

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY J. MILLS and DEPARTMENT OF THE AIR FORCE,
SELFREDGE AIR NATIONAL GUARD BASE, MI

*Docket No. 98-2110; Submitted on the Record;
Issued July 17, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying waiver of the overpayment that occurred in this case.

The Board has duly reviewed the record on appeal and finds that the Office abused its discretion.

Section 8129(a) of the Federal Employees' Compensation Act¹ provides that when an overpayment of compensation is made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled. Section 8129(b) provides the only exception to this mandatory adjustment:

“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.”²

In its June 4, 1998 decision, the Office found that appellant was without fault in the matter of the overpayment. The Office also found that appellant did not meet the criteria to

¹ 5 U.S.C. § 8129(a).

² *Id.* at § 8129(b).

establish that recovery of the overpayment would defeat the purpose of the Act because his monthly income exceeded his monthly expenses by almost \$400.00.³

In determining appellant's income, the Office included compensation benefits of \$1,435.00 every 28 days or \$1,554.00 per month. The Office also included an estimated \$300.00 per month in wages from the Mercy Ambulance Service, Inc., based on appellant's work history. The record fails to support either of these incomes.

In a decision dated January 21, 1998, the Office reduced appellant's compensation to reflect his capacity to earn wages as a wheelchair van driver, a position he had held for 19 years. Beginning February 1, 1998 appellant's net compensation, after deducting a health benefits subscription of \$273.18, was \$1,140.82 each four weeks or \$1,235.89 per month.⁴ By June 4, 1998 appellant's net compensation had increased slightly to \$1,161.82 each four weeks or to \$1,258.64 per month, which was still \$295.36 less income than the Office used to determine his eligibility for waiver.

Further, in a December 22, 1997 letter to the Office, the president and chief executive officer of Mercy Ambulance Service, Inc., advised that the company had eliminated its wheelchair van service and found it necessary to terminate appellant's employment as of January 1, 1998. When appellant requested waiver and submitted his overpayment recovery questionnaire, he included a March 2, 1998 letter from the company president. The president again advised that appellant's employment with the company had ended in December 1997. Due to a lack of use, the company had found it necessary to get out of the wheelchair transportation business. When appellant contacted the company in January 1998 to request employment, the president felt that he could offer some part-time light duty. The president explained that appellant "will only be hired as a call in for hospital-to-hospital transfers where no lifting is required." He failed to confirm whether appellant had actually begun such work and he provided no information on pay.

Thus, when the Office finalized its overpayment determination on June 4, 1998, the evidence of record showed that appellant no longer had earnings as a wheelchair van driver. The Board finds that it was error for the Office to include such earnings as current income for the purpose of determining appellant's eligibility for waiver.

With no more than \$1,258.64 per month in net compensation benefits, with no earnings from his former position as a wheelchair van driver and with no substantiation of any current earnings, the record at the time of the Office's June 4, 1998 decision showed that appellant's accepted monthly expenses exceeded his monthly income by \$206.36. Accordingly, the Board finds that the Office abused its discretion in denying waiver of the overpayment.

³ Section 10.322(a) of Title 20 of the Code of Federal Regulations provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary and necessary living expenses. 20 C.F.R. § 10.322(a).

⁴ If the Office includes gross rather than net compensation as income, it must also include any health benefits subscription or other deduction on the expense side.

The June 4, 1998 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
July 17, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member