

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TONY E. MOORER and DEPARTMENT OF THE AIR FORCE,
TINKER AIR FORCE BASE, OK

*Docket No. 98-51; Submitted on the Record;
Issued October 20, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly found an overpayment of \$18,372.56; (2) whether the Office properly denied waiver of recovery of the overpayment; and (3) whether the Office properly determined to recover the overpayment by withholding \$200.00 from appellant's continuing compensation benefits.

The Board has reviewed the case on appeal and finds that the Office properly found an overpayment in the amount of \$18,372.56.

The Office accepted appellant's claim for an emotional condition and entered him on the periodic rolls. Appellant completed a Form 1032 on March 12, 1993 and indicated that he was no longer entitled to compensation at the augmented rate as his wife died on September 4, 1992. Appellant continued to complete Form 1032s and did not claim dependents. On March 25, 1997 the Office adjusted appellant's compensation as he no longer had dependents. In a letter dated April 16, 1997, the Office made a preliminary determination that an overpayment occurred as appellant continued to receive compensation at the augmented rate after the death of his wife. Appellant requested waiver and completed an overpayment recovery questionnaire. By decision dated July 30, 1997, the Office found that an overpayment in the amount of \$18,372.56 had occurred as appellant was improperly paid at the augmented rate from September 4, 1992 to March 1, 1997. The Office found appellant without fault in the creation of the overpayment, determined that waiver was not necessary and found that \$200.00 could be withheld from appellant's continuing compensation benefits.

Appellant has not contested the fact of amount of the overpayment and the Board finds that appellant was not entitled to receive compensation at the augmented rate after September 4, 1992.

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

Section 8129(a) of the Federal Employees' Compensation Act provides that when an overpayment of compensation occurs "because of an error of fact of law," adjustment or recovery shall be made by decreasing later payment to which the individual is entitled.¹ The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b):

"Adjustment 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."

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

Section 10.322(a) of the implementing regulations² provides that 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. 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 current income, including compensation benefits, to meet current ordinary and necessary living expense; and (2) the individual's assets do not exceed a 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. This base includes all of the individual's assets not exempt from recoupment.

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. An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.³

In this case, appellant completed an overpayment recovery questionnaire and indicated that his monthly income was \$3,212.94 per month. Appellant indicated that his monthly expenses as of August 1997 were \$2,371.04. The Office noted that appellant had two additional loans that were in default, but appellant was not yet required to repay these loans. The Office properly determined appellant did not need substantially all of his current income to meet ordinary expenses and that waiver was not necessary.

¹ 5 U.S.C. § 8129(a).

² 20 C.F.R. § 10.322(a).

³ *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

With respect to whether recovery would be against equity and good conscience, section 10.323(b) of the implementing regulations provides that “Recovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or notice that such payments would be made, relinquished a valuable right or changed his position for the worse.” Appellant has not alleged, and the evidence does not demonstrate, that he relinquished a valuable right or changed his position for the worse in reliance on the erroneous augmented compensation which formed the basis for the overpayment.⁴

The Board further finds that the Office properly determined to recover the overpayment by withholding \$200.00 per month from appellant’s continuing compensation benefits.

Section 10.321(a) of the regulations⁵ provides:

“Whenever an overpayment has been made to an individual who is entitled to further 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.”

In the present case, the Office, in determining the rate of repayment by deduction from appellant’s continuing compensation payments, considered the factors set forth by this section. The Office noted appellant’s financial circumstances including the two outstanding loans, the possibility that appellant might require full-time care in the near future as well as the amount that his income exceeded his debts. The Office determined that a deduction of \$200.00 per month would provide appellant with a \$600.00 per month financial cushion for emergencies. The Office further noted that its decision could be reviewed if appellant’s circumstances changed.

⁴ On appeal, appellant through his representative submitted additional new evidence. As the Office did not consider this in reaching a final decision, the Board may not consider it for the first time on appeal. 20 C.F.R. § 501.2(c).

⁵ 20 C.F.R. § 10.321(a).

The decision of the Office of Workers' Compensation Programs dated July 30, 1997 is hereby affirmed.

Dated, Washington, D.C.
October 20, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member