

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GARY L. ALLEN and TENNESSEE VALLEY AUTHORITY,  
SEPUOYAH NUCLEAR PLANT, Soddy-Daisy, TN

*Docket No. 02-670; Submitted on the Record;  
Issued August 27, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment occurred in the amount of \$4,601.14; (2) whether the Office properly determined that appellant was not entitled to waiver of the overpayment; and (3) whether the Office properly determined that \$100.00 should be withheld from appellant's continuing compensation checks to recover the overpayment; and (4) whether the Office abused its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128.

This case has previously been on appeal before the Board. In the first appeal, the Board, in a February 23, 1996 decision, affirmed the July 1, 1993 decision, finalized on July 12, 1993. In the July 12, 1993 decision, the Office found that appellant forfeited his right to compensation in the amount of \$24,858.64 for the period December 15, 1989 to March 15, 1991, for knowingly failing to report earnings. The Office found that an overpayment was created as a result and that appellant was at fault in the matter. In the second appeal, the Board in a July 8, 1999 affirmed the March 13, 1997 decision, which found that appellant's February 21, 1997, request for modification of the prior decision was cumulative and immaterial to the relevant issues of the case and insufficient for merit review. The facts and the circumstances of the case are completely set out in these decisions and are hereby incorporated by reference.<sup>1</sup>

Following the July 8, 1999 Board decision, appellant sought vocational rehabilitation counseling and later accepted a position as a juvenile probation officer on April 2, 2001. The Office found that this position fairly and reasonably represented appellant's wage-earning capacity.

On November 2, 2001 the Office made a preliminary determination that an overpayment occurred from April 2 through August 11, 2001, in the amount of \$4,601.14, based on the fact

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<sup>1</sup> Docket No. 93-2448 (issued February 23, 1996); Docket No. 97-2122 (issued July 8, 1999).

that appellant was paid for total wage-loss compensation for the stated period after he resumed working on April 2, 2001. The Office determined that appellant was without fault in the creation of the overpayment since he had no control over the administrative error. The Office advised appellant that if believed he should receive a waiver instead of repaying the overpayment he should submit a completed Form OWCP-20, which detailed income and expenses, along with supporting documentation.

In a December 17, 2001 decision, the Office formally determined that an overpayment was created in this case, in the amount of \$4,601.14. The Office found that the circumstances of appellant's case did not warrant a waiver of the recovery of the overpayment and advised appellant that \$100.00 would be withheld from his monthly compensation until the \$4,601.14 overpayment was absolved.

In a letter dated December 30, 2001, appellant requested reconsideration. Appellant requested that the decision to withhold \$100.00 from his monthly compensation be overturned. Appellant also argued that, following the first notice of overpayment, he submitted a detailed listing of his income and monthly expenses by certified mail and that this evidence should have been reviewed before the decision was made final. Appellant asserted that the Office decision would have an extreme adverse effect on his ability to maintain his current standard of living.

By decision dated February 4, 2002, the Office denied appellant's request for a review of the merits. The Office found that, although appellant alleged that he submitted income and expense information that was not considered, appellant failed to submit such information on reconsideration and the information was not of record. The Office further found that appellant's letter requesting reconsideration raised no substantive legal questions, which would warrant a merit review.

The Board finds that appellant received an overpayment of \$4,601.14 for compensation received from April 2 through August 11, 2001, based on total disability, when appellant was in fact working full time during that period and should have received a reduced rate.

Section 8129(a) of the Federal Employees' Compensation Act<sup>2</sup> provides that when an overpayment of compensation is made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled. Section 8129(b) provides the only exception to this mandatory adjustment:

“Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”<sup>3</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8129(b).

Because the Office found appellant to be without fault in the creation of the \$4,601.14 overpayment, then in accordance with section 8129(b), the Office may only recover the overpayment if it is determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulations<sup>4</sup> provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship by depriving a currently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses. Recovery will defeat the purpose of the Act to the extent that (1) the individual from whom recovery is sought needs substantially all of her current income, including compensation benefits, to meet current ordinary and necessary living expenses and (2) the individual's assets do not exceed a 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. This base includes all of the individual's assets not exempt from recoupment.<sup>5</sup>

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>6</sup>

The Board having duly considered the record finds that the case is not in posture for a decision on the issue of waiver.

In a memorandum attached to the December 17, 2001 decision, the Office indicated that appellant failed to respond to the overpayment notification with income and expense information, therefore, the Office could not consider waiver in this case. The record, however, reflects that appellant requested waiver and submitted supportive income and expense documentation prior to the December 17, 2001 decision. He submitted a Form CA-2202 signed on November 30, 2001, which indicated that appellant requested waiver of the overpayment based on the written evidence. He also submitted a Form OWCP-20 signed November 29, 2001, which detailed his income and expenses and he attached supportive documentation including account information and monthly bills. The record reflects that these documents were received on December 6, 2001.

Based on the overpayment questionnaire completed by appellant on November 29, 2001 he has a monthly income of \$1,364.86, for wages and compensation benefits. Appellant alleges

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<sup>4</sup> 20 C.F.R. § 10.436 (1999).

<sup>5</sup> See *Robert F. Kenney*, 42 ECAB 297 (1991).

<sup>6</sup> 20 C.F.R. § 10.437 (1999).

monthly expenses totaling \$2,485.00, which exceeds his family income level.<sup>7</sup> The Board notes that appellant made a specific and itemized list of his monthly expenses and submitted supportive documentation. As such, the Office was obligated to ascertain whether appellant was entitled to waiver based on such information regarding the overpayment. On remand, the Office should examine these amounts for reasonableness, recalculate where appropriate and provide explanatory rationale regarding waiver.

For the reasons stated above, the Board further finds that this case is not in posture for a decision, on the issue of whether the Office abused its discretion by ordering repayment of the overpayment by deducting \$100.00 every four weeks from appellant's continuing compensation payments. Consequently, the Board remands the case to the Office for recalculation of the monthly repayment amount, if necessary, based on a correct determination of appellant's ordinary and necessary living expenses in comparison with his monthly income.

The decision of the Office of Workers' Compensation Programs dated December 17, 2001 is hereby set aside. In light of the Board's resolution of the issues of waiver and repayment of the overpayment in this case, the issue regarding the denial of appellant's request for reconsideration is moot.

Dated, Washington, DC  
August 27, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>7</sup> An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00. Federal (FECA) Procedure Manual, Part 6 -- *Debt Management, Initial Overpayment Actions*, Chapter 6.200(a)(1) (September 1994); *Stanley K. Hendlar*, 44 ECAB 698 (1993).