

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RONNIE M. KING and DEPARTMENT OF THE NAVY,  
NAVAL AIR STATION, Pensacola, FL

*Docket No. 01-654; Submitted on the Record;  
Issued December 10, 2001*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of \$6,162.00 in compensation; (2) whether the Office properly denied appellant's request for waiver of recovery of the overpayment; and (3) whether the Office properly withheld \$666.00 a month from appellant's continuing compensation.

On December 8, 1994 appellant, then a 36-year-old aircraft electrician, grabbed a calibration unit, weighing approximately 100 pounds, that was beginning to fall from a table. Appellant claimed that he sustained a strain to his right wrist and upper arm. Appellant stopped working on February 2, 1995 and returned on February 3, 1995. Appellant's employment was terminated on September 30, 1995 due to a reduction in force.

Appellant underwent surgery on November 27, 1995 with a diagnosis of DeQuervain's tenosynovitis, radial scaphoid impingement of the right wrist and a dorsal ganglion cyst in the right wrist. Dr. Kenneth F. Hill performed a release of the DeQuervain's canal, radial styloidectomy and excision of the dorsal ganglion cyst. The Office accepted appellant's claim for a right wrist and shoulder strain and began payment of temporary total disability compensation effective November 27, 1995. The Office subsequently approved vocational rehabilitation for appellant in drafting and design technology.

In an April 29, 1998 memorandum, the employing establishment informed the Office that appellant had been separated from the employing establishment on September 30, 1995 and began receiving severance pay for a 21-week period. The employing establishment reported that appellant received \$3,792.00 from November 27, 1995 through January 20, 1996 and \$2,844.00 from January 21 through March 2, 1996. The severance period ended on February 24, 1996.

In a June 1, 1999 decision, the Office found that appellant was not entitled to compensation from November 27, 1995 through February 24, 1996 because he was receiving severance pay.

In a June 30, 1999 letter, the Office made a preliminary finding that appellant received a \$6,162.00 overpayment because he received compensation and severance pay for the same period, November 17, 1995 through February 24, 1996. The Office further found that appellant was without fault in the creation of the overpayment. The Office indicated that appellant could seek waiver of recovery of the overpayment if recovery would defeat the purpose of the Federal Employees' Compensation Act<sup>1</sup> of providing at least a subsistence income or would be against equity and good conscience. In a July 15, 1999 response, appellant requested waiver of recovery of the overpayment and an oral hearing.

In an October 20, 1999 decision, the Office found that appellant had been reemployed as a junior analyst/designer effective October 18, 1999. It, therefore, determined that appellant had a 33 percent loss of wage-earning capacity and reduced his compensation accordingly. The Office indicated that appellant's net compensation would be \$666.00 every four weeks.

In a December 21, 1999 decision, the Office found that appellant had a 14 percent permanent impairment of the right arm. The Office indicated that the schedule award would run from December 5, 1999 to October 6, 2000 with a payment of \$2,020.00 every four weeks. It noted that appellant's compensation for a loss of wage-earning capacity would be suspended during this period.

The hearing was conducted on June 27, 2000. In an October 4, 2000 decision, the Office hearing representative found that appellant had received a \$6,162.00 overpayment of compensation. He denied waiver of recovery of the overpayment and directed that the overpayment be recovered by withholding appellant's entire \$666.00 monthly compensation.

The Board finds that appellant received a \$6,162.00 overpayment in compensation.

Under the regulations issued pursuant to the Act, an employee may not receive temporary total disability compensation at the same time he is receiving severance pay.<sup>2</sup> In this case, appellant received both severance pay and compensation from November 27, 1995 to February 24, 1996. He was not entitled to temporary total disability compensation during this period. He, therefore, received an overpayment in compensation.

The Board further finds that the Office acted within its discretion in denying appellant's request for waiver of recovery of the overpayment.

Where an overpayment of compensation has been made because of an error of fact or law, collection of the compensation shall be waived when an overpayment has been made to an individual who is without fault and adjustment or recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience. The waiver of an overpayment of compensation by the Office is a matter that rests within its discretion to be exercised pursuant to statutory guidelines.<sup>3</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 20 C.F.R. § 10.421(c).

<sup>3</sup> *William Phillips, Jr.*, 39 ECAB 330 (1987).

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under 5 U.S.C. § 8129(b) as specified in 20 C.F.R. § 10.436 provides as follows:

“Recovery of an overpayment will defeat the purpose of the FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because:

(a) The beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and

(b) The beneficiary’s assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.”<sup>4</sup>

In *Robert E. Wenzholz*,<sup>5</sup> the Board found that the guidelines for recovery of an overpayment from an individual who is without fault, such as those set forth in section 10.436, were meant to be read conjunctively and that the overpaid individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his income to meet his current ordinary and necessary living expenses and also that his assets, those which are not exempted, do not exceed the set resource base.<sup>6</sup>

At the hearing, appellant presented evidence that the net monthly household income was \$4,431.16, based on the salaries received by appellant and his wife. He reported monthly expenses of \$943.31 for mortgage, \$300.00 for utilities, \$500.00 for food for a family of four, \$50.00 for miscellaneous expenses, \$18.67 for lawn service, \$783.76 for car payments, \$80.67 for car insurance, \$149.83 for automobile maintenance, \$141.83 in child expenses, including clothing, lunch money and allowances, \$90.81 for additional life insurance, \$860.00 in contributions to their church, \$75.00 for clothing, \$50.00 for personal necessities, \$34.42 for a timeshare ownership, \$91.67 for educational expenses for appellant’s wife, \$36.25 for family birthday presents, \$10.00 for professional dues, \$20.00 for credit card payments and \$127.88 for his retirement plan and life insurance. Appellant calculated his total expenses as \$4,367.88.

The Office hearing representative noted the \$2,020.00 appellant was receiving in his schedule award, which was due to expire on October 5, 2000. At the time appellant would begin receiving \$666.00 every four weeks for loss of wage-earning capacity. The Office hearing representative appropriately found that the \$860.00 in monthly contributions to appellant’s

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<sup>4</sup> 20 C.F.R. § 10.436.

<sup>5</sup> 38 ECAB 311 (1986).

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

church was excessive. The evidence of record, therefore, shows that appellant had a net monthly household income of \$5,097.16 and monthly expenses less than the reported \$4,367.88. As appellant did not need substantially all of his income to meet his expenses, recovery of the overpayment would not defeat the purposes of the Act.<sup>7</sup>

Appellant testified at the hearing that, during the period of the dual payments of severance pay and compensation, the excess funds were used to pay down and consolidate debts. To show that recovery of an overpayment would be against equity and good conscience, appellant must show that he had no knowledge of the payment of compensation, that recovery of the overpayment would create a financial hardship, or that he relinquished a valuable right in receipt of the compensation.<sup>8</sup> In this case, appellant knew he was receiving compensation. The financial hardship test is applied only in situations where the recipient was not entitled to receive compensation in the first place but did receive compensation in error. As appellant was entitled to compensation, this test does not apply in his case. In the third test, appellant must show that recovery of the overpayment would place him in a worse financial position than if he had never received compensation. However, in the present case, appellant indicated that receipt of the overpayment of compensation allowed appellant to pay off some credit card bills and consolidate others. By reducing debt, appellant placed himself in a better financial position. Therefore, recovery of the overpayment would not be against equity and good conscience.

As the only limitation on the Office's authority is reasonableness, 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 known facts.<sup>9</sup> There is no evidence that the Office's denial of appellant's request for waiver of recovery of the overpayment constituted an abuse of discretion.

The Board further finds that the Office properly withheld appellant's entire compensation payment to recover the overpayment in compensation.

The evidence in this case shows that, without the \$666.00 monthly compensation payment, appellant's income exceeded his expenses by approximately \$60.00. He, therefore, did not need the compensation paid for the loss of wage-earning capacity to meet his expenses. As a result, his entire compensation can be withheld to satisfy the overpayment.

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<sup>7</sup> Appellant reported \$136,634.42 in assets. However, \$117,335.87 of the assets was held in the employee savings plan of appellant's wife. Appellant and his wife also had \$18,708.56 in investments and money market accounts, which is in excess of the resource base set forth in the Office procedures of \$5,000.00 for a couple plus \$600.00 for each dependent. In appellant's case, his resource base would be \$6,200.00.

<sup>8</sup> See note 5, Chapter 6.200.6(b) September 1994)

<sup>9</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

The October 4, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
December 10, 2001

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member