

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID BRYANT and DEPARTMENT OF THE NAVY,
SEA SYSTEMS COMMAND, Vallejo, CA

*Docket No. 98-2327; Submitted on the Record;
Issued July 18, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$4,488.00 occurred; (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; (3) whether the Office properly denied appellant's request for waiver of the recovery of \$4,488.00; and (4) whether the Office properly determined that \$100.00 should be withheld from appellant's continuing compensation checks to recover the overpayment.

The Office accepted appellant's claim for left ankle fracture, degenerative arthritis of the right knee, patella femoral arthrosis of the right knee and surgical reduction and internal fixation of the left ankle. Appellant received appropriate compensation benefits.

In a preliminary determination dated July 16, 1996, issued on July 17, 1996, the Office found that appellant received an overpayment of \$4,488.00 because he received dual benefits of severance pay and separation pay while in receipt of compensation for 11 weeks from April 2 through June 17, 1996. The Office found that appellant was at fault in the matter of the overpayment. The Office informed appellant that, if he disagreed with the fact or the amount of the overpayment, he had the right to submit new evidence to support his contention or he could request a waiver or recoupment within 30 days of the 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.

On July 27, 1996 appellant requested a hearing before an Office hearing representative and requested waiver of the overpayment. The hearing was held on October 22, 1996. Appellant testified that he notified the Office that he received the severance pay and stated that "they could n[o]t figure out what to do with it." He stated that he kept all the payments and the Office told him he could keep some of it but that after the hearing he might have to pay some of it back. Appellant stated that he felt he was being discriminated against because all his coworkers who were laid off or fired got severance pay but then he was disabled and was told he

would not receive it. Appellant separated from his employment approximately on April 1, 1996 and received eleven weeks of severance pay through June 17, 1996. Appellant emphasized he did not believe there was an overpayment because he was entitled to severance pay just like his coworkers.

By decision dated December 27, 1996, the Office hearing representative found appellant's compensation benefits were reduced based on his ability to earn the wages of an information clerk. She stated that under the Federal Employees' Compensation Act appellant could receive severance pay concurrently with compensation benefits if they were based on the amount of his reduced benefits. The hearing representative, therefore, found that no overpayment existed and vacated the July 17, 1996 preliminary overpayment determination.

By decision dated May 19, 1997, the Assistant Branch Chief reviewed the December 27, 1996 hearing representative's decision and reissued the July 17, 1996 preliminary overpayment determination. The Branch Chief found that the Office hearing representative misapplied the law in that, while the Act allows concurrent payments of compensation benefits and severance pay when the severance pay is based on appellant's reduced salary, in appellant's case, from April 2 to June 17, 1996 appellant received severance pay at the full rate of his former position of shipwright rather than at the reduced rate in the selected position of information clerk. The Branch Chief, therefore, found that an overpayment existed in the amount of \$4,488.00. He found that appellant was at fault in the creation of the overpayment because he knew, or reasonably should have known, that he was not entitled to receive compensation based on his loss in wage-earning capacity, while he was receiving severance pay at his full salary rate.

Appellant requested an oral hearing before an Office hearing representative, which was held on August 28, 1997. At the hearing, appellant reiterated that he informed the Office that he was receiving the checks, that Ms. Stultz advised him to keep \$4,500.00 in the bank pending the outcome of the hearing and when the decision was issued stating there was no overpayment, based on Ms. Stultz's advice, he spent the \$4,500.00 he had been saving.

By decision dated May 15, 1998, the Office hearing representative found that an overpayment in the amount of \$4,488.00 existed because appellant received severance pay from April 2 through June 17, 1996, while he was receiving compensation for his loss in wage-earning capacity. The Office hearing representative stated that appellant was receiving severance pay based on the pay he would have received had he been working his full regular duty and, therefore, the overpayment was created by appellant receiving his full salary, in the form of severance pay, plus compensation for his loss in wage-earning capacity. The Office hearing representative found that appellant was without fault in the creation of the overpayment but that appellant was not entitled to waiver of the overpayment and the overpayment would be recovered at the rate of \$100.00 every four weeks.

The Board finds that the Office properly determined that appellant received an overpayment of compensation from April 2 to June 17, 1996 in the amount of \$4,488.00.

The Board has held that appellant may not receive severance pay while he is receiving compensation benefits.¹ The Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17(c)(2) (April 1996), provides, however, that concurrent payments of severance pay and compensation benefits are allowed only in situations where appellant's pay is based on a reduced salary. The evidence of record establishes that from April 2 through June 17, 1996 appellant received his severance pay in the amount of \$8,106.00 based on the full rate of his former position as a shipwright rather than at the reduced rate in the selection position of the information clerk. Therefore, an overpayment occurred in the amount of the severance pay, which exceeded the amount appellant would have received based on the reduced rate of an information clerk and the Office correctly determined that amount was \$4,488.00 based, in part, on computer printout sheets from the Employment Standards Administration.

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 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 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.

At the October 22, 1996 and the August 28, 1997 hearings, appellant testified that he informed the Office that he was receiving the checks and at the August 28, 1997 hearing, he testified that based on the Office hearing representative's advice he kept half the money in the bank pending the outcome of the hearing and also based on her advice, spent the money once she issued her decision and found no overpayment had been made. Appellant, therefore, did not

¹ See *Bonnye Matthews*, 45 ECAB 657, 668 (1994).

² 5 U.S.C. § 8129(b).

³ *James Lloyd Otte*, 48 ECAB 334, 338 (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).

know and could not reasonably have known that the severance payments he received were incorrect. Appellant also furnished the information to the Office, on which the Office based its finding that an overpayment had been created and, therefore, did not fail to furnish information, which he knew or should have known to be material.

The Board also finds that the Office properly denied appellant's request for waiver of recovery 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 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. 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 \$3,000.00.¹⁰

In the July 17, 1996 preliminary determination, the Office advised appellant that he should submit the appropriate financial information to establish whether he was eligible for a waiver. Appellant did not submit any financial information. Although appellant was provided

⁶ 5 U.S.C. § 8129(a).

⁷ 5 U.S.C. § 8129(b).

⁸ *James Lloyd Otte, supra* note 3; *see William J. Murphy*, 40 ECAB 569, 571 (1989).

⁹ 20 C.F.R. § 10.322.

¹⁰ *James Lloyd Otte, supra* note 3; *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

with an opportunity, he did not submit any financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act. Further, the evidence does not show that appellant relied on the payments or notice of the payments by relinquishing a valuable right or changing his position for the worse. Absent evidence documenting appellant's financial status, the Office cannot determine whether appellant is entitled to waiver and waiver cannot be granted.¹¹ Accordingly, the Office properly determined that appellant was not entitled to a waiver of the overpayment in this case.

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." The evidence does not show that the Office's withholding of \$100.00 from continuing compensation payments of \$1,597.22 was improper.¹²

The decision of the Office of Workers' Compensation Programs dated May 15, 1998 is hereby affirmed.

Dated, Washington, D.C.
July 18, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ See *William D. Emory*, 47 ECAB 365, 373 (1996); *Richard S. Gumper*, 43 ECAB 811, 817 (1992).

¹² See *William D. Emory*, *supra* note 11.