

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ABEL L. RAEL and DEPARTMENT OF THE ARMY,  
DEPOT ACTIVITY BUILDING, Pueblo, CO

*Docket No. 99-2398; Submitted on the Record;  
Issued May 14, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment in the amount of \$46,476.05 occurred; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly recovered the overpayment by withholding \$1,000.00 a month from appellant's continuing compensation.

Appellant, a 42-year-old warehouseman, filed a notice of traumatic injury on February 21, 1989, alleging that he injured his lower back in the performance of duty. The Office accepted appellant's claim for lumbosacral strain. He returned to work on March 10, 1989. Appellant filed a notice of recurrence of disability on March 20, 1990, which the Office accepted on May 4, 1990.

On June 1, 1990 the employing establishment listed appellant's pay rate as \$12.04 an hour. Appellant used sick leave from March 12 to May 19, 1990 and returned to a different work assignment earning \$9.31 an hour. The Office authorized compensation from May 20 to August 25, 1990 at a weekly pay rate of \$372.40 or \$9.31 an hour. The Office entered appellant on the periodic rolls on August 15, 1990 with that pay rate.

On February 21, 1992 the employing establishment informed the Office that appellant was not receiving compensation at the date-of-injury pay rate of \$12.04 an hour. On March 17, 1992 the Office noted that appellant received \$12.04 an hour from November 1989 until February 1990. The Office stated that on the date of recurrence appellant was earning \$9.31 an hour. On March 31, 1992 the Office mistakenly concluded that appellant was earning \$12.04 an hour on February 21, 1989 and was entitled to the greater of the two pay rates. Beginning April 5, 1992, the Office increased appellant's weekly pay rate to \$481.60 to reflect his date-of-injury pay of \$12.04 an hour. On April 24, 1992 the Office issued appellant a check for \$10,840.32, the difference between his date-of-injury and his recurrent pay rates. The Office noted that appellant had received \$26,138.64 and that he was entitled to \$36,978.96.

In a memorandum dated February 19, 1997, the employing establishment requested verification of the date-of-injury pay rate. The employing establishment noted that, prior to June 10, 1989, appellant was earning either \$9.22 as a warehouseman or \$11.89 as a supervisor. However, there is no evidence in the record that appellant was working at the supervisory rate on the date of recurrence, on the date of injury or during the year prior to the injury. The pay rates of \$9.31 and \$12.04 did not go into effect until June 10, 1989. The employing establishment submitted a notice of personnel action effective June 18, 1989 increasing appellant's salary from \$9.22 to \$9.31 an hour. The employing establishment also submitted a second notice of personnel action effective November 19, 1989 changing appellant's salary from \$9.31 to \$12.04 an hour. A third notice of personnel action effective February 25, 1990 again changed appellant's position and his salary. His new salary was \$9.31 an hour.

By decision dated June 9, 1997, the Office reduced appellant's compensation to reflect his pay rate of \$9.31 an hour.

In a letter dated January 29, 1998, the Office proposed to terminate appellant's compensation. By decision dated March 2, 1998, the Office terminated appellant's compensation effective March 28, 1998. He requested an oral hearing and by decision dated November 23, 1998, the hearing representative vacated the Office's March 2, 1998 termination.

In a letter dated August 11, 1998, the Office informed appellant of a preliminary determination of an overpayment of compensation in the amount of \$46,519.07. The Office stated that the overpayment occurred because appellant was paid at an incorrect hourly rate from May 20, 1990 to May 24, 1997. The Office also stated that basic life insurance premiums were not withheld from May 20, 1990 through March 30, 1996. The Office found that appellant was without fault in the creation of the overpayment and requested financial information to evaluate appellant's entitlement to waiver.

Appellant requested an oral hearing on September 3, 1998 and completed the overpayment recovery questionnaire. By decision dated April 19, 1999, the hearing representative modified the Office's determination of overpayment to reflect appellant's correct pay rate of \$9.31 an hour. He also found that appellant had overpaid his life insurance premiums in the amount of \$915.69. The hearing representative concluded that an overpayment of \$46,476.05 existed, that appellant was not at fault in the creation of the overpayment and that the overpayment was not subject to waiver. The hearing representative concluded that the overpayment should be collected by withholding \$1,000.00 from appellant's continuing compensation benefits.

The Board finds that an overpayment in the amount of \$46,476.05 exists in this case.

Although appellant alleged that he was entitled to compensation at the \$12.04 rate, the evidence establishes that his pay rate on the date of recurrence of disability was \$9.31. Therefore, the Office paid appellant compensation at an incorrect rate of pay resulting in an overpayment of \$46,476.05,<sup>1</sup> the difference between the compensation he received and the compensation he was due at \$9.31 an hour.<sup>2</sup>

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<sup>1</sup> The hearing representative noted that beginning May 25, 1997 the Office paid appellant compensation based on

The Board further finds that the overpayment is not subject to waiver.

Section 10.434 of the Office's regulations provides that if the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless:

“(a) Adjustment or recovery would defeat the purposes of the [Federal Employees' Compensation] Act.<sup>3</sup>

“(b) Adjustment or recovery of the overpayment would be against equity and good conscience.<sup>4</sup>

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purposes of the Act if the beneficiary needs substantially all his current income to meet current ordinary and necessary living expenses<sup>5</sup> and the beneficiary's assets do not exceed a specified amount as determined by the Office.<sup>6</sup> Section 10.437 provides that a recovery of an overpayment would be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or when any individual in reliance on such payments gives up a valuable right or changes his or her position for the worse.<sup>7</sup>

There is no evidence in this case that appellant changed his position for the worse or gave up a valuable right in reliance on his compensation payments.

In this case, appellant completed the overpayment recovery questionnaire indicating that he and his wife had a total monthly income of \$3,004.00. Expenses included: rent, \$150.00; food, \$250.00; clothing, \$100.00; utilities, \$195.00; and other expenses of \$720.00. Appellant indicated that he owed other debts totaling \$1,584.97. He listed his total monthly expenses as \$2,999.97.

At the oral hearing, appellant testified that he received \$733.00 a month in social security benefits; \$199.00 from the Office of Personnel Management; and \$2,078.00 in benefits from the Department of Veterans Affairs (VA) for a total income of \$3,010.00. Appellant indicated that

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a salary of \$373.65 per week rather than \$372.40 per week.

<sup>2</sup> The hearing representative also found that appellant had paid the Office an excess of \$915.69 for life insurance and that this excess should be applied to the overpayment reducing it to \$45,560.36.

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 20 C.F.R. § 10.434.

<sup>5</sup> This occurs when monthly income does not exceed monthly expenses by more than \$50.00. *Jan K. Fitzgerald*, 51 ECAB \_\_\_ (Docket No. 98-2007, issued September 13, 2000).

<sup>6</sup> 20 C.F.R. § 10.436. This amount has been considered to be \$3,000.00 for an individual. *Fitzgerald*, *supra* note 5.

<sup>7</sup> 20 C.F.R. § 10.437.

his monthly expenses included: \$150.00 in rent; \$180.00 car insurance; \$200.00 utilities; \$250.00 food; Key Bank \$479.00 per month; Security Services, \$440.00; Centennial Bank, \$443.00; Credit Union, \$233.00; American Express, \$150.00; Capital Bank, \$50.00; Montgomery Ward, \$300.00; Parts America, \$30.00; clothes, \$100.00 for a total of \$3,005.00.

The hearing representative properly noted that appellant's compensation benefits had been reinstated. Appellant will receive an additional income of \$1,296.76 per month plus social security benefits of \$733.00 and VA benefits of \$2,078.00 for total monthly income of \$4,107.76.<sup>8</sup> The amount exceeds his monthly expenses by \$1,102.76. Therefore, recovery of the overpayment would not defeat the purpose of the Act.

The Board further finds that the Office properly recovered the overpayment by withholding \$1,000.00 a month from appellant's continuing compensation benefits.

Section 10.321(a) of the regulations<sup>9</sup> provides:

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to 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 resulting hardship upon such individual.”

In this case, the Office considered the factors set forth by this section. Based upon appellant's information regarding his income and expenses, the Office's decision to withhold \$1,000.00 from appellant's continuing compensation benefits was made with due regard to his monthly expenses and income and is, therefore, appropriate under the circumstances of this case.

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<sup>8</sup> The hearing representative did not include the Office of Personnel Management benefits in his calculation of appellant's available income and informed appellant that if his VA benefits were reduced that he should notify the Office for further consideration.

<sup>9</sup> 20 C.F.R. § 10.321(a).

The April 19, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
May 14, 2001

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Priscilla Anne Schwab  
Alternate Member