

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEONARD M. STANISLAWSKI and U.S. POSTAL SERVICE,
POST OFFICE, Stevens Point, WI

*Docket No. 98-88; Submitted on the Record;
Issued November 29, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$9,868.65 for the period September 18, 1992 to April 26, 1997; (2) whether the Office abused its discretion by denying waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment by withholding \$240.00 every 4 weeks from his continuing compensation.

On September 10, 1987 appellant sustained an employment-related right shoulder impingement syndrome secondary to right rotator cuff tear with surgical repair. By decision dated November 27, 1991, the Office determined that appellant's actual position as modified distribution clerk and corresponding wages fairly and reasonably represented his wage-earning capacity. By decision dated March 24, 1992, the Office granted him a schedule award for a 13 percent impairment of the right upper extremity. On June 12, 1997 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$9,868.65 which arose because he had been paid at the wrong pay rate after his schedule award expired on September 18, 1992 until April 26, 1997. The Office sent appellant an overpayment recovery questionnaire which he returned on July 8, 1997.¹ By decision dated July 14, 1997, the Office found that appellant received an overpayment of compensation in the amount of \$9,868.65, that he was without fault in the creation of this overpayment and that recovery of the overpayment would not defeat the purposes of the Act,² as appellant's monthly income exceeded his monthly expenses and his assets exceeded the resource base of \$5,000.00 for an individual with a spouse. The Office informed appellant that \$240.00, the amount of his compensation check, would be withheld each payment period from his continuing compensation.

¹ Appellant indicated that his gross monthly income was \$3,027.00 and listed assets worth \$39,381.00. His monthly expenses totaled \$2,528.18. It does not appear that appellant included the \$240.00 wage-loss compensation received under the Federal Employees' Compensation Act in calculating his monthly income.

² 5 U.S.C. §§ 8101-8193.

The Board finds that appellant received an overpayment of compensation in the amount of \$9,868.65.

The record contains evidence which shows that appellant received compensation based on an incorrect pay rate per week for the period September 18, 1992 to April 26, 1997. This was due to the fact that, following expiration of appellant's schedule award, he was placed on compensation for total disability rather the pay rate based on his wage-earning capacity. Appellant has not shown, nor does the record otherwise establish, that the Office erred in calculating the amount of the overpayment due to the erroneous pay rate. Therefore, an overpayment in compensation in the amount of \$9,868.65 was created.

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

Section 8129(a) of the Act³ 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 payment 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."⁴

With respect to whether recovery of the overpayment would be against equity and good conscience, section 10.323(b) of the Office's regulations⁵ provides:

"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 her position for the worse.... To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely on reliance on the payments or on the notice of payment. To establish that the individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss."

In this case, the Office found that appellant was not at fault in the creation of the overpayment of compensation. Regarding waiver, the evidence does not show that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpayment.

³ 5 U.S.C. § 8129(a).

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.323(b).

Section 10.322(a) of the Office's regulations⁶ provides that recovery of an overpayment would 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. Recovery will defeat the purpose of the Act 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 or \$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. This base includes all of the claimant's assets not exempted from recoupment. Section 10.322(d) states:

"Assets -- cash on hand, the value of stocks, bonds, savings accounts, mutual funds and the like; and (2) Nonliquid Assets -- the fair market value of property such as a camper, second home, extra automobile, jewelry, etc. Assets for these purposes shall not include the value of household furnishings, wearing apparel, family automobile, burial plot or prepaid burial contract, a home which the person maintains as the primary family domicile, or income producing property if the income from such property has been included in comparing income and expenses."

Appellant's financial records provided to the Office establish that he had assets totaling greater than \$5,000.00.⁷ The Office, therefore, did not abuse its discretion by refusing to waive the overpayment of compensation.

The Board also finds that the Office properly required repayment by withholding \$240.00 from appellant's continuing compensation every 4 weeks.

Section 10.321(a)⁸ provides that if an overpayment of compensation has been made to one entitled to future payments, 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."

At the time of the July 14, 1997 decision, appellant received \$240.00 in compensation every 4 weeks. The monthly amount of compensation would be greater by one-twelfth and would therefore be \$260.00. Appellant listed his gross monthly income as \$3,027.00⁹ with expenses totaling \$2,528.18 which would indicate that he had at least \$498.82 in monthly household income above his monthly expenses. The Board finds that the Office gave due regard to appellant's financial circumstances in determining the rate of repayment in this case and, thus,

⁶ 20 C.F.R. § 10.322(a).

⁷ *Id.*

⁸ 20 C.F.R. § 10.321(a).

⁹ *See supra* note 1.

did not abuse its discretion under the standard noted above in determining that repayment of the overpayment could be accomplished by withholding \$240.00 every 4 weeks from appellant's compensation.¹⁰

The decision of the Office of Workers' Compensation Programs dated July 14, 1997 is hereby affirmed.

Dated, Washington, D.C.
November 29, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ The Board notes that subsequent to issuance of the July 14, 1997 decision, appellant questioned the overpayment decision. In letters dated July 28 and September 22, 1997, the Office informed appellant that it would consider adjusting the repayment scheme but that appellant needed to submit additional information regarding his expenses.