

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT G. OLSEN and DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE, Ananconda, MT

*Docket No. 00-1685; Submitted on the Record;  
Issued October 23, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$2,133.06 occurred; (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; and (3) whether the Office properly denied appellant's request for waiver of recovery of the overpayment.

The Office accepted appellant's claim for preexisting degenerative disc disease and preexisting disc herniation. Appellant retired effective August 29, 1999. In a preliminary determination dated January 14, 2000, the Office found that appellant received an overpayment of \$2,133.06 because effective August 29, 1999 appellant began receiving retirement benefits, but he continued to be paid compensation checks until January 1, 2000. The Office found that appellant was without fault in the matter of the overpayment. The Office informed appellant that he should provide information regarding his income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of the Federal Employees' Compensation Act<sup>1</sup> to recover the overpayment.

By decision dated April 6, 2000, the Office finalized the January 14, 2000 preliminary determination that appellant received an overpayment of \$2,113.06 and was without fault in the creation of the overpayment. The Office also found that appellant was not entitled to waiver of recovery of the overpayment. Further, the Office determined that the entire amount of \$2,133.06 should be paid in full within 30 days from the date of the decision.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101 *et seq.*

<sup>2</sup> The Board notes that the Office had issued an August 12, 1999 decision establishing appellant's loss of wage-earning capacity and an August 18, 1999 overpayment decision which resulted when appellant returned to work. The Board notes on appeal that appellant did not contest either of these decisions and, accordingly, will not review the merits of these decisions.

The Board finds that appellant received an overpayment in the amount of \$2,133.06.

The Office found in its January 14, 2000 preliminary determination that appellant received an overpayment of \$2,133.06 because he began receiving retirement benefits effective August 29, 1999 and also received additional compensation as a result of his loss of wages until January 1, 2000. On a Form CA1105-0989 dated August 30, 1999, appellant indicated that on August 27, 1999 he elected to receive federal retirement benefits. This retirement was effective August 28, 1999. The Office calculated that the excess compensation appellant received from August 29, 1999 through January 1, 2000 totaled \$2,133.06. Appellant did not contest either the fact of the overpayment or the amount. 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 found that appellant was without fault in the creation of the overpayment.

Section 8129(b) of the Act<sup>3</sup> provides that an overpayment of compensation shall be recovered by the Office 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 be against equity and good conscience.<sup>4</sup> Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.<sup>5</sup>

The implementing regulation<sup>6</sup> provides that a claimant is at fault in the creation of an overpayment when he or she: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which he or she knew or should have known to be incorrect.

In this case, appellant informed the Office in August 1999 that he elected Office of Personnel Management retirement effective August 29, 1999. The record also contains a report of a telephone call of January 12, 2000 documenting a call between the claims examiner and an official of appellant's employing establishment. The employing establishment indicated that appellant had conserved three of the five overpaid checks. In his request for waiver and a letter of February 22, 2000, appellant stated that he was totally unaware that the three checks were overpayments as they were not listed as wages. He stated that as he formally retired, he was no longer entitled to wages.

The Board finds that appellant is without fault in the creation of the overpayment. The record indicates that on August 12, 1999 the Office notified appellant that his compensation had been adjusted to account for his wage-earning capacity compensation as he returned to work. On August 25, 1999 the Office notified appellant that he must make an election between retirement

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<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> See *James H. Hopkins*, 8 ECAB 281, 287 (1997); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>5</sup> *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

<sup>6</sup> 20 C.F.R. § 10.433(a).

and FECA benefits as he is not entitled to receive concurrent benefits. The Office advised that when specifying an effective date of election for OPM benefits allow for a sufficient lead time to allow a smooth transition between the termination of his Office benefits and the start of OPM annuity. On August 30, 1999 appellant elected OPM benefits and stated that the effective date of his election was August 27, 1999. As of January 12, 2000, appellant had not cashed three of the five checks and had followed up with his employer to notify the Office that his Office compensation checks should stop. Although the evidence of file is contrary to appellant's argument that he did not know what the continuing compensation checks represented, the fact that he advised the Office in a timely manner that he retired and had followed up with his employer on January 12, 2000 to notify the Office to stop the compensation checks supports the Office's finding that appellant was without fault in the creation of the overpayment.

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

Section 8129(a) of the Act<sup>7</sup> provides that, where an overpayment of compensation has been made "because of an error of fact or law," adjustments shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustments or recovery by the United States may not be made when incorrect payments 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."<sup>8</sup>

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.<sup>9</sup> The Office must 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 10.434-.437 of the implementing federal regulations.

Section 10.436<sup>10</sup> provides that 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 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 expenses and the beneficiary'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 dependent plus \$600.00 for each additional dependent. For waiver under the "defeat the purpose of the Act" standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base of \$3,000.00.<sup>11</sup>

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<sup>7</sup> 5 U.S.C. § 8129(a).

<sup>8</sup> 5 U.S.C. § 8129(b).

<sup>9</sup> *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

<sup>10</sup> 20 C.F.R. § 10.436.

<sup>11</sup> *James Lloyd Otte*, *supra* note 9; *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

In determining that appellant was not entitled to waiver of the overpayment, the Office obtained figures from appellant's overpayment recovery questionnaire dated January 26, 2000 and a letter dated February 22, 2000 in which appellant valued his rental property at \$55,000.00. The Office determined that appellant had a total monthly income of \$2,275.34, consisting of \$1,375.34 in civil service benefits, \$500.00 in earnings and \$400.00 in other income. The Office determined that appellant's monthly expenses totaled \$2,470.39, based on his rent or mortgage of \$1,370.39, \$700.00 for food and clothing, \$200.00 for utilities and \$200.00 for miscellaneous. The Office further found that appellant had a savings account balance of \$1,500.00, \$100.00 in cash, and other rental property valued at \$55,000.00. The Office found that as appellant's assets exceeded the dollar criteria, recovery would not defeat the purpose of the Act. It further found that repayment in this case would not be against equity or good conscience.

The Board has stated that the guidelines for recovery of an overpayment from an individual who is without fault 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, those which are not exempted, do not exceed a resource base of \$3,000.00 (or \$5,000.00 with a spouse or dependent).<sup>12</sup>

In the financial statement appellant submitted with his request for waiver of the overpayment, appellant listed numerous items of expense which were reasonable. However, none of the items of expenses were substantiated. Thus, although appellant's monthly expenses appears to exceed his monthly income by almost \$1,000.00, without any substantiation of such expenses, there can be no showing that this is a true indication of appellant's situation.<sup>13</sup> Additionally, the Board notes that appellant listed assets in excess of \$5,000.00; specifically, he reported \$1,600.00 in cash and savings account and rental property valued at \$55,000.00, for a total of \$56,600.00 in available assets. This resource base clearly exceeds that stipulated as the maximum allowable for a claimant with dependent, in order to defeat the purpose of the Act. Therefore, appellant has not demonstrated that recovery would defeat the purpose of the Act as is required for waiver.

With respect to whether recovery would be against equity and good conscience, section 10.437 of the implementing regulations provides that "[r]ecovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or notice that such payments will be made, relinquished a valuable right or changed his position for the worse."<sup>14</sup> Appellant asserts that he was totally unaware that he received overpayment checks as he had retired. However, as previously discussed, the facts of this case indicate that appellant knew or should have known that he was not entitled to any payment of

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<sup>12</sup> *Robert E. Wenholz*, 38 ECAB 311 (1986).

<sup>13</sup> Appellant submitted some evidence of his finances in his appeal before the Board. The Board's review, however, is limited to the evidence that was before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c).

<sup>14</sup> 20 C.F.R. § 10.437 (1999).

compensation as he did not cash three of the issued checks on January 12, 1999. Accordingly, appellant cannot show reliance on any payment of compensation for either his medical bills or claimed expenses to his rental property. Moreover, there is no showing that appellant would experience severe financial hardship in attempting to repay this debt as he has available assets. As appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience” the Board finds that the Office properly denied waiver of recovery of the overpayment.

The decision of the Office of Workers’ Compensation Programs dated April 6, 2000 is hereby affirmed.

Dated, Washington, DC  
October 23, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member