

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REGINALD L. KIRKLAND and U.S. POSTAL SERVICE,
POST OFFICE, Macon, GA

*Docket No. 99-1442; Submitted on the Record;
Issued November 9, 2000*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$7,134.40 occurred; and (2) whether the Office properly denied appellant's request for waiver of recovery of the overpayment.

The Office accepted appellant's claim for right shoulder impingement and left rotator cuff tear. He was unable to work as of approximately August 4, 1994 and received compensation until November 11, 1995 when he was terminated due to his refusal of suitable employment. In the preliminary determination dated June 13, 1996, the Office found that appellant received an overpayment of \$7,134.40 because appellant continued to receive compensation from November 12, 1995 through March 2, 1996 after his benefits were terminated due to his refusal of suitable employment. The Office found that appellant was at fault in the creation of the overpayment because a compensation order was issued on October 20, 1995 informing him that he was not entitled to compensation effective November 12, 1995 and therefore he should have known he should not accept checks after that date.

On July 5, 1996 appellant requested a prerecoupment hearing before an Office hearing representative which was held on April 15, 1997.

By decision dated June 18, 1997, the Office hearing representative modified the Office's June 13, 1996 preliminary finding to reflect that appellant was without fault in the creation of the overpayment. The Office found that based on Forms CA-1032 dated October 24, 1994 and October 31, 1995 which the Office sent appellant informing him that continuing compensation would be decided based on the information submitted, it was reasonable for appellant to believe that he was entitled to compensation from the submission of those forms. The Office hearing representative found that the Office did not meet its burden to establish that appellant knew or should have known that he was not entitled to continuing compensation. The Office hearing

representative also found that waiver of the recovery of the overpayment was not warranted and ordered appellant to repay the Office \$300.00 per month until the overpayment was recovered.

Appellant subsequently requested reconsideration of the Office's decision on July 11 and November 11, 1997. By decisions dated August 27 and November 25, 1997, the Office denied appellant's request for modification. Further, in the November 25, 1997 decision, the Office noted that an appeal right to request reconsideration were erroneously issued with the June 18 and August 27, 1997 decisions since appellant was not entitled to request reconsideration after the issuance of a final overpayment decision but nonetheless stated it would review the record since the Office erred in issuing incorrect appeal rights. The Office stated, however, that appellant had no further rights to reconsideration but could appeal the decision to the Board.

In a memorandum of a conference between appellant and the Office dated January 5, 1999, the Office considered whether the overpayment should be written off due to extreme financial hardship and, if not, whether the monthly recovery payment of \$300.00 should be reduced based on appellant's inability to pay that amount.

By decision dated February 4, 1999, the Office reduced appellant's monthly recovery payment to \$100.00, stating that it had reviewed appellant's record and financial standing and had decided to reduce the payment amount deducted from his Office of Personnel Management (OPM) annuity.

The Board finds that appellant received an overpayment in the amount of \$7,134.40.

By decision dated October 20, 1995, the Office terminated appellant's compensation benefits effective November 12, 1995 for his refusal to accept suitable work. Appellant continued to receive compensation benefits, however, after the cutoff date, and using computer printout sheets, the Office determined that an overpayment in the amount of \$7,134.40 occurred from November 12, 1995 through March 2, 1996. The Office's determination is proper.

The Board finds that the case is not in posture for decision on the issue of whether appellant is entitled to a waiver of recovery of the overpayment.

Section 8129(a) of the Act¹ 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 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."²

¹ 5 U.S.C. § 8129(a).

² 5 U.S.C. § 8129(b).

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the office to waive the overpayment.³ 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 10.434 through 10.437 of the implementing federal regulations.

Section 10.436⁴ provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses and the beneficiary’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 \$3,000.00.⁵

In determining that appellant was not entitled to waiver of the overpayment, the Office hearing representative determined that appellant’s monthly income totaled \$4,826.28 and his monthly expenses were \$2,307.00. She also found that appellant had \$350.00 in liquid assets and \$3,500.00 in nonliquid assets. The Office hearing representative based her determination of appellant’s monthly income on \$1,102.60 appellant received per month from a private employer, \$208.33 monthly income from a family farm, \$10,836.33 per month from OPM for disability retirement, and \$2,432.00 per month from Kirkland Auto Sales. Appellant submitted a letter showing that his monthly expenses were \$2,307.00. At the hearing, he testified that in his checking and savings accounts he had approximately \$50.00 and his second car had a market value of \$3,500.00. However, it was not clear how the Office obtained the figure of \$2,432.00 from Kirkland Auto Sales.⁶ Appellant’s records from Kirkland Auto Sales showed that he suffered a loss of \$5,555.50.

In his July 11, 1997 request for reconsideration, appellant alleged that the Office hearing representative failed to account for his expenses involved in maintaining the farm consisting of \$6,000.00 in the amount of principal and interest (or \$2,000.00 when divided by 3) and the cost of the machinery \$720.00 (or \$240.00 when divided by 3) which yielded only a \$260.00 profit to him. He contended that he did not have a resource base of \$3,500.00 because his 1990 Ford van had a market value of \$1,500.00 and his 1984 Cadillac had a market value of \$1,200.00 so that his total resource base was \$2,700.00. Appellant further contended that he did not have an

³ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

⁴ 20 C.F.R. § 10.436.

⁵ *James Lloyd Otte*, *supra* note 3; *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

⁶ The figure of \$10,836.33 for appellant’s monthly income from OPM is clearly a misprint because otherwise appellant’s total income would far exceed the total monthly income of \$4,826.28 which the Office hearing representative calculated. It appears that the Office hearing representative meant \$1,083.33 for the monthly income from OPM because that figure is the proper amount to equal the total monthly income of \$4,826.28. At the hearing appellant testified that his annual gross income from OPM was \$13,000.00 or \$1,083.33 a month.

income of \$2,432.00 from Kirkland Auto Sales because he lost money when he sold the cars and additionally paid interest on the bank loans to purchase the cars causing him a greater financial loss. Appellant submitted documents showing he paid his bank a total of \$4,530.53 in interest in 1996 for his personal account, Kirkland Farms and Kirkland Auto Sales. He submitted documents of his car sales.

The Office denied appellant's request for modification in its August 27, 1997 decision.

With his November 11, 1997 request for reconsideration, submitted a copy of his 1996 income tax return, reiterated his contention that the Office erred in finding that he had an income of \$2,432.00 from Kirkland Auto Sales when in truth he had a loss. Appellant also stated that he was unable to work since September 1997 due to a shoulder condition and therefore he no longer earned \$1,102.60 from a private employer and stated that his only monthly income was \$1,113.12 from OPM. Appellant's 1996 tax return showed that due to a large business loss, his total adjusted gross income was negative \$10,284.00. He had tax exempt interest of \$260.00.

By letter dated February 4, 1998 appellant requested reconsideration of the Office's decision, and requested waiver of recovery of the overpayment stating that he was unable to pay his debts, he had to refinance his home, and his only income was the monthly payment of \$896.30 from OPM. He stated that he continued to be treated for his shoulder and he was hospitalized twice for major depression in January and May 1996. Appellant submitted an overpayment recovery questionnaire dated February 4, 1998 stating that his income from OPM was \$896.30 a month and he had \$66.50 a month income from rental property. It also showed that he had over \$700.00 in expenses and that he refinanced his home resulting in a new loan of \$43,000.00. By letter dated November 16, 1998, the Office informed appellant that he was not entitled to a request for reconsideration pursuant to the November 25, 1997 decision.

In the January 5, 1999 telephone conference, the Office, represented by the senior claims examiner, attempted to clarify some of the issues raised by appellant's last request for reconsideration. The Office stated that appellant said that he received a gross payment of \$1,142.00 per month from OPM but after deductions for optional life insurance, basic life insurance and federal income tax, his net payment from OPM was \$896.30 per month. Appellant stated that he did not list the property on which he received rental income of \$66.50 a month as an asset because he had only a partial interest in the property which he shared with his siblings and therefore could not liquidate the property. Appellant told the Office that he sold his 1984 Cadillac for \$1,700.00 at a loss in March 1998 and drove a 1990 Ford van worth approximately \$1,400.00. He also stated that two cars remaining from his failed personal business with Kirkland Auto Sales, a 1984 Mercury and a 1988 Tempo which were worth \$300.00 and \$150.00, were repossessed. Appellant stated that he listed that he spent \$400.00 a month on food because he lived alone and ate out a lot but at the time he only spent \$200.00 a month on food. Appellant told the Office he could not repay the Office after he refinanced his house because he had "hit rock bottom" when he refinanced his house and had no money remaining after his creditors were paid.

In the February 4, 1999 decision, the Office reduced the amount of the recovery of the overpayment from \$300.00 to \$100.00 a month.

In the present case, the Office hearing representative's analysis in the June 18, 1997 decision as to whether appellant's income exceeded his expenses was not proper. In calculating appellant's monthly income, the Office hearing representative relied on the figure of \$1,102.60 representing appellant's monthly income from a private employer, \$208.33 monthly income from the family farm, \$10,836.33 per month from OPM (actually \$1,083.33), and \$2,432.00 per month from Kirkland Auto Sales, which totaled \$4,826.28. The figure of \$2,432.00 from Kirkland Auto Sales, however, is not supported by evidence in the record.

In his subsequent requests for reconsideration and in the January 5, 1999 telephone conference, appellant stated or submitted documentation to show that he received a net payment from OPM of \$896.30 per month, that the figure of \$66.50 he listed on the overpayment recovery questionnaire represented his share of a partial interest in property he shared with his siblings and per an affidavit submitted by an experience car salesman dated July 9, 1997, he had one car (having sold his 1984 Cadillac at a loss), a 1990 Ford van, with market value approximately of \$1,400.00, and had repossessed two cars remaining from his Kirkland Auto Sales with a market value total of \$450.00. Appellant stated that he had over \$700.00 in expenses. Further, his 1996 tax return showed that total adjusted gross income was negative \$10,284.00 and he had tax exempt interest of \$260.00 which appeared to represent the profit he made in running a farm which he did with his family.

Section 20 C.F.R. § 10.126 states that the Office's decision "shall contain findings of fact and a statement of reasons." The absence of the appropriate findings of facts and statement of reasons on the relevant issues precludes the Board's review of the Office's decision.⁷ In the June 18, 1997 decision, the Office hearing representative's failure to give reasons for how she obtained the figure of \$2,432.00 from Kirkland Auto Sales in determining appellant's monthly income precludes the Board's review of the Office's final decision. The Office hearing representative's analysis in that decision was the only analysis of appellant's financial situation in the record. In the subsequent decisions denying appellant's requests for reconsideration dated August 27 and November 25, 1997, the Office did not completely address the specific evidence appellant submitted nor explain how that evidence affected its original determination of appellant's financial status, when clearly appellant was indicating his income and resource base was much less than originally found by the Office, and the data he submitted, if considered, might entitle him to waiver. Specifically, the Office did not explain how it obtained \$2,432.00 income from Kirkland Auto Sales when appellant's records showed he suffered a loss. Further, the Office did not explain why it did not consider the expenses appellant incurred in operating the farm in determining appellant's monthly income from the farm. The subsequent evidence appellant submitted with his requests for reconsideration, if credited, might show that he had less of a resource base than first found by the Office, for instance, because of the sale of his car. The fact that appellant's tax exempt interest was \$260.00 in 1996 which appears to represent the profit he made on the farm requires further analysis by the Office. While appellant did not submit evidence showing that he was unable to work since September 1997, he submitted evidence showing that his income and resource base was less than the Office first found. The case should therefore be remanded for the Office to make the proper analysis of appellant's financial status in determining whether he is entitled to waiver, and cite the specific source of the

⁷ See *Beverly Dukes*, 46 ECAB 1014, 1017 (1995); *James B. Bowers*, 44 ECAB 121, 123 (1992).

information it uses to obtain its figures. It should consider all the relevant evidence appellant submitted of his financial status and cite to the record the sources it uses for obtaining the figures it uses. After any further development as it deems necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated February 4, 1999 is hereby affirmed on the fact and amount of overpayments; the February 4, 1999 decision is vacated and the case is remanded for further consideration on the issue of waiver consistent with this opinion.

Dated, Washington, DC
November 9, 2000

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member