

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CECIL R. BRUMMETT and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, Eugene, OR

*Docket No. 01-1508; Submitted on the Record;
Issued August 5, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$13,733.71 overpayment of compensation from January 1, 1996 through December 31, 1997; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly recovered the overpayment by withholding \$250.00 from continuing compensation payments.

On February 26, 1971 appellant, then a 38-year-old contract specialist, injured his back when he slid down a hill. The Office accepted appellant's claim for a temporary aggravation of lumbar spondylolysis, herniated disc at L4-5 and authorized a lumbar laminectomy on May 22, 1979. He stopped work on February 26, 1971 and returned on March 8, 1971.

On April 10, 1989 appellant filed a claim for recurrence of disability indicating that around February 3, 1989 he experienced extreme pain in his back and left leg. The Office accepted his claim for recurrence of disability and paid appropriate compensation.

In a letter dated August 25, 1998, appellant indicated that he had actual wage earnings for 1996 of \$2,864.00; and for 1997 of \$8,493.00 in addition to his civil service retirement.

In a letter dated January 12, 1999, appellant elected to receive compensation benefits instead of a civil service annuity. The Office of Personnel Management (OPM) notified the Office that appellant had been dropped from their rolls and requested recovery of the benefits paid from the Civil Service Retirement Fund for the period of time also covered by Office benefits. The dual service coverage began on February 3, 1998 and ended December 30, 1998. The annuity paid for this period totaled \$196,961.20. The Office remitted the above funds to OPM.

In a March 31, 1999 overpayment worksheet, the Office determined that appellant was due compensation for the period of February 3, 1992 to December 31, 1995 in the amount of \$132,204.07; appellant had wage-earning capacity for the period of January 1, 1996 to

December 31, 1997 in the amount of \$59,457.98; and was entitled to compensation benefits for the period of January 1, 1998 to January 20, 1999 in the amount of \$40,890.64 for a total amount due to appellant of \$232,552.69. The Office determined that appellant was paid compensation benefits from February 3, 1992 to January 30, 1999 in the amount of \$46,359.12; the Office reimbursed OPM for civil service retirement payments made to appellant of \$196,961.20; and paid additional compensation benefits to appellant for the period of January 1 to 30, 1999 in the amount of \$2,966.08 for a total payment to appellant of \$246,286.40. The amount due appellant, \$232,552.69 subtracted from the amount paid to appellant, \$246,286.40 resulted in an overpayment of \$13,733.71. Appellant's earnings for the period of January 1, 1996 to December 31, 1997 were reduced according to the *Albert C. Shadrick* decision,¹ which resulted in a wage-earning capacity of \$109.20 per week.

On April 28, 1999 the Office made a preliminary finding that appellant had been overpaid benefits in the amount of \$13,733.71. The Office noted that the overpayment occurred because the Office retroactively paid compensation benefits for total disability for the period of January 1, 1996 to December 31, 1997; however, the Office did not take into account appellant's wage earnings for this period which resulted in the overpayment of compensation in the amount of \$13,733.71. The Office also determined that appellant was without fault in the matter of the overpayment. The Office indicated that appellant had the right to submit, within 30 days, evidence or arguments regarding the overpayment and his eligibility for waiver of the overpayment.

In a letter dated April 28, 1999, the Office responded to appellant's request for an explanation as to how compensation was calculated. The Office informed appellant that his compensation pay rate was based on his earnings on the date of his recurrence, February 3, 1989. The Office indicated that appellant's weekly earnings on that date were \$729.67 and noted that on March 1, 1990 appellant was afforded a cost-of-living adjustment. Appellant's earnings for the period of January 1, 1996 to December 31, 1997 were reduced according to the *Shadrick* formula which resulted in a wage-earning capacity of \$109.20 per week.²

In a letter dated May 25, 1999, appellant challenged the calculations of the overpayment and noted that if he was without fault then he would request further discussion of the matter.

By decision dated March 30, 2001, the Office found that appellant received a \$13,733.71 overpayment of compensation from January 1, 1996 to December 31, 1997 for which he was without fault in creating. In an accompanying memorandum, the Office indicated that no additional financial evidence or argument was submitted by appellant to support eligibility for waiver and, therefore, waiver of overpayment was not granted. The Office indicated that appellant challenged the pay rate calculation which was addressed in the Office's letter of April 28, 1999. The Office advised that the overpayment would be recovered by deducting \$250.00 from appellant's continuing compensation payments every four weeks.

¹ 5 ECAB 376 (1953).

² *Supra* note 1; *see also* page 660 of the record.

The Board finds that appellant received an overpayment of \$13,733.71 in compensation from January 1, 1996 to December 31, 1997.

The record indicates that appellant was retroactively paid compensation benefits for total disability for the period of January 1, 1996 to December 31, 1997; however, the Office did not take into account appellant's wage earnings for this period. Consequently, he received an overpayment of compensation in the amount of \$13,733.71.³ The Office properly determined that for the period of January 1, 1996 to December 31, 1997 appellant received an overpayment of \$13,733.71. He does not dispute that he received the overpayment in question, rather questions the pay rate calculations noting that as of January 1992 he was receiving \$2,562.00 per pay period, at a weekly rate of \$640.00, contrary to the Office's weekly rate of \$607.00 per week.

The Office noted that appellant's pay rate was based on his earnings as of the date of the recurrence on February 3, 1989, which was \$729.67. He does not dispute this amount. The Office further noted that beginning March 1, 1990 appellant was afforded a cost of living adjustment once a year, based on the consumer price index for that year and as March 1992 appellant's compensation was \$624.00 per week. The Board notes that he has submitted no financial documentation to substantiate that his weekly pay rate was \$640.00 nor has he provided any evidence in support of his allegation that the Office utilized an incorrect pay rate. The Board finds that the Office properly determined the amount of the overpayment that covered the period of January 1, 1996 to December 31, 1997.

The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment.

Section 8129 of the Federal Employees' Compensation Act⁴ 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 does not automatically result in waiver of 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.⁵

Section 10.436 of the implementing federal regulations⁶ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under

³ The record indicates that appellant earned actual wages during this period of \$11,357.00. The Office properly followed its procedures and applied the *Shadrick* formula using appellant's actual earnings and determined the amount due appellant, \$232,552.69 subtracted from the amount paid by the Office to appellant, \$246,286.40 resulted in an overpayment of \$13,733.71. Appellant did not dispute this amount. The Board finds that the Office properly calculated the overpayment for the period in question.

⁴ 5 U.S.C. § 8129.

⁵ See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

⁶ 20 C.F.R. § 10.436.

which recovery may be considered to “defeat the purpose of the Act.” Section 10.438 of the regulations⁷ provides that “the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office] ... failure to furnish the information within 30 days of the request shall result in denial of waiver....”

In this case, appellant was advised by the Office to provide the necessary financial information by completing the overpayment recovery questionnaire issued on April 28, 1999 if he wanted to request waiver. On May 25, 1999 appellant questioned the rate of pay and requested an appeal. However, appellant failed to submit the overpayment questionnaire, request a waiver or initiate any other actions that were specified in the preliminary overpayment decision. Additionally, appellant failed to submit financial information supporting his position. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act.⁸

With respect to whether recovery would be against equity and good conscience, section 10.437(a)(b) of the federal regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or, 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. Appellant did not submit any financial information to show that he would experience severe financial hardship; that he relinquished a valuable right; or showed that his position changed for the worse. The Office did not have the necessary financial information to determine whether recovery of the overpayment would cause financial hardship or that he changed his position for the worse. There is no evidence in the record that appellant made a decision that would not otherwise have been made and the evidence does not demonstrate, that he relinquished a valuable right or changed his position for the worse in reliance on the overpayments. As stated previously, appellant failed to submit the financial information required by section 10.438 of the regulations⁹ which was necessary to determine whether appellant detrimentally relied on the overpayments. 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 Board further finds that the Office did not abuse its discretion in requiring repayment of \$250.00 every four weeks from appellant.

Section 10.441(a) provides if an overpayment has been made to an individual who is entitled to further payments and no refund is made, the Office “shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of

⁷ 20 C.F.R. § 10.438.

⁸ See 20 C.F.R. § 10.438 (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

⁹ 20 C.F.R. § 10.438.

compensation, the financial circumstance of the individual and any other relevant factors, so as to minimize any hardship.”¹⁰

The record establishes that appellant did not submit an overpayment recovery questionnaire nor did he furnish any supporting financial evidence to substantiate his expenses from which the Office could determine what amount appellant could afford to repay out of his continuing compensation benefits.¹¹ The Office, therefore, considered the total amount of net compensation appellant was receiving of \$2,832.46 and determined that a \$250.00 withholding every four weeks from compensation would promptly repay the overpayment with the least amount of burden on appellant. As appellant has submitted no financial information indicating that such an amount would not minimize any hardship, the Office properly directed repayment by withholding this amount from continuing compensation.

Following issuance of the March 30, 2001 Office decision and on appeal appellant alleges that the Office improperly assessed interest on the overpayment. However, the Office has not issued a decision on this issue and, therefore, the Board does not have jurisdiction to review this matter.¹²

¹⁰ 20 C.F.R. § 10.441(a).

¹¹ *See* 20 C.F.R. § 10.438 which provides that if additional financial information is not submitted or a preredemption 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. The overpaid individual has the responsibility of providing the financial information as the Office may require.

¹² *See* 20 C.F.R. § 501.2(c).

The decision of the Office of Workers' Compensation Programs dated March 30, 2001 is affirmed.

Dated, Washington, DC
August 5, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member