

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOSEPH NICKERSON and DEPARTMENT OF THE AIR FORCE,  
WRIGHT PATTERSON AIR FORCE BASE, OH

*Docket No. 99-892; Submitted on the Record;  
Issued June 1, 2000*

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DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment in the amount of \$738.79 was created; (2) whether the Office properly denied waiver of the overpayment; and (3) whether appellant abandoned his request for a hearing before an Office hearing representative.

On September 11, 1996 appellant, then a 51-year-old logistics management specialist, filed a notice of traumatic injury, alleging that he suffered a hairline fracture of his humerus due to an automobile accident, which occurred on September 10, 1996 in the course of his federal employment. On October 18, 1996 the Office accepted the claim for a fracture of the right humerus. The Office subsequently awarded compensation for total temporary disability.

On January 3, 1997 Dr. Suresh Gupta, appellant's treating physician, indicated that appellant could return to work for four hours per day beginning January 6, 1997, that he could return to work for six hours per day four weeks later and that he could return to full-time work in another four weeks.

On January 14, 1997 appellant filed claim for continuing compensation, Form CA-8, claiming compensation for the period of January 5 through 18, 1997. Appellant attached a schedule indicating that he had worked four hours per day during this period.

An Office daily computation log indicated that appellant received compensation for 80 hours of work lost, covering the period of January 4 through 17, 1997. The total amount of compensation received totaled \$1,373.32 and included a \$20.74 deduction for health insurance premiums.

On January 29, 1997 appellant filed a claim for continuing compensation, Form CA-8, claiming compensation for the period of January 19 through February 1, 1997. Appellant

attached a schedule indicating that he worked four hours per day during this period, which included a holiday.

An Office daily computation log indicated that appellant received compensation for 36 hours of lost hours due to his injury for the period of January 19 through February 1, 1997 totaling \$606.14. This amount included a \$20.74 deduction for health benefit premiums.

On February 11, 1997 appellant filed claim for continuing compensation, Form CA-8, claiming compensation for the period of February 2 through 15, 1997. Appellant attached a schedule indicating that he only worked four hours per day on February 3, 4 and 5, 1997. For the rest of the period claimed, appellant worked six hours per day.

An Office daily computation log covering the period indicated that appellant was compensated for 26 lost hours of work for the period of February 2 through 15, 1997. The total amount of compensation received was \$432.00 and this amount included a \$20.74 deduction for health insurance premiums.

In a letter dated February 27, 1997, the Office indicated that appellant was returned to work four hours per day beginning January 6, 1997, six hours per day beginning February 3, 1997 and full time beginning March 3, 1997. The Office stated that the work restrictions were supported by a medical report. The Office further indicated that it erred in paying appellant for full-time disability for the period of January 6 through 19, 1997. It also stated that a second overpayment occurred from February 3 through 5, 1997, a period in which appellant should have worked six hours per day, but worked only four hours. Because appellant received compensation for four hours per day, the Office found that appellant was overpaid six hours for this period. The Office totaled the overpayment and found that appellant received compensation for an extra 46 hours for the period of January 6 through February 15, 1997. The Office noted, however, that health benefit premiums were erroneously deducted for the period of January 4 through February 14, 1997 and stated that the erroneously deducted premiums, totaling approximately \$62.22, would be deducted from the overpayment amount. Finally, the Office informed appellant of the information needed to establish a recurrence of disability due to his alleged inability to work six hours per day beginning February 3, 1997.

By decision dated May 7, 1997, the Office denied appellant's claim for compensation for the period of January 20 through February 15, 1997 because the evidence failed to demonstrate a relationship between the lost time claimed and the on-the-job injury. In an accompanying memorandum, the Office noted that on January 3, 1997 appellant's attending physician, Dr. Gupta, released him to work four hours per day for four weeks, then six hours per day for four weeks and then returned him to full duty. The Office noted that on January 29 and February 11, 1997 appellant filed claims for lost hours beyond these medical restrictions. The Office found that the medical evidence failed to support any disability beyond the restrictions initially established by Dr. Gupta on January 3, 1997.

On May 12, 1997 the Office completed an ACPS Daily Roll Payment Form, Form CA-25-A. The Office noted that for the period of January 6 through 19, 1997 appellant should have received \$696.53 in compensation for 40 hours of lost hours and that appellant should have received \$975.14 for the period of January 20 through February 15, 1997 for 56 hours of lost

hours. The Office totaled this amount to equal \$1,671.67. The Office then calculated that amount appellant actually received for these periods, totaling \$2,472.68 and subtracted the amount appellant should have received to determine that appellant received an overpayment of compensation of \$801.01. Finally, the Office deducted the health benefits premiums mistakenly deducted from appellant's compensation from January 4 through February 14, 1997, totaling \$62.22, to find that appellant owed an overpayment of \$738.79.

On May 27, 1997 the Office made a preliminary determination that an overpayment existed in the amount of \$738.79. The Office stated that between January 6 and February 15, 1997 appellant was overpaid compensation for wage loss based on a total loss of 142 hours when he was entitled to a loss of only 96 hours. The Office further stated that appellant was without fault in the matter and requested information on his income and expenses so that it could determine whether he was entitled to a waiver of recovery. The Office properly advised appellant that a request for a hearing before a representative of the Branch of Hearings and Review, or additional evidence or arguments, must be submitted within 30 days of the date of the preliminary determination. It also informed appellant to attach any supporting documents to his correspondence and described the types of financial documentation it needed.

On June 27, 1997 appellant requested a waiver of the overpayment and stated that he wanted a hearing with the Branch of Hearings and Review. Although appellant completed an overpayment recovery questionnaire, Form OWCP-20, he failed to provide any supporting financial documents. In an accompanying letter, appellant requested additional time to submit this supporting financial documentation.

On June 12, 1998 the Branch of Hearings and Review informed appellant that an informal hearing would be held on July 6, 1998.

By decision dated August 29, 1998, the Branch of Hearings and Review found that appellant failed to appear at the July 6, 1998 hearing and failed to request cancellation at least three-calendar days prior to the hearing. It further found that since appellant failed to appear at the hearing and failed to show good cause for the failure to appear within 10 days after the time set for the hearing, that appellant abandoned his request for a hearing.

By decision dated September 14, 1998, the Office finalized its preliminary determination regarding the \$738.79 overpayment. Moreover, it found that circumstances failed to warrant a waiver of recovery of the overpayment. In an accompanying memorandum, the Office indicated that appellant failed to provide any supporting financial documentation for his request for waiver.

The Board finds that appellant received an overpayment of compensation in the amount of \$738.79.

The Office's daily computation logs establish that for the period of January 4 through 17, 1997 appellant received compensation for 80 hours of lost work. Appellant, however, indicated that he worked 40 hours during this period. Consequently, appellant was receiving compensation for total temporary disability for a period in which he worked four hours per day. Moreover, the Office daily computation logs indicated that appellant received compensation for

26 hours of lost work for the period of February 2 through 15, 1997. Appellant, however, was only entitled to receive compensation for 20 hours of lost work for this period based on his treating physician's opinion that he was capable of working six hours per day beginning February 3, 1997. The Office subsequently totaled the amount of money appellant actually received for the periods of January 6 through February 15, 1997, totaling \$2,472.68 and subtracted the amount appellant should have received for the period, totaling \$1,671.67, to find that an overpayment of \$801.01 existed. It then deducted the health insurance premiums mistakenly deducted for the same period, totaling \$62.22, to reach the final overpayment amount of \$738.79. Inasmuch as the \$738.79 overpayment is supported by the record and it is not contested by appellant, the Board finds that appellant received an overpayment in this amount.

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

Section 8129(a) of the Federal Employees' Compensation Act<sup>1</sup> provides that where an overpayment of compensation has been 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 an individual is entitled. Section 8129(b) describes the only exception to the Office's right to adjust later payments or to recover overpaid compensation:

“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.”<sup>2</sup>

In its September 14, 1998 decision, the Office found that appellant was not at fault in the creation of the overpayment that occurred. The fact that an individual is without fault in the matter of an overpayment, however, does not, by itself, preclude the Office from adjusting later payments or recovering the overpayment. Section 8129(b) prohibits adjustment or recovery when the individual is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience. The guidelines for determining whether adjustment or recovery would defeat the purpose of the Act or be against equity and good conscience are respectively set forth in sections 10.322 and 10.323 of Title 20 of the Code of Federal Regulations.

Section 10.322(a) provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and if the individual's nonexempted assets do not exceed a resource base of \$3,000.00 or \$5,000.00 if the individual has a spouse or one dependent.<sup>3</sup> Section 10.323 provides that recovery of an overpayment is considered to be against equity and good conscience if the overpaid individual was not entitled to benefits and would experience severe financial hardship in attempting to repay the debt, with “severe

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Id.* at § 8129(b).

<sup>3</sup> 20 C.F.R. § 10.322(a).

financial hardship” determined by the same criteria set forth in section 10.322, or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his position for the worse.<sup>4</sup>

The Form OWCP-20 overpayment recovery questionnaire is designed to obtain the financial information necessary to determine whether adjustment or recovery would defeat the purpose of the Act. When the Office issued its preliminary determination on May 27, 1997 it explained the need for financial information and requested that appellant complete and submit an attached overpayment recovery questionnaire together with supporting financial documentation. Appellant requested waiver and a hearing on June 27, 1997 but thereafter submitted no supporting financial documentation verifying the information on his overpayment recovery questionnaire. The Office scheduled a hearing on July 6, 1998, but appellant failed to attend and he never submitted any financial documentation supporting the information on his overpayment recovery questionnaire. Although appellant is without fault in the matter of the overpayment, he nonetheless bears responsibility for providing the financial information necessary to support his request to waive recovery of the overpayment. Section 10.324 of Title 20 of the Code of Federal Regulations states in this regard:

“In requesting waiver of an overpayment, either in whole or in part, the overpaid individual has the responsibility for providing the financial documentation described in section 10.322 as well as such additional information as the Office may require to make a decision with respect to waiver. Failure to furnish the information within 30 days of request shall result in the denial of waiver and no further requests for waiver shall be entertained until such time as the requested information is furnished.”<sup>5</sup>

Whether to waive an overpayment of compensation is a matter that rests within the Office’s discretion pursuant to statutory guidelines.<sup>6</sup> The Board has long held that when a claimant fails to provide the financial evidence necessary to support his request for waiver, the Office commits no abuse of discretion in denying that request.<sup>7</sup> Accordingly, the Board finds that the Office did not abuse its discretion in refusing to waive recovery of the overpayment in the present case.<sup>8</sup>

The Board further finds that the Office properly determined that appellant abandoned his request for a hearing before the Office hearing representative.

Section 8124(b) of the Act<sup>8</sup> provides claimants under the Act a right to a hearing if they request a hearing within 30 days of the Office’s decision. Under section 10.137<sup>9</sup> of the

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<sup>4</sup> *Id.* at § 10.323.

<sup>5</sup> 20 C.F.R. § 10.324.

<sup>6</sup> *See William J. Murphy*, 40 ECAB 569 (1989).

<sup>7</sup> *E.g., Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986); *Joseph H. Light*, 13 ECAB 358 (1962).

<sup>8</sup> 5 U.S.C. § 8124.

applicable regulations a scheduled hearing may be postponed upon written request of a claimant or his representative if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. If a claimant fails to appear at a scheduled hearing, he has 10 days after the date of the scheduled hearing to request that another hearing be scheduled. Where good cause for the failure to appear is shown, a second hearing will be scheduled.

In this case, appellant failed to appear for a hearing. The hearing was scheduled for July 6, 1998. Appellant did not request a postponement of the hearing more than three days prior to the scheduled date of the hearing. He also did not provide any explanation within 10 days of the scheduled date of the hearing for his failure to appear. Accordingly, the Office properly determined that appellant had abandoned his request for a hearing.

The decisions of the Office of Workers' Compensation Programs dated September 14 and August 29, 1998 are hereby affirmed.

Dated, Washington, D.C.

June 1, 2000

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>9</sup> 20 C.F.R. § 10.137.