

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY HOPKINS and DEPARTMENT OF THE AIR FORCE,
SEYMOUR-JOHNSON AIR FORCE BASE, NC

*Docket No. 00-2572; Submitted on the Record;
Issued September 13, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue issues are: (1) whether appellant received an overpayment in compensation of \$2,793.93; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment; and, (3) whether the Office properly required repayment of the overpayment by withholding \$200.00 every four weeks from his continuing compensation.

On June 24, 1996 appellant, then a 58-year-old firefighter, sustained employment-related cuts and abrasions, fractures of his right arm and ribs and a leg abscess when he fell from a ladder. He stopped work that day and received appropriate compensation. On February 21, 1997 appellant returned to temporary limited duty and again stopped work on August 8, 1997 to undergo necessary surgery on his right arm. Following vocational rehabilitation, on March 18, 1999 appellant secured private employment as a salesman. By decision dated February 24, 2000, the Office found that this position fairly and reasonably represented appellant's wage-earning capacity.¹

On March 10, 2000 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$2,793.93 which was created because he received full disability compensation rather than his loss of wage-earning capacity pay rate from the date he returned to work, March 18 until May 22, 1999. The Office further found that appellant was at fault in the creation of the overpayment. On an attached Office form, the Office requested that appellant indicate whether he wished to contest the existence or amount of the overpayment or to request waiver of the overpayment.² The Office also asked him to complete

¹ Appellant has not appealed the February 24, 2000 decision.

² The form provides a claimant with three choices: (1) A request of waiver and a telephone conference; (2) a request of waiver with the Office making the decision on the written record; and (3) a request of waiver with a hearing before the Branch of Hearings and Review. With each of these choices, a claimant is to provide supporting financial documents.

an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. The Office indicated that the financial information would be used to determine whether he was entitled to waiver and that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment. The Office enclosed a worksheet detailing its calculation of the overpayment.

In a letter dated March 28, 2000, appellant contested the fault determination, provided information about his employment and advised that he would not provide the information requested in Parts II, III, IV and V of the overpayment questionnaire,³ feeling that it was an invasion of privacy. He requested that the district office base its decision on the written evidence of record. By letter dated April 18, 2000, the Office informed appellant that he was not at fault in the creation of the overpayment but that waiver could not be granted because he had failed to submit the required financial information. He was given an additional 15 days to submit the information.

In a May 5, 2000 decision, the Office finalized its preliminary determination that appellant received an overpayment in compensation in the amount of \$2,793.93 and that he was without fault in the creation of the overpayment. The Office determined that the circumstances of appellant's case did not warrant waiver of recovery of the overpayment as he failed to submit the required financial information. The Office determined that recovery of the overpayment would be made from appellant's continuing compensation at a rate of \$200.00 every 28 days.

The Board finds that appellant received an overpayment of compensation in the amount \$2,793.93.

The record in this case indicates that for the period March 18 through May 22, 1999 appellant received compensation at the full rate rather than the rate reflected by his loss of wage-earning capacity. Appellant has not shown and the record does not otherwise establish that the Office erred in calculating the amount of the overpayment. Therefore, an overpayment in compensation in the amount of \$2,793.93 was created.

The Board further finds that, while appellant was not at fault in the creation of the overpayment, he is not entitled to waiver.

Section 8129(a) of the Federal Employees' Compensation Act⁴ 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.⁵ 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

³ Part II requests information regarding income, Part III information regarding assets, Part IV expenses and Part V other liabilities.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8129(a).

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.”⁶

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.⁷ 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 and 10.437 of the implementing federal regulations.⁸ Furthermore, section 10.438 of the federal regulations provides:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.”⁹

In the instant case, the Board finds that appellant did not make a good-faith effort to fully complete an overpayment recovery questionnaire.¹⁰ On March 10, 2000 the Office mailed him a questionnaire and requested that he furnish the requested information within 30 days. In a letter dated March 28, 2000, appellant advised that he felt that the information requested in Parts II, III, IV and V of the questionnaire was an invasion of privacy. By letter dated April 18, 2000, appellant was given an additional 15 days to submit the requested information. He did not respond. Without an accurate and complete breakdown of appellant’s monthly income, monthly expenses and assets, supported by financial documentation, the Office was not able to calculate whether appellant’s assets exceeded the specified resource base. The Office therefore properly found that appellant was not entitled to waiver on the grounds that recovery would defeat the purpose of the Act.¹¹

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in

⁶ 5 U.S.C. § 8129(b).

⁷ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

⁸ 20 C.F.R. §§ 10.434, 10.437 (1999).

⁹ 20 C.F.R. § 10.438 (1999).

¹⁰ See *Gail M. Roe*, 47 ECAB 268 (1995).

¹¹ *Id.*

attempting to repay the debt,¹² or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.¹³

Appellant, however, has submitted no evidence to establish that he relinquished a valuable right or changed his position for the worse in reliance on the overpaid compensation. The Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

Lastly, the Board finds that the Office properly required repayment by withholding \$200.00 every four weeks from appellant's continuing compensation.

With regard to the amount withheld from appellant's continuing compensation payments to recover the amount of the overpayment, section 10.441(a) of Office regulations provides:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account 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 hardship.”¹⁴

When, as in this case, an individual fails to provide requested information on income, expenses and assets, the Office should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.¹⁵ The Board finds that the Office did not abuse its discretion in following those guidelines in this case.¹⁶

¹² 20 C.F.R. § 10.437(a) (1999).

¹³ 20 C.F.R. § 10.437(b) (1999).

¹⁴ 20 C.F.R. § 10.441(a) (1999).

¹⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.4.d(1)(b) (September 1994).

¹⁶ The Board notes that appellant submitted additional evidence subsequent to the May 15, 2000 decision of the Office and with his appeal to the Board. The Board cannot consider this evidence; however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

The decision of the Office of Workers' Compensation Programs dated May 15, 2000 is hereby affirmed.

Dated, Washington, DC
September 13, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member