

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RALPH W. KASTLA and DEPARTMENT OF THE AIR FORCE,  
AIR NATIONAL GUARD, KEY FIELD, Meridian, MS

*Docket No. 00-1538; Submitted on the Record;  
Issued April 19, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly found an overpayment of compensation of \$21,144.90 in appellant's schedule award; and (2) whether the Office's refusal to waive recovery of the overpayment constituted an abuse of discretion.

Appellant, a 77-year-old aircraft technician, filed a claim on August 5, 1997 alleging that he developed a loss of hearing due to factors of his federal employment. He stopped work on April 29, 1979. The Office accepted appellant's claim for 39 percent binaural loss of hearing on November 6, 1998. The Office granted appellant a schedule award for 39 percent loss of hearing in both ears on December 16, 1998. The award ran from November 25, 1997 to December 5, 1998 with a pay rate of \$426.45 per week.

On May 3, 1999 the Office made a preliminary finding of overpayment in the amount of \$21,025.14. The Office stated that it had improperly included cost-of-living increases since 1979.<sup>1</sup> The Office found that appellant was without fault in the creation of the overpayment.

On November 12, 1999 the Office issued a corrected finding of overpayment in the amount of \$22,272.29 and again found that appellant was without fault in the creation of the overpayment. The Office stated that from November 25, 1997 through February 28, 1999 appellant was entitled to a schedule award based on \$319.84 per week, in the amount of \$21,063.75. Appellant received a cost-of-living increase on March 1, 1999, which increased his compensation pay rate to \$325.00 per week. The Office stated that appellant's total schedule award should have been \$25,010.18 rather than the \$47,282.47 that he received, resulting in an overpayment of \$22,272.29.

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<sup>1</sup> The Office's regulations provide that where injury does not result in disability but compensation is payable for permanent impairment of a covered function of the body, a beneficiary is eligible for cost-of-living adjustments where the award for such impairment began more than one year prior to the date the cost-of-living adjustment took effect. 20 C.F.R. § 10.420(b).

Appellant submitted an overpayment recovery questionnaire and amendments on December 2, 1999. He stated that he had spent the schedule award payment on home improvements and charitable donations “that would not otherwise been made and would present a hardship to repay.” Appellant requested waiver of the overpayment.

On December 22, 1999 the Office requested additional information regarding the charitable donations to determine if appellant detrimentally relied on the schedule award amount.

Appellant responded on January 3, 2000 and submitted evidence regarding his charitable donations. He stated that he increased his tithing to his church to include the increased income due to the schedule award payment.

By decision dated February 3, 2000, the Office reduced appellant’s overpayment to \$21,144.90 based on his increased charitable contribution and found that appellant was not entitled to waiver of the overpayment due to the amount in his credit union account.

The Board finds that the Office properly found an overpayment of compensation of \$22,272.29 as an incorrect pay rate was used in determining his schedule award. Appellant does not contest the fact or amount of the overpayment, but asserts that the overpayment should be waived as he was not at fault in the creation and he detrimentally relied on the overpayment in making renovations to his home and increasing charitable contributions.

The Board finds that the Office properly found that appellant was without fault in the creation of the overpayment and did not abuse its discretion by denying waiver of all 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 payment to which the individual is entitled.<sup>2</sup> 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 10.436 of the implementing regulations<sup>3</sup> provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship to a presently or formerly entitled beneficiary because the beneficiary needs substantially all of his or her

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<sup>2</sup> 5 U.S.C. § 8129(a).

<sup>3</sup> 20 C.F.R. § 10.436.

current income, including compensation benefits, to meet current ordinary and necessary living expenses and the individual's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.

For waiver under this 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.<sup>4</sup>

In this case, an overpayment recovery questionnaire indicated that appellant and his wife had a monthly income of \$3,325.13 and monthly expenses of \$3,190.60. Appellant has a surplus of \$134.53 per month. He also indicated that he had assets in the amount of \$35,003.20 including cash, a checking account and a credit union account. Appellant also stated that he had made home improvements in the amount of \$18,112.94 and charitable contributions in the amount of \$3,900.00. He submitted a letter from his church indicating that his contributions increased from \$4,095.00 in 1998 to \$6,085.00 in 1999.

The information submitted by appellant does not establish that he met either of the above tests for waiver of overpayment as his income exceeds his debt by more than \$100.00 per month and as he has assets of at least \$35,003.20.

Section 10.437 of the implementing regulations provides that recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when any individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. In making such a decision, the Office does not consider the individuals current ability to repay the overpayment.

In this case, appellant alleged that he changed his position for the worse in reliance on the payment. He asserted that he increased his charitable contribution to his church by \$3,900.00 and that he made improvements to his home in the amount of \$18,112.94.

The regulations provide that in order to establish that an 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.<sup>5</sup>

The Office determined that making renovations to his home did not result in a loss for appellant. The Office noted that appellant had increased the value or comfort of his home and that appellant indicated that he could recover the cost of these renovations if he sold his home. The Board has held that conversion of the overpayment into a different form from which the claimant derived some benefits does not constitute loss.<sup>6</sup> Therefore, the Office acted within its discretion.

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

<sup>5</sup> 20 C.F.R. § 10.437.

<sup>6</sup> *Jorge O. Diaz*, 51 ECAB \_\_\_\_ (Docket No. 97-334, issued October 13, 1999).

The Office also found that appellant had increased his charitable contribution in reliance on the overpayment of compensation. The Office determined that appellant increased his contribution by \$2,400.00 over the prior year. The Office determined that appellant had received a 47 percent overpayment of compensation and it would be equitable to reduce his overpayment recovery by 47 percent of the increased charitable contribution or \$1,128.00. The Office therefore reduced appellant's overpayment from \$22,272.29 to \$21,144.90.

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>7</sup>

In this case, appellant has submitted no evidence that the Office abused its discretion by refusing to reduce his overpayment to reflect a greater percentage of his charitable contribution. Therefore, the Board finds that the Office did not abuse its discretion by reducing appellant's overpayment based on a percentage of his increased charitable contribution.

With respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases whether the Office seeks recovery from continuing compensation benefits under the Act. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the Office's recovery of an overpayment under the Debt Collection Act.<sup>8</sup>

The February 3, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
April 19, 2001

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

Priscilla Anne Schwab  
Alternate Member

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<sup>7</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

<sup>8</sup> *See Lewis George*, 45 ECAB 144, 154 (1993).