagreed with the fact or the amount of the overpayment, he had to submit new evidence to support his contention or he could request a waiver or recoupment

¹ In another preliminary decision dated January 16, 1997, the Office found that an overpayment in the amount of \$316.26 had occurred because appellant returned to work full time on September 12, 1994 and received compensation for total disability through September 17, 1994. However, by letter dated February 18, 1997, the Office absolved appellant of any indebtedness resulting from that overpayment because the cost of collecting the amount exceeded the amount to be collected.

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.

By letter dated January 16, 1997, the Office also increased appellant's weekly compensation rate to include cost-of-living increases.

By letter dated January 25, 1997, appellant returned the completed overpayment recovery questionnaire and stated that he had no knowledge that he was being overpaid.

By decision dated February 18, 1997, the Office finalized the preliminary determination, stating that the overpayment of \$2,658.95 occurred from February 21, 1995 through January 4, 1997 as appellant had received compensation based on an incorrect pay rate and appellant was not entitled to waiver of the overpayment. The Office stated that appellant had received compensation at the incorrect pay rate for that time period and was without fault in the creation of the overpayment. The Office found that appellant had a monthly income of \$1,550.47, monthly expenses of \$1,665.03, and \$21,800.00 in savings. The Office concluded that appellant was not entitled to waiver of the recovery of the overpayment because his assets exceeded the \$5,000.00 resource base. The Office also found that appellant would not experience hardship in repaying the overpayment because of the amount of his savings, he derived personal gain from the incorrect payments because they were made directly to him and he did not show that he relinquished a valuable right or changed his position for the worse due to reliance on the incorrect payments. The Office concluded that \$50.00 should be withheld from appellant's continuing compensation payments until the overpayment was repaid.

The Board finds that appellant received an overpayment in the amount of \$2,658.95.

The Office found in its January 16, 1997 preliminary determination that appellant received an overpayment of \$2,658.95 from February 21, 1995 through January 4, 1997 because the Office paid appellant compensation at an incorrect rate. The disability benefits payment work sheet, Form CA-25, and the Employment Standards Administration computer printout dated January 16, 1997 support this finding. Further, appellant does not refute the fact of an overpayment and there is no evidence to the contrary.

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

Section 8129(b) of the Federal Employees' Compensation Act² 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

² 5 U.S.C. § 8129(b).

purpose of the Act or be against equity and good conscience.³ Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.⁴

The implementing regulation⁵ 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 evidence establishes that the overpayment occurred because the Office paid appellant compensation at an incorrect rate from February 21, 1995 through January 4, 1997. Appellant did not know and had no reason to know that the rate of payment was incorrect. He is therefore without fault in the creation of the overpayment.

Section 8129(a) of the Act⁶ 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.”⁷

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.⁸ 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 10.322⁹ 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

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

⁴ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁵ 20 C.F.R. § 10.320(b).

⁶ 5 U.S.C. § 8129(a).

⁷ 5 U.S.C. § 8129(b).

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

⁹ 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. In his January 25, 1997 letter, appellant stated that he had a five-year-old daughter and an eighteen-year-old son but did not indicate whether the son was dependent on him. Therefore, 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 \$5,000.00.¹⁰

Appellant's only income is his workers' compensation check of \$1,431.20 per month which, when multiplied by 13 compensation checks per year and divided by 12 months per year, equals \$1,550.47. He indicated in his overpayment recovery questionnaire that he has monthly expenses of \$1,665.03 and savings of \$21,800.00.¹¹ Appellant's monthly expenses exceed his monthly income by \$114.56. Thus, he requires substantially all of his income to meet current ordinary and necessary living expenses. However, because appellant's assets of \$21,800.00 exceed the resource base of \$5,000.00, appellant is not entitled to waiver of recovery of the overpayment.

Section 10.321(a) provides if an overpayment of compensation has been made to one entitled to future payments, proper adjustments 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."

Although the Office did not explicitly analyze appellant's financial status in concluding \$50.00 was an appropriate amount to withhold from appellant's continuing compensation payments, given that the Office considered appellant's income, expenses and the fact appellant had savings of \$21,800.00, the amount of \$50.00 is not unreasonable.

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

¹¹ On appeal, appellant contends that he erroneously completed the overpayment recovery questionnaire and submitted a copy of his credit union account to show that \$21,000.00 represented a debt and not an asset. As this evidence was not before the Office at the time of its decision, it may not be considered by the Board on appeal; *see* 20 C.F.R. 501.2(c). However, appellant may submit this evidence with a request for reconsideration to the Office.

The decision of the Office of Workers' Compensation Programs dated February 18, 1997 is hereby affirmed.

Dated, Washington, D.C.
November 18, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member