

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLARD S. MOGER, JR. and DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD, Norfolk, VA

*Docket No. 99-1798; Oral Argument Held May 17, 2000;
Issued June 15, 2000*

Appearances: *Robin M. Nelhuebel*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$25,000.00 because he claimed and received compensation benefits for the period immediately following his retirement and had received separation incentive pay in the amount of \$25,000.00; (2) whether appellant was without fault in the creation of the overpayment such that he was entitled to waiver of recovery of the overpayment; (3) whether the Office properly denied waiver of recovery of the overpayment; and (4) whether the Office abused its discretion in determining that repayment would be made by withholding \$1,000.00 per month from appellant's continuing compensation benefits.

On March 30, 1989 the Office accepted that appellant, a nuclear staff employee, developed bilateral pulmonary asbestosis in the performance of his duties, causally related to exposures in his federal employment. Appellant continued in his employment with the employing establishment until September 30, 1995, when he retired and accepted an irrevocable early out separation incentive payment of \$25,000.00. Appellant thereafter received retirement benefits under the auspices of the Office of Personnel Management.

However, on November 25, 1996 appellant applied for and received benefits under the Federal Employees' Compensation Act,¹ noting the effective date of his election as October 1, 1995.

On October 15, 1997 the Office determined that an overpayment had been created in the case amounting to \$25,000.00 as appellant had accepted compensation for the period, in which

¹ 5 U.S.C. §§ 8101-8193.

he had received a separation incentive payment of \$25,000.00. The Office indicated that under 5 U.S.C. § 8116(a), lump-sum separation payments are not included in the categories of payments, which may be made concurrently with compensation payments. The Office noted that, once the employing establishment advised the Office of the total dollar amount of separation pay and the date of separation or retirement, this amount should be applied to the amount of compensation for wage loss on a dollar-for-dollar basis. The Office indicated that this was not done in appellant's case. The Office found, however, that appellant could not reasonably have known that he was overpaid because it was the Office's responsibility to ensure that money received from any separation incentive was applied to the amount of compensation payable for wage loss on a dollar-for-dollar basis. Therefore, the Office determined that appellant was without fault in the creation of the overpayment of compensation.

Appellant requested a prerecoumpment hearing which was held on October 19, 1998. By decision dated December 28, 1998, an Office hearing representative found that an overpayment in the amount of \$25,000.00 had been created by appellant's receipt of dual benefits following his September 30, 1995 retirement, as he received a \$25,000.00 separation incentive payment following his September 30, 1995 retirement and thereafter also elected to receive compensation benefits for wage loss beginning October 1, 1995. The hearing representative found that appellant was not at fault in the creation of the overpayment, such that he could be entitled to waiver of recovery of the overpaid amount if he met the criteria set forth in 5 U.S.C. § 8129(b). The hearing representative further found, however, that appellant did not meet the waiver criteria, as the evidence he submitted in the Overpayment Recovery Questionnaire reflected that he had a monthly income of \$5,001.00 with monthly expenses of \$3,253.00, such that there was a monthly surplus of \$1,748.00 available after his ordinary and necessary living expenses were taken care of, from which to collect the overpayment. The hearing representative determined that appellant had not presented evidence supporting that recovery of the overpayment would cause financial hardship of a nature sufficient to justify waiver and found that the overpayment would be recovered by withholding \$1,000.00 per month from appellant's continuing compensation benefits.

By letter dated March 12, 1999, appellant requested reconsideration of the December 28, 1998 decision. By letter dated March 24, 1999, his designated representative argued that waiver of recovery was appropriate as, under 20 C.F.R. § 10.437 (1999), recovery would be against equity and good conscience as appellant gave up a valuable right, his federal employment, "in reliance upon the payments."

By decision dated April 21, 1999, the Office denied modification of the December 28, 1998 overpayment decision. The Office noted that 20 C.F.R. § 10.437 (1999), regarding under what circumstances recovery of an overpayment would be against equity and good conscience, applied to reliance upon payments of compensation under the Act, not the payment of a separation incentive by an employing establishment, such that this section was not applicable in appellant's case. The Office noted that appellant's separation date was effective September 30, 1995 and the separation payment of \$25,000.00 was issued for the period commencing October 1, 1995, which overlapped the period for which appellant elected to receive compensation for wage loss.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$25,000.00 due to his dual receipt of separation or early retirement incentive pay and compensation benefits for total disability.

Appellant elected to receive compensation for total disability for the period commencing October 1, 1995. The record establishes he also received separation pay in the amount of \$25,000.00 during that period, following his voluntary retirement from the employing establishment on September 30, 1995. FECA Bulletin No. 96-2 defines separation pay as a “buyout” offered by an employer to encourage employees to leave federal employment voluntarily. The FECA Bulletin further provides that a claimant may not concurrently receive separation pay and payment for total disability, stating that “[t]he employing establishment should advise the Office of the total dollar amount of the separation pay and the date of the separation or retirement. This amount should be applied to the amount of compensation for wage loss on a dollar-for-dollar basis.”²

On appeal appellant asserts that because he actually received only the after-tax portion of his \$25,000.00 separation amount, to require him to repay the entire \$25,000.00 plus interest was inequitable. However, as the Office procedures clearly provide for a dollar-for-dollar offset, the Office properly determined that appellant received an overpayment of compensation in the amount of \$25,000.00 due to his receipt of dual benefits.³

The Board further finds that the Office properly denied waiver of recovery of the overpaid compensation.

Section 8129 of the Act⁴ provides that an overpayment of compensation must be recovered 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 would be against equity and good conscience. Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then 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.”⁵

Section 10.322(a) of the implementing regulations⁶ 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

² See FECA Bulletin No. 96-2 (issued November 5, 1995); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17 (April 1996), codified as current 20 C.F.R. § 10.421 (effective January 4, 1999).

³ See *Charles J. Hughes*, Docket No. 98-1490 (issued February 4, 2000).

⁴ 5 U.S.C. § 8129.

⁵ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

⁶ 20 C.F.R. § 10.322(a) (1998).

compensation benefits, to meet current ordinary and necessary living expenses; 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 additional dependent. This base includes all of the individual's assets not exempt from recoupment.⁷

The Board has held that subsections (1) and (2) of 20 C.F.R. § 10.322(a) are meant to be read conjunctively and that a claimant must meet both conditions before recovery will defeat the purpose of the Act.⁸ Consequently, to establish that recovery would defeat the purpose of the Act, a claimant must show that he needs substantially all of his income to meet current and ordinary living expenses and also that his assets do not exceed the applicable resource base.

In the instant case, the Office determined that appellant was without fault in the creation of the overpayment of compensation. The Office, therefore, properly examined whether recovery of the overpayment would defeat the purpose of the Act. Under these circumstances, the Board finds that recovery of this overpayment will not defeat the purpose of the Act because the evidence does not establish that financial hardship would occur considering both under both subsections (1) and (2) of 20 C.F.R. § 10.322(a).⁹ Upon evaluating the evidence, the hearing representative noted that appellant's monthly income exceeded his monthly expenses by \$1,748.00; the evidence, therefore, fails to establish that any financial hardship would result under the applicable subsections. Additionally, the Board notes that appellant listed assets in excess of \$5,000.00; specifically that he and his wife had \$30,100.00 in checking and savings and \$36,000.00 in stocks and bonds, for a total of \$66,100.00 in available assets. This resource base clearly exceeds that stipulated as the maximum allowable for a claimant with dependent, in order to defeat the purpose of the Act. Therefore, appellant has not demonstrated that recovery would defeat the purpose of the Act as is required for waiver.

With respect to whether recovery would be against equity and good conscience, section 10.323(b) of the implementing regulations provides that "[r]ecovery 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 will be made, relinquished a valuable right or changed his position for the worse."¹⁰ As noted above, this clause is not applicable in this case as the reliance identified and contemplated under the instant regulations, is reliance upon payments of compensation under the Act and not reliance upon an employing establishment separation incentive. Appellant asserts that he opted for early retirement in reliance on receipt of the \$25,000.00 separation incentive, but that reliance is not the reliance which is cognizable under the applicable sections of the Act and its implementing regulations. As appellant did not file for workers' compensation benefits under the Act until November 25, 1996, more than a year after he opted for early retirement, he cannot show reliance on any payment of compensation in his making the decision to accept the separation incentive and to retire. The issue of an

⁷ *Robert F. Kenney*, 42 ECAB 297 (1991).

⁸ *See William Phillips, Jr.*, 39 ECAB 330 (1987).

⁹ *See also* 20 C.F.R. § 10.436 (1999).

¹⁰ 20 C.F.R. § 10.323(b) (1999). *See also* 20 C.F.R. § 10.437 (1999).

overpayment did not arise in this case until appellant's claim was accepted by the Office and his election to receive compensation benefits effective October 1, 1995. Had appellant elected to receive compensation benefits following the period in which he received the separation pay, no overpayment would have been created by receipt of dual benefits. Therefore, appellant cannot show that, on September 30, 1995, when he received the \$25,000.00 early retirement amount, he accepted his early retirement package in reliance on erroneous compensation, which formed the basis for the overpayment. As appellant has not shown that recovery would "defeat the purpose of the Act" or would "be against equity and good conscience" the Board finds that the Office properly denied waiver of recovery of the overpayment.

The Board also finds that the Office properly required repayment by withholding \$1,000.00 from appellant's monthly continuing compensation.

The Office's implementing regulations provide:

"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."¹¹

The record establishes that appellant has \$1,748.00 per month discretionary income. The hearing representative carefully evaluated the financial information of record regarding his income and expenses, which established a substantial monthly surplus, in addition to financial assets and resources adequate to enable appellant to repay the overpayment in a lump sum if desired and avoid accrual of further interest on the money owed. Therefore, the Board finds that the Office did not abuse its discretion in deciding to withhold \$1,000.00 per month from appellant's continuing compensation in order to facilitate recovery of the overpayment.

¹¹ 20 C.F.R. § 10.321(a) (1998). *See also* 20 C.F.R. § 10.441(a) (1999).

The decisions of the Office of Workers' Compensation Programs dated April 21, 1999 and December 28, 1998 are affirmed.

Dated, Washington, D.C.
June 15, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member