

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD SCARPATO and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

*Docket No. 01-53; Submitted on the Record;
Issued August 30, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant received a \$385.72 overpayment of compensation from June 1 to July 15, 2000; and (2) whether the Office of Workers' Compensation Programs properly determined that the overpayment was not subject to waiver.

On October 2, 1997 appellant, then a 35-year-old letter carrier, sustained an injury to his back. The Office accepted appellant's claim for the conditions of lumbar strain and herniated nucleus pulposus. The Office began payment of compensation at the augmented rate of three-fourths of appellant's pay,¹ on the basis that his spouse qualified as an eligible dependent.

By EN-1032 form, which the Office received on July 21, 2000, appellant notified the Office that his divorce became final on June 1, 2000.

The Office changed appellant's compensation to the two-thirds rate effective July 16, 2000.

By letter dated August 18, 2000, the Office made a preliminary determination that appellant received an overpayment of compensation of \$385.72 for June 1 through July 15, 2000 because due to his divorce, appellant had no eligible dependents and was entitled to compensation at the statutory rate of two-thirds effective June 1, 2000. The record reveals, however, that appellant received compensation at the three-fourths rate, for which he was found to be without fault. The Office informed appellant of the circumstances under which the overpayment could be waived and asked appellant to submit information regarding his financial circumstances and complete an overpayment recovery questionnaire.

By decision dated September 20, 2000, the Office found that appellant received an overpayment of compensation of \$385.72 for June 1 through July 15, 2000 and that the

¹ See section 8110(a)(1) of the Federal Employees' Compensation Act, 5 U.S.C. § 8110(a)(1).

overpayment was not subject to waiver. The overpayment would be recovered by deducting the entire sum from the next compensation payment.

The Board finds that appellant received an overpayment of \$385.72 for June 1 through July 15, 2000.

The basic statutory rate of compensation paid under the Act² is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, he is entitled to have his basic compensation augmented at the rate of 8 1/3 percent of his monthly pay.³ Under the Act, a wife is considered an employee's dependent if "(a) she is a member of the same household as the employee; (b) she is receiving regular contributions from the employee for her support; or (c) the employee has been ordered by a court to contribute to her support."⁴

In this case, appellant notified the Office by an EN-1032 form, which the Office received on July 21, 2000, that his divorce was final on June 1, 2000. Accordingly, appellant should have been paid compensation at the basic two-thirds rate effective June 1, 2000. Because the Office did not change appellant's compensation rate until July 16, 2000, the period of overpayment is June 1 through July 15, 2000. The Board also finds that the Office properly determined the amount of overpayment as \$385.72.

The Board further finds that the Office acted within its discretion in denying waiver of the overpayment and recovering the entire amount from appellant's next compensation payment.

Section 8129 of the Act⁵ provides that an overpayment 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." (Emphasis added.) 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.⁶

Section 10.436 of the implementing federal regulations⁷ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section and outlines the

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8110(b).

⁴ 5 U.S.C. § 8110(a)(1).

⁵ 5 U.S.C. § 8129(a)(6).

⁶ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

⁷ 20 C.F.R. § 10.436.

specific financial circumstances under which recovery may be considered to “defeat the purpose of the Act.” Section 10.438 of the regulations⁸ provides that in requesting waiver of an overpayment ... the overpaid individual has the responsibility for providing the financial information described in section 10.436, 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 the request shall result in denial of waiver.

Appellant was asked by the Office to provide the necessary financial information by completing the overpayment recovery questionnaire issued on August 18, 2000 if he wanted to request waiver. Appellant, however, did not respond to the preliminary overpayment notification. On appeal, appellant contended that, although his divorce was effective June 1, 2000, he was still responsible for his wife’s support until he received the final decree on July 11, 2000. Appellant, however, provided no evidence of such support or what his responsibilities to the household were. Even had appellant provided such evidence, the Board could not review such evidence for the first time on appeal.⁹

As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act. With respect to whether recovery would be against equity and good conscience, section 10.437(b) of the federal 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 on notice that such payments would be made, relinquished a valuable right or changed his position for the worse.”¹⁰ Appellant has not alleged and the evidence does not demonstrate, that he relinquished a valuable right or changed his position for the worse in reliance on the overpayments. The Office properly denied waiver of recovery of the overpayment.

As appellant failed to submit any current financial information, there was no evidence from which the Office could consider the amount appellant could afford to repay. In the absence of such information, the Office’s decision to recover the full amount of \$385.72 from the next compensation payment was appropriate.¹¹

⁸ 20 C.F.R. § 10.438.

⁹ 20 C.F.R. § 501.2(c).

¹⁰ 20 C.F.R. § 10.437(b).

¹¹ 20 C.F.R. § 10.441(a); see *Nina D. Newborn*, 47 ECAB 132 (1995); *Burnett Terry*, 46 ECAB 457 (1995).

The September 20, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 30, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member