

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE R. MAUPIN and DEPARTMENT OF THE NAVY,
Point Mugu, CA

*Docket No. 98-1230; Submitted on the Record;
Issued June 5, 2000*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant was without fault in the creation of an overpayment in the amount of \$4,724.05 and that the overpayment was not subject to waiver; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits of his wage-earning capacity determination on February 26 and June 18, 1997.

On June 8, 1979 appellant, an electronics technician, filed a claim alleging that on May 29, 1979 he injured his back in the performance of duty. The Office accepted his claim for lumbosacral strain and herniated disc L5-S1. The Office entered appellant on the periodic rolls on November 18, 1986. Appellant returned to light-duty work on December 28, 1992. By decision dated March 25, 1993, the Office determined that the light-duty position represented appellant's wage-earning capacity and reduced his compensation benefits. Appellant resigned from the employing establishment on January 3, 1994. By decision dated October 26, 1995, the Office modified appellant's wage-earning capacity as he worked eight hours a day as an electronics technician from July 12, 1993 until January 3, 1994. On November 7, 1995 appellant requested an oral hearing. By decision dated November 4, 1996 and finalized November 6, 1996, the hearing representative affirmed the Office's October 26, 1995 decision finding that appellant performed the duties of the position for more than 90 days and that he had not established that he sustained a material change in the nature and extent of his work-related condition. Appellant requested reconsideration on February 4, 1997. By decision dated February 26, 1997, the Office found that appellant's request was not sufficient to require review of the merits. On June 18, 1997 appellant requested reconsideration of the November 6, 1996 decision. By decision dated August 26, 1997, the Office declined to reopen appellant's claim for review of the merits.

On May 7, 1997 the Office issued a preliminary determination of overpayment finding that appellant's health and life insurance premiums were not deducted from January 10 to April 3, 1993 and January 9, 1994 to January 4, 1997. The Office further found that appellant's

optional life insurance was not deducted from January 10 to February 26, 1993. The Office found that appellant was without fault in the creation of the overpayment and requested additional financial information to determine if waiver was appropriate. By decision dated August 26, 1997, the Office found an overpayment in the amount of \$4,724.05 had occurred and that the overpayment was not subject to waiver.

The Board has duly reviewed the case on appeal and finds that the Office properly found that appellant was without fault in the creation of an overpayment in the amount of \$4,724.05 and that the overpayment was not subject to waiver.

In a worksheet dated April 22, 1997, the Office noted that it failed to make health benefit and optional life insurance deductions from January 10 to April 3, 1993 and again from January 9, 1994 to January 4, 1997. The Office indicated in the first period appellant had returned to work, the employing establishment asked that the Office reinstate benefits, and that the Office did so but failed to collect the overpayment. The Office further noted that appellant returned to full-time work on October 17, 1993 and stopped on January 3, 1994 but that the Office did not collect health and life insurance beginning at that point. The Office concluded that appellant received an overpayment in the amount of \$4,724.05.

In the instant case, appellant did not dispute fact or amount of overpayment. Appellant asserted that he was entitled to 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 or law," adjustment or recovery shall be made by decreasing later payments 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

¹ 5 U.S.C. § 8129(a).

² 20 C.F.R. § 10.322(a).

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.

In the instant case, appellant provided financial information to the Office. He indicated that he had monthly expenses in the amount of \$1,086.00 and that his total monthly income was \$1,189.02. This information establishes that appellant has a monthly surplus of \$103.02. Appellant further indicated that he had funds and property totaling \$74,363.90. Based on the financial information provided, appellant does not meet either of the exceptions for waiver.

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 upon 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 compensation which formed the basis for the overpayment.

As appellant has not shown that recovery would "defeat the purpose of the Act" or "be against equity and good conscience" the Board finds that the Office properly denied waiver of recovery of the overpayment. With respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Where appellant is no longer receiving wage-loss compensation,³ the Board does not have jurisdiction with respect to the Office's recovery of an overpayment under the Debt Collection Act.⁴

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on February 26 and August 26, 1997.

The Office found that the full-time position of modified electronics technician represented appellant's wage-earning capacity and modified his March 25, 1993 wage-earning capacity determination by decision dated October 26, 1995. The hearing representative affirmed this decision on November 6, 1996.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show a modification of the wage-earning capacity award.⁵ In the present

³ In this case, appellant elected Office of Personnel Management benefits retroactive to January 9, 1994.

⁴ See *Lewis George*, 45 ECAB 144, 154 (1993).

⁵ *Mildred Alder-Johnson*, 50 ECAB ____ (Docket No. 97-1972, issued July 19, 1999).

case, appellant worked full time as an electronics technician from July 12, 1993 until he resigned on January 3, 1994.

Appellant requested reconsideration of the Office's November 6, 1996 decision on February 4, 1997. In support of his request for reconsideration, appellant submitted a report dated December 13, 1996 from Dr. Richard B. Small, a Board-certified neurosurgeon. In his report, Dr. Small stated that appellant did not recover from the lumbar laminectomy and that he had permanent right lumbar radiculopathy with foot drop and severe dysesthesia. He stated that appellant returned to work four hours a day and increased to nine hours in 1993 retiring in 1994. Dr. Small stated that appellant was severely disabled and physically incapable of returning to work as an electronics technician since the time of his injury.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁶ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁷

The report of Dr. Small is not sufficient to require the Office to reopen appellant's claim for review of the merits as Dr. Small repeated the findings and conclusions of his earlier reports previously considered by the Office. In his May 25, 1993 report, Dr. Small stated that appellant could not return to full duty in his date-of-injury position without restrictions. He provided similar physical findings on June 7, 1993 noting that appellant had marked L5-S1 weakness with foot drop on the left lower extremity. Dr. Small also stated that appellant should not sit for prolonged periods.

As Dr. Small's December 13, 1996 report does not constitute relevant new evidence not previously considered by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on February 26, 1997.

In support of his June 18, 1997 request for reconsideration, appellant again submitted Dr. Small's December 13, 1996 report and alleged that he sustained a recurrence of disability. As noted previously, the December 13, 1996 report does not constitute relevant new evidence to the issue of appellant's wage-earning capacity and is not sufficient to require the Office to reopen appellant's claim on this issue. The Board notes that the Office did not address appellant's claim for recurrence of disability in its August 26, 1997 decision. As the Office has not issued a final decision addressing appellant's claim for recurrence of disability, the Board may not consider it for the first time on appeal.⁸

⁶ 20 C.F.R. § 10.138(b)(1).

⁷ 20 C.F.R. § 10.138(b)(2).

⁸ 20 C.F.R. § 501.2(c).

The August 26 and February 26, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
June 5, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member