

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES R. PECK and DEPARTMENT OF THE ARMY,
ARMY MATERIAL COMMAND, Tooele, UT

*Docket No. 99-1787; Submitted on the Record;
Issued July 13, 2001*

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 determined that appellant received an overpayment in the amount of \$714.42 because insurance premiums were not deducted from his compensation; (2) whether the Office abused its discretion in denying waiver of the overpayment after finding that appellant was without fault in the creation of the overpayment.

On December 4, 1992 appellant, a 52-year-old mechanic's helper, filed a claim for benefits, alleging that excessive lifting and bending, at work had aggravated his preexisting degenerative disc disease. The Office accepted the claim for permanent aggravation of degenerative disc disease on March 19, 1993 and paid appropriate compensation.

On February 11, 1995 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$714.42 from January 23, 1994 through February 4, 1995 because basic and retirement life premiums had not been deducted from his compensation. The Office found that appellant was without fault in the matter because he could not have been aware that the payments he had been receiving were incorrect. The Office advised appellant that if he disagreed with the fact or amount of the overpayment he could submit new evidence in support of his contention. The Office informed appellant that he had the right to request a preresoupment hearing and that any response should be submitted within 30 days. Appellant did not respond.

By letter dated July 29, 1997, the Office issued a second preliminary determination that an overpayment had occurred, again advised appellant that he was without fault and indicated that he was entitled to the same rights and courses of action in the February 11, 1995 letter. Appellant did not respond.

In a decision dated May 19, 1998, the Office found that appellant was not entitled to waiver. The Office noted that appellant had twice been advised, by letters dated February 11,

1995 and July 29, 1997, that a preliminary finding of an overpayment had been made but he had not responded.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$714.42

The record establishes that appellant received augmented compensation because insurance premiums were not deducted from his compensation. The Office calculated the amount of overpayment by taking appellant's bi-weekly premium for basic life insurance, \$4.62, and multiplying it by the number of bi-weekly periods from January 23, 1994 through February 4, 1995, twenty-seven, which amounted to an overpayment of \$124.74. The Office then took appellant's bi-weekly premium for retirement life insurance, \$21.84 and multiplied it by 27, which amounted to an overpayment of \$589.68. These figures were added for a total overpayment of \$714.42.

The Board further finds that the Office acted within its discretion in denying waiver of the overpayment.

Section 8129 of the Federal Employees' Compensation Act¹ 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 is not sufficient, in and of itself, for the Office to waive 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," pursuant to the guidelines provided in sections 10.322 and 10.323 of the implementing federal regulations.²

With regard to the "defeat the purpose of the Act" standard, section 10.322 of the regulations³ provides:

"(a) General. Recovery of an overpayment will defeat the purpose of the Act if recovery would cause 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. Recovery will defeat the purpose of this subchapter to the extent that:

(1) The individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and

(2) The individual'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

¹ 5 U.S.C. § 8129(a)-(b).

² 20 C.F.R. §§ 10.322-23. See *William J. Murphy*, 40 ECAB 569 (1989); *James M. Albers*, 36 ECAB 340 (1984).

³ 20 C.F. R. § 10.322.

dependent, plus \$600[.00] for each additional dependent. This base includes all of the claimant's assets not exempted from recoupment in paragraph (d) of this section. The first \$3,000[.00] or more depending on the number of the claimant's dependents is also exempted from recoupment." (Emphasis added.)

With regard to the "against equity and good conscience" standard, section 10.323 of the regulations⁴ provides:

"(b) Recovery 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. In making such a decision, the individual's present ability to repay the overpayment is not considered...."

However, section 10.321(h) of the Office's regulations⁵ provides that, if additional financial evidence is not submitted, or a prerecoupment hearing is not requested within 30 days of the Office's preliminary overpayment determination, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action. Section 10.324 of the Office's regulations⁶ provides that in requesting waiver of an overpayment, the overpaid individual has individual has the responsibility for providing the financial information described in section 10.322, as well as such additional information as the Office may require to make a decision on waiver; that failure to furnish the information within 30 days of request shall result in denial of waiver; and that no further requests for waiver shall be entertained until such time as the requested information is furnished.

In this case, the case contains no response from appellant to either of the Office's letters dated February 11, 1995 and July 29, 1997 regarding the overpayment of compensation. In addition, the Board finds that the evidence does not support appellant's allegations that he did not receive these letters in the mail. Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.⁷

Copies of the February 11, 1995 and July 29, 1997 Office letters advising appellant of its preliminary determination of overpayment show appellant's correct address, which at that time was the address stated on his CA-2 claim form and the address at which he was receiving his monthly compensation checks. Accordingly, the Office properly found that appellant's failure to respond to two letters, which were dated more than two years apart, was sufficient grounds to find that he does not qualify for waiver.

⁴ 20 C.F.R. § 10.323.

⁵ 20 C.F.R. § 10.321(h).

⁶ 20 C.F.R. § 10.324.

⁷ *A.C. Clyburn*, 47 ECAB 153 (1995); *Clara T. Norga*, 46 ECAB 473 (1995); *Newton D. Lashmett*, 45 ECAB 181 (1993); *Larry L. Hill*, 42 ECAB 596 (1991).

Appellant failed to submit any evidence showing that he needed substantially all of the current monthly income to meet living expenses or that the amount of the overpayment was wrongly computed, as requested by the Office in its February 11, 1995 and July 29, 1997 letters. Therefore, appellant does not qualify for waiver under the “defeat the purpose of the Act” standard.⁸ Further, there is no evidence in this case, nor did appellant allege, that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received from January 23, 1994 through February 4, 1995. Pursuant to its regulations, the Office, therefore, acted within its discretion in denying waiver of recovery of the overpayment in the amount of \$714.42.

The decision of the Office of Workers’ Compensation Programs dated May 19, 1998 is hereby affirmed.

Dated, Washington, DC
July 13, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁸ See *Nina D. Newborn*, 47 ECAB 132 (1995).