

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH A. GRANT and U.S. POSTAL SERVICE,
POST OFFICE, Greensboro, NC

*Docket No. 00-1761; Submitted on the Record;
Issued May 7, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for recovery of waiver of a \$3,040.44 overpayment in compensation.

On October 1, 1997 appellant, then a 42-year-old letter carrier, slipped on dog excrement and fell, injuring his right ankle. The Office accepted his claim for a right ankle sprain. On March 10, 1998 appellant underwent arthroscopic surgery on the right ankle for debridement of an osteochondral defect of the medial tibia in the right ankle joint and debridement of diffuse synovitis of the right ankle. He did not work from March 10 through March 28, 1998 and returned to light-duty work on March 29, 1998. The Office subsequently authorized leave buy back for that period. In an October 5, 1998 decision, the Office issued a schedule award for a 10 percent permanent impairment of the right foot, to run for the period June 3 through October 24, 1998.

In a February 17, 1999 letter, the Office informed appellant that it had made a preliminary finding that he had received a \$3,040.44 overpayment in compensation. The Office explained that overpayment occurred because his compensation, including his schedule award, had been based on an incorrect weekly pay rate of \$764.40 when his actual weekly pay rate was \$564.68. The Office further found that appellant was without fault in the creation of the overpayment. The Office informed him that recovery of the overpayment may be waived if recovery would defeat the purpose of the Federal Employees' Compensation Act or would be against equity or good conscience. The Office stated that the purpose of the Act was to provide at least a basic income for beneficiaries. It indicated that it would be against equity and good conscience to recover an overpayment if a claimant, acting on incorrect information from the Office, gave up a valuable right he could not regain; spent or committed funds in a way he otherwise would not have and suffered a financial loss as a result; or would suffer a severe financial hardship in trying to repay the debt. The Office requested that appellant submit financial information in support of any request for waiver of recovery of the overpayment. The Office informed him of his right to request a hearing before an Office hearing representative.

In a March 10, 1999 response, appellant requested a hearing before an Office hearing representative. He reported that he had monthly pay of \$1,800.00 while his wife had monthly pay of \$800.00. Appellant listed the following monthly expenses: \$600.00 for food; \$100.00 for clothing; \$848.00 for mortgage; \$100.00 for gas; \$232.00 for electricity; \$30.00 for water; \$100.00 for telephone; \$75.00 for home maintenance; \$176.00 in automobile loan payments; \$300.00 in gasoline and oil; \$30.00 in maintenance; \$113.00 in car insurance; \$100.00 in insurance not withheld from income; \$150.00 in school tuition for his wife and daughter; and \$57.00 in fees for cable television (TV) and internet access. He also reported that he had a total of \$8,900.00 in credit card debt, on which he paid \$230.00 a month. Appellant explained that expenses for gasoline for the car were high because his wife operated a newspaper route. At the September 28, 1999 hearing, he explained his financial information further.

In a January 20, 2000 decision, the Office hearing representative reviewed appellant's financial information. The hearing representative calculated his net monthly income as \$2,487.23 and net assets as \$14,000.00 in his thrift savings account, \$750.00 in savings and \$50.00 in checking accounts. She calculated appellant's regular and recurring expenses as \$2,948.00. The hearing representative found appellant's expenses to be reasonable except for his food expenses and payments made toward two credit cards. She found \$400.00 a month, rather than \$600.00 a month, to be a reasonable food expense for three people. The hearing representative noted from the testimony that appellant's credit cards were used for regular and recurring expenses which had already been included in the calculation of expenses and therefore should not be included in calculating appellant's monthly expenses. She also found that expenses for internet access, cellular telephone service and cable TV were conveniences, not ordinary and necessary expenses. The hearing representative therefore concluded that appellant's monthly expenses could be reduced by \$547.00 to \$2,401.00. She stated that appellant's income exceeded his expenses and his assets exceeded the resource base used to determine whether an overpayment should be recovered. The hearing representative therefore found that appellant did not need substantially all his income to meet current ordinary and necessary expenses. She concluded that the evidence of record did not establish that recovery of the overpayment would defeat the purpose of the Act. The hearing representative therefore denied appellant's request for waiver of recovery of the overpayment.

The Board finds that the case is not in posture for decision.

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.¹

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:

¹ *William Phillips, Jr.*, 39 ECAB 330 (1987).

“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.”²

In *Robert E. Wenholz*,³ 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 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 do not exceed the set resource base.

The hearing representative found that appellant did not need all of his monthly income to meet his current ordinary and necessary expenses. However, she made this finding after reducing or eliminating some of the expenses set forth by appellant. The hearing representative reduced appellant’s food expenses from \$600.00 to \$400.00 but did not provide any evidence or justification for her belief that the amount she set was a more appropriate food expense for three people. Restoration of this arbitrary reduction, by itself, would place appellant’s ordinary and necessary monthly expenses above his monthly income. The hearing representative also concluded that appellant’s credit card expenses should not be included in his monthly expenses. The credit card debt, however, does not represent current ordinary and necessary expenses but a debt incurred in attempting to meet such expenses in past months. The hearing representative also did not consider the effect on appellant’s credit if he failed to pay at least a minimum payment on his credit card debt. She properly considered appellant’s cable TV to be an expense that was not an ordinary or necessary expense. However, the hearing representative did not inquire whether the expense of internet access was an ordinary and necessary expense in light of the fact that appellant’s wife and daughter were taking educational courses which might require internet access for purposes of taking such courses. She, therefore, improperly found that appellant did not need all of his monthly income to meet his current ordinary and necessary expenses.

Similarly, the Office hearing representative erred in her calculation of appellant’s assets. In considering appellant’s assets, she included the amount in appellant’s thrift savings account. The hearing representative, however, did not discuss whether money in a federal employee’s

² 20 C.F.R. § 10.436 (1999).

³ 38 ECAB 311 (1986).

thrift savings account could be considered a current asset that could be used to repay an overpayment in compensation. Under the Thrift Savings Plan, it appears that withdrawals can be made from an in-service employee's plan for only two reasons; the employee is over 59 years old or the employee has documented financial hardship. The record shows that appellant currently is under 59 years old and has returned to employment. He therefore remains in service. The record does not establish that appellant would be allowed to withdraw funds from his Thrift Savings Plan on account on the grounds of financial hardship. The only alternative for appellant would be to borrow against his Thrift Savings Plan account to repay the overpayment. In this situation, appellant would then create a debt which he would have to repay, thereby converting an asset into additional debt and expenses. The Office must take these matters into consideration, particularly the severe restrictions on appellant's access to funds in his Thrift Savings Plan, before it can find that the funds in appellant's Thrift Savings Plan would be considered an asset to be used in determining whether recovery of the overpayment should be waived.

In light of the errors made by the Office hearing representative, the case must be remanded for further development. On remand, the Office should make a proper calculation of appellant's monthly expenses and assets. If the Office reduces any amount of appellant's expenses, it must provide a justification for such a reduction. If the Office determines that appellant's thrift savings account should be included as part of his assets, it should provide its rationale for such inclusion. After further development as it may find necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs, dated January 20, 2000, is hereby set aside and the case remanded for further action as set forth in this decision.

Dated, Washington, DC
May 7, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member