

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEON J. MORMANN and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS, U.S. PENITENTIARY, Atlanta, GA

*Docket No. 02-583; Submitted on the Record;
Issued August 5, 2002*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant received a \$5,103.82 overpayment in compensation; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for wavier of recovery of the overpayment.

The case has been on appeal previously.¹ In a September 21, 2000 decision, the Board noted that the Office had informed appellant that it had made a preliminary determination that he had received a \$5,103.12 overpayment in compensation. The Office reported that appellant was erroneously paid compensation at three-quarters of his weekly pay because he claimed his daughter, born August 20, 1978, as a dependent who was attending college but subsequently informed the Office that his daughter had not attended college. The Office indicated that the period of the overpayment was from August 20, 1996 to August 16, 1998, when the Office reduced appellant's compensation to two-thirds of his weekly pay. Appellant requested waiver of the overpayment, stating that his ex-wife had become his common law wife and therefore qualified as a dependent. The Office found that appellant's ex-wife did not qualify as a dependent under the Federal Employees' Compensation Act. The Board stated that the status of whether a common law marriage existed was dependent on state law. The Board indicated that the state of Georgia did not recognize common law marriages after January 1, 1997. The Board found that appellant did not establish prior to January 1, 1997 that he and his ex-wife had held themselves out to be married, that they had the capacity to contract a marriage, that they had made an agreement of marriage, and that they had consummated the agreement. The Board therefore concluded that appellant had not established that he had any dependents after August 20, 1996 and therefore was not entitled to augmented compensation after that time.

In an October 25, 2000 letter, the Office asked appellant to complete a new overpayment recovery questionnaire, as his previous questionnaire was two years old. In an October 27, 2000

¹ Docket No. 99-1945 (issued September 21, 2000). The history of the case is contained in the prior decision and is incorporated by reference.

response, appellant reported no income beyond his compensation payments. He listed monthly expenses of \$300.00 for rent or mortgage, \$250.00 for food, \$200.00 for clothing, \$170.00 for utilities and \$450.00 for miscellaneous expenses. He also reported that he had a \$7,000 debt to his ex-wife, on which he was paying \$200.00 a month. He stated that he had \$105.00 cash on hand.

Appellant argued that the overpayment should be waived. He stated that a representative of the Office had told him that his daughter would remain a dependent until she was 23 years old. He indicated that there was no mention of her being mandated to remain in school.

In a November 27, 2001 decision, the Office found that appellant had received an overpayment of compensation of \$5,103.12 because he received augmented compensation for the period August 20, 1996 through August 16, 1998 for a dependent when he was not entitled to such augmented compensation. The Office further found that appellant was without fault in the creation of the overpayment. The Office denied appellant's request for waiver of the overpayment. The Office indicated that appellant had a monthly income of \$1,865.28 and monthly expenses of \$1,570.00. The Office concluded that appellant did not need substantially all of his monthly income to meet his expenses. The Office indicated that it would recover the overpayment by deducting \$100.00 each month from his continuing compensation payments.

The Board finds that appellant received a \$5,103.12 overpayment in compensation.

The Board has previously held that appellant's ex-wife cannot be considered a dependent. Under section 8110(a)(3)² a child is a dependent if he or she is under 18 years old and is living with the employee or receiving regular contributions toward his or her support. Compensation payments for a dependent child will continue if the child is a student who is under 23 years old, has not completed 4 years of education beyond the high school level and is regularly pursuing a full-time course of study or training.³ In this case, appellant's daughter became 18 years old on August 20, 1996 and was not enrolled in a full-time course of study beyond the high school level at that time or at any time prior to August 16, 1998. She therefore was not a dependent as defined by the Act and appellant was not entitled to receive augmented compensation on that basis. He therefore received an overpayment of compensation for the augmented compensation he received from August 20, 1996 to August 16, 1998.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for waiver of recovery of the overpayment.

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

² 5 U.S.C. § 8110(a)(3).

³ 5. U.S.C. § 8101(17).

overpayment of compensation by the Office is a matter that rests within its discretion to be exercised pursuant to statutory guidelines.⁴

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:

“Recovery of an overpayment will defeat the purpose of the [Office] if such recovery would cause hardship to a currently or formerly entitled beneficiary because:

(a) 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

(b) The beneficiary’s assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.”⁵

In *Robert E. Wenholz*,⁶ 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, and the applicable Office procedures, 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 the set resource base. The Office procedure manual sets the asset resource base of \$3,000.00 for a single person and \$5,000.00 for a married person, with an additional \$600.00 for each dependent. The procedure manual’s test for determining whether a claimant needs substantially all of his current income to meet his current ordinary and necessary living expenses is whether a claimant’s income is less than his monthly expenses or does not exceed his monthly expenses by more than \$50.00.⁷ In this case, appellant’s assets were below \$3,000.00. However, his monthly income exceeded his expenses by more than \$50.00. Therefore, he does not need substantially all of his current monthly income to meet his expenses. As a result, recovery of an overpayment would not defeat the purposes of the Act.

⁴ *William Phillips, Jr.*, 39 ECAB 330 (1987).

⁵ 20 C.F.R. § 10.436.

⁶ 38 ECAB 311 (1986).

⁷ Federal (FECA) Procedure Manual, Part 6 -- Overpayments and Collections, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (September 1994).

Appellant also did not show that recovery of the overpayment would be against equity and good conscience. To show that recovery would be against equity and good conscience, appellant must show that recovery would impose a financial hardship, that he had no knowledge of the overpayment and did not benefit from it, or that he had detrimental reliance on inaccurate information from the Office.⁸ In this case, appellant did not show that recovery of the overpayment would create a financial hardship. He claimed that he did not realize that he was receiving an overpayment of compensation. However, he derived a benefit from the overpayment because he received the augmented compensation for a period in which he was not entitled to such compensation. He contended that he received inaccurate information from an Office representative that his daughter would remain a dependent until she was 23 years old. However, appellant did not show detrimental reliance to the extent that, based on the inaccurate information, he relinquished a valuable right which he could not recoup or than he had changed his position such that he was in a worst position than if he had never received the excess compensation. Appellant therefore has not shown that recovery of the overpayment was against equity and good conscience. As appellant did not show any basis on which recovery of the overpayment could be waived, the Office properly denied appellant's request for waiver of recovery of the overpayment.

The decision of the Office of Workers' Compensation Programs, dated November 26, 2001, is hereby affirmed.

Dated, Washington, DC
August 5, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ *Id.* at Chapter 6.200.6(b).