

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BILLY L. DURHAM and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, Fort Worth, TX

*Docket No. 99-978; Submitted on the Record;  
Issued November 30, 2000*

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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 appellant received an overpayment of compensation benefits in the amount of \$64,188.31 for the period August 13, 1981 through February 28, 1998; (2) whether the Office properly denied appellant's request for waiver of recovery of the overpayment and (3) whether the Office properly determined that \$1,000.00 should be withheld from appellant's continuing compensation checks to recover the overpayment.

The Office accepted appellant's claim for manic depressive illness and has made periodic compensation payments to appellant since December 6, 1979. In a preliminary determination dated March 20, 1998, the Office found that appellant received an overpayment of \$64,188.31 because he was paid at an incorrect pay rate for his loss of wage-earning capacity from August 13, 1981 through February 28, 1998. The Office found that appellant was without fault in the matter of the overpayment. The Office informed appellant that he should provide information regarding his income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of the Federal Employees' Compensation Act to recover the overpayment.

By letter dated April 17, 1998, appellant requested waiver of the overpayment, stating that since there were no actual records of the original calculations, he could not "help but have some doubt of the accuracy of the new amount." He stated that there might have been a factor involved in 1979 that was unknown today. Appellant also stated that considering his and his wife's age, it would "definitely be a financial hardship and would be against equity and good conscience" to recover the overpayment. Appellant submitted the Overpayment Recovery Questionnaire, Form OWCP-20, dated April 17, 1998, showing his financial status including his income and expenses.

By decision dated December 16, 1998, the Office finalized the preliminary determination and determined that \$1,000.00 should be withheld from appellant's compensation payments effective December 6, 1998.

The Board finds that the Office properly determined that appellant received an overpayment of compensation benefits in the amount of \$64,188.31.

In the March 20, 1998 preliminary determination, the Office noted that on July 6, 1979 it found that the position of management trainee fairly and reasonably represented appellant's wage-earning capacity based on his ability to earn \$230.00 in the position. The Office stated that compensation for partial disability was paid retroactively to May 13, 1976, which was the effective date of appellant's election of Act benefits instead of a retirement annuity. The Office stated that by decision dated March 2, 1998, the Branch of Hearings and Review found that in 1979 the Office incorrectly calculated the amount of compensation according to the *Shadrick*<sup>1</sup> formula. The Office stated that the Office incorrectly determined that the current pay rate for appellant's job and step when injured effective July 6, 1979 was \$831.69 and incorrectly paid appellant \$429.38 as of August 3, 1973, the date when the disability began. The Office stated that the correct current pay rate and step for appellant's job when injured was \$642.60 and the Office commenced the correct payment rate of \$461.31 as of March 2, 1998.

The Office further stated that, based on a computer printout list of all compensation payments made to appellant since August 13, 1981 when manual records were computerized, the usual overpayment procedures were to be applied for the period May 13, 1976 to the present. The Office stated that the amount of overpayment from May 13, 1976 through August 12, 1981 could not be determined because the manual records which existed were inadequate to determine the specific amount of compensation paid to appellant. However, the amount of the overpayment could be determined for the period August 13, 1981 through February 28, 1998. An attached disability benefits payment worksheet, Form CA-25, showed how the Office made its calculation. Computer printout sheets from the Employment Standards Administration supported the Office's findings of the compensation payments made to appellant from August 13, 1981 through February 28, 1998. Other supporting documents were an Office memorandum dated March 2, 1998 from the Office hearing representative to the district Director and a printout of a wage-earning capacity report. The Office hearing representative's finding that an overpayment in the amount of \$64,881.31 from August 13, 1981 through February 28, 1998 is supported by the evidence of record and, therefore, is proper.

The Board further finds that the Office properly denied waiver of recovery of the overpayment in the amount of \$64,881.31.

Section 8129(a) of the Act<sup>2</sup> 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

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<sup>1</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>2</sup> 5 U.S.C. § 8129(a).

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 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>3</sup>

With respect to whether recovery of the overpayment would be against equity and good conscience, section 10.323(b) of the Office’s regulations<sup>4</sup> provides:

“Recovery of an overpayment is considered to be inequitable and against good conscience when an individual in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse.... To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely on reliance on the payments or on the notice of payment. To establish that the individual’s position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss.”

In this case, the Office found that appellant was not at fault in the creation of the overpayment of compensation. Regarding waiver, the evidence does not show that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpayment. Section 10.322(a) of the Office’s regulations<sup>5</sup> provides that recovery of an overpayment would 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 or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (2) 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. This base includes all of the claimant’s assets not exempted from recoupment. Section 10.322(d) states:

“Assets—cash on hand, the value of stocks, bonds, savings accounts, mutual funds and the like; and (2) Nonliquid Assets—the fair market value of property such as a camper, second home, extra automobile, jewelry, etc. Assets for these purposes shall not include the value of household furnishings, wearing apparel, family automobile, burial plot or prepaid burial contract, a home which the person maintains as the primary family domicile, or income producing property if the income from such property has been included in comparing income and expenses.”

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<sup>3</sup> 5 U.S.C. § 8129(b); *Blaine E. Bedeger*, 48 ECAB 418, 420-21 (1997).

<sup>4</sup> 20 C.F.R. § 10.323(b).

<sup>5</sup> 20 C.F.R. § 10.322(a).

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 to not exceed the resource base of \$3,000.00.<sup>6</sup>

In the December 16, 1998 decision, based on appellant’s Recovery Overpayment Questionnaire dated April 17, 1998, the Office considered that appellant’s monthly expenses totaled \$6,413.86 consisting of \$253.00 in Social Security benefits, appellant’s wages of \$320.00, his wife’s wages of \$1,231.00, other income of \$1,900.00 and compensation benefits of \$2,709.86. The Office also considered that appellant’s monthly income totaled \$3,464.00 consisting of \$788.00 in mortgage or rent, \$700.00 in food, \$300.00 in clothing, \$480.00 in utilities and other expenses of \$1,195.00. Appellant had four houses. He sold two, each for \$60,000.00 with no mortgages, sold the third house for \$52,000.00 with a \$35,000.00 mortgage and the fourth house, in which he resides, had a listed value of \$113,000.00. The value of the four houses was \$250,000.00. Appellant also had \$1,200.00 in cash on hand, \$18,975.00 in checking accounts, \$8,026.00 in a savings account, \$65,030.00 in stocks and bonds and an IRA annuity worth \$48,641.00. Further, on Form OWCP-20, appellant indicated that he had furnishings and tools worth \$50,000.00.

The Office found that appellant’s monthly income of \$6,413.86 exceeded his monthly expenses of \$3,463.00 by \$2,950.86 and that, after deducting \$5,600.00 [representing appellant’s status as a married individual with a dependent] from appellant’s checking account balance, appellant had sufficient funds to pay the entire overpayment. The Office concluded that the evidence did not support that appellant would suffer any financial hardship in having to repay the overpayment.

The Office correctly determined that appellant’s monthly income of \$6,413.86 exceeded his monthly expenses of \$3,463.00 by \$2,950.86. The Office also correctly determined that appellant’s assets significantly exceed the \$5,600.00 resource bases. Although the value of appellant’s home where he lived in the amount of \$113,000.00 and the value of his furniture and tools do not constitute assets under the Act, the other assets appellant listed totaled \$270,926.26 consisting of \$137,000.00 for his three homes and \$133,926.26 for other funds. Appellant’s assets of \$270,926.26, therefore, exceed his resource base of \$5,600.00. The Office’s finding that appellant did not establish that he is entitled to waiver of the recovery of the overpayment is proper under the Act.

The Board also finds that the Office properly deducted \$1,000.00 from appellant’s monthly compensation payment.

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.”

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<sup>6</sup> *James Lloyd Otte*, 48 ECAB 334, 338 (1997).

In the present case, the Office considered the difference between appellant's monthly income and expenses and the amount of appellant's assets and determined that \$1,000.00 was a reasonable amount to deduct from appellant's continuing compensation payment as the amount would not appear or cause a financial hardship on appellant and his family. The Board finds that in determining this repayment schedule, the Office rendered due regard to the factors set forth in section 10.321 and that the repayment schedule was not unreasonable under the circumstances.<sup>7</sup>

The decision of the Office of Workers' Compensation Programs dated December 16, 1998 is hereby affirmed.

Dated, Washington, DC  
November 30, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>7</sup> *James Lloyd Otte, supra* note 6; *see Forrest E. Brown, II*, 44 ECAB 278, 286 (1992).