

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RODNEY K. PERKINS and DEPARTMENT OF THE AIR FORCE,  
Fort Sam Houston, TX

*Docket No. 99-2383; Oral Argument Held February 8, 2001;  
Issued August 29, 2001*

Appearances: *Rodney K. Perkins, pro se; Catherine P. Carter, Esq.,  
for the Director, Office of Workers' Compensation Programs.*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$46,350.80; and (2) whether the Office properly determined that appellant was not entitled to a waiver of recovery of the overpayment.

On February 4, 1987 appellant, then a 22-year-old laborer, was struck by an automobile while in the performance of duty. The Office accepted appellant's claim for contusions of the left knee and left hand and cervical and lumbosacral strains. The Office placed appellant on the period compensation rolls and for approximately 12 years following his February 4, 1987 employment injury, appellant continued to receive compensation benefits for total disability.

In a preliminary determination dated October 5, 1998, the Office found that appellant received an overpayment of \$46,350.80. The Office explained that appellant had earnings from employment during the period January 1, 1990 through April 19, 1998 while he continued to receive compensation for total disability. Additionally, the Office found that appellant was without fault in the matter of the overpayment. Appellant requested a waiver of recovery of the overpayment and submitted financial information in support of his request.

By decision dated March 1, 1999, the Office finalized its preliminary determination that appellant received an overpayment of \$46,350.80. Additionally, the Office found that appellant was not entitled to a waiver of recovery of the overpayment. Further, the Office determined that the overpayment would be recovered by deducting \$500.00 per month from appellant's continuing compensation.

On July 7, 1999 appellant filed an appeal with the Board regarding the Office's March 1, 1999 decision.<sup>1</sup> Appellant subsequently requested oral argument, which was held on February 8, 2001.

The Board finds that appellant received an overpayment in the amount of \$46,350.80.

Appellant reported earnings of \$62,211.99 during the period January 1, 1990 through April 19, 1998, which represented average weekly earnings of \$143.68 and he received disability compensation in the amount of \$99,957.34 during the same period. The Office recomputed appellant's entitlement to disability compensation taking into account his average weekly earnings during the period January 1, 1990 through April 19, 1998 and determined that appellant was entitled to \$53,606.54 for the period in question. The difference between the amount previously paid by the Office and the amount appellant was entitled to receive represented an overpayment of \$46,350.80. The Office's determination of the amount of the overpayment is proper and is supported by the evidence of record.

The Board further finds that the Office properly determined that appellant was not entitled to a waiver of recovery of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act precludes recovery of an overpayment 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 be against equity and good conscience.<sup>2</sup>

In this case, the Office found appellant was without fault in the creation of the overpayment. However, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive recovery of the overpayment.<sup>3</sup> Section 10.434 of the implementing regulations specifically provides that if the Office finds that the recipient of an overpayment was not at fault, "repayment will still be required" unless adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.<sup>4</sup>

Pursuant to section 10.436 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: (a) 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

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<sup>1</sup> By decision dated March 30, 1999, the Office reduced appellant's compensation to zero effective April 24, 1999, based upon his failure to undergo vocational rehabilitation as directed. While this decision was issued less than one year prior to the filing of the instant appeal on July 7, 1999, appellant did not specifically request review of the Office's March 30, 1999 decision. Therefore, the Board will not exercise jurisdiction over the Office's March 30, 1999 decision.

<sup>2</sup> 5 U.S.C. § 8129(b); see *James H. Hopkins*, 48 ECAB 281, 287 (1997); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>3</sup> *Marlon G. Massey*, 49 ECAB 650, 652 (1998).

<sup>4</sup> 20 C.F.R. § 10.434 (1999).

expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office based upon data furnished by the Bureau of Labor Statistics.<sup>5</sup>

On appeal, appellant argued that the Office erred in calculating his monthly income and expenses. He further argued that a proper accounting of his reported income and expenses would reveal that he needs substantially all of his current income to meet current ordinary and necessary living expenses. The Office determined that appellant and his wife had a combined monthly income of \$4,057.50. This figure represents appellant's monthly compensation benefits of \$1,224.16 and his spouse's monthly income of \$2,833.33, which was based on a reported annual income of \$34,000.00.<sup>6</sup> Appellant reported 1999 estimated monthly expenses of \$3,996.00. The Office determined that only \$2,739.00 of the total claimed monthly expenses was reasonable and necessary.

An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.<sup>7</sup> In this case, even if the Office allowed all of appellant's claimed 1999 monthly expenses of \$3,996.00, appellant's monthly household income of \$4,057.50 is sufficient to meet his claimed expenses. After deducting his claimed expenses from his monthly household income, appellant would be left with \$61.50 of income. Inasmuch as appellant's monthly household income exceeds his claimed expenses by more than \$50.00, appellant has failed to demonstrate that he needs substantially all of his current income to meet ordinary and necessary living expenses.<sup>8</sup>

Section 10.437 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.<sup>9</sup> Additionally, recovery is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>10</sup> With respect to this latter determination, the individual's current ability to repay the overpayment is not considered.<sup>11</sup>

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<sup>5</sup> 20 C.F.R. § 10.436(a), (b) (1999).

<sup>6</sup> At oral argument, appellant contended that his spouse's monthly income after taxes was \$2,100.00. Appellant initially reported that his spouse earned an annual income of \$34,000.00, which represents an average monthly income of \$2,833.33. As the record is devoid of any documentary evidence regarding the income taxes incurred by appellant's spouse, the Board finds that the Office properly relied on appellant's initial representation in determining his spouse's monthly income.

<sup>7</sup> *Marlon G. Massey*, *supra* note 3.

<sup>8</sup> *Id.*

<sup>9</sup> 20 C.F.R. § 10.437(a) (1999).

<sup>10</sup> 20 C.F.R. § 10.437(b) (1999).

<sup>11</sup> *Id.*

To establish that a valuable right was relinquished, the individual must show that the right was in fact valuable, that it cannot be regained and that the action taken was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>12</sup> And 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>13</sup>

The issue of whether appellant would experience severe financial hardship in attempting to repay the debt has been resolved. As previously noted, appellant failed to demonstrate that he needs substantially all of his current income to meet ordinary and necessary living expenses. Consequently, appellant cannot satisfy the requirements of section 10.437(a). Additionally, there is no evidence in this case nor did appellant allege, that pursuant to section 10.437(b) he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received while working. The Board, therefore, finds that the Office did not abuse its discretion in denying waiver of recovery of the overpayment.

Regarding the method of recovery of the overpayment, section 10.441<sup>14</sup> provides as follows:

“(a) When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account 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 hardship.”

In this case, appellant was receiving continuing compensation at the time of the Office's March 1, 1999 decision. There is no evidence of record that the Office abused its discretion in determining the methods of overpayment recovery.

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<sup>12</sup> 20 C.F.R. § 10.437(b)(1) (1999).

<sup>13</sup> 20 C.F.R. § 10.437(b)(2) (1999).

<sup>14</sup> 20 C.F.R. § 10.441(a) (1999).

The March 1, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
August 29, 2001

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

Priscilla Anne Schwab  
Alternate Member