

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of JAMES A. GRAY and HOLOCAUST MEMORIAL COUNCIL,  
U.S. HOLOCAUST MEMORIAL MUSEUM, Washington, DC

*Docket No. 02-195; Submitted on the Record;  
Issued December 27, 2002*

---

DECISION and ORDER

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

The issues are: (1) whether appellant received a \$2,816.87 overpayment of compensation; (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 deducting \$80.00 from appellant's continuing compensation payments every 28 days.

The Board finds that appellant received a \$2,816.87 overpayment of compensation.

On June 24, 1999 appellant, then a 37-year-old supply technician, sustained an employment-related lumbosacral strain and herniated nucleus pulposus at L5-S1.<sup>1</sup> Appellant received appropriate compensation for periods of disability. By decision dated October 10, 2001, the Office determined that appellant received a \$2,816.87 overpayment of compensation, that the overpayment was not subject to waiver of recovery, and that the overpayment should be repaid by deducting \$80.00 from appellant's continuing compensation payments every 28 days.

Beginning in April 2000, appellant no longer had a dependent as he was separated from his wife, was not living with her, and did not provide her with support payments.<sup>2</sup> Appellant received augmented compensation for the period April 1, 2000 to August 11, 2001. He was not entitled to augmented compensation for this period because he no longer had a dependent.

During the period April 1, 2000 to March 24, 2001 (51 weeks) appellant received compensation at that augmented rate of 75 percent of \$469.77 per week, *i.e.*, \$352.33 per week (or \$1,409.32 every 4 weeks). He should have received compensation for this period at the nonaugmented rate of 66 percent of \$469.77 per week, *i.e.*, \$310.05. Therefore, he received an overpayment of \$42.28 per week and the overpayment per week figure times 51 weeks would

---

<sup>1</sup> On February 8, 2000 appellant underwent lumbar surgery which was authorized by the Office.

<sup>2</sup> Appellant advised the Office of these facts in September 2000.

render a total overpayment during this period of \$2,156.28. During the period March 25 to August 11, 2001 (20 weeks) appellant received compensation at that augmented rate of 75 percent of \$485.67 per week, *i.e.*, \$364.25 per week (or \$1,457.00 every 4 weeks). He should have received compensation for this period at the nonaugmented rate of 66 percent of \$485.67 per week, *i.e.*, \$320.54. Therefore, he received an overpayment of \$43.71 per week and the overpayment per week figure times 20 weeks would render a total overpayment during this period of \$874.20. Adding the overpayment figures together for the periods April 1, 2000 to March 24, 2001 and March 25 to August 11, 2001 yields a total overpayment which is no less than the \$2,816.87 overpayment declared by the Office. On appeal appellant alleged that he created an overpayment that was less than the overpayment of \$2,816.87 declared by the Office. However, the evidence of record does not support his contention.<sup>3</sup>

The proper calculation of the overpayment for the period April 1, 2000 to August 11, 2001 would be \$3,030.48. The Office apparently arrived at a figure of \$2,816.87 for this period because it based its calculations on the supposition that appellant received \$352.33 per week for the period April 1, 2000 to August 11, 2001. As noted above, appellant actually received \$352.33 per week for the period April 1, 2000 to March 24, 2001, but received \$364.25 per week for the period March 25 to August 11, 2001. This error by the Office is harmless as its overpayment calculation was lower than the proper calculation.

For these reasons, appellant received a \$2,816.87 overpayment of compensation.

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.<sup>4</sup> These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which states: "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>5</sup> Since the Office found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the

---

<sup>3</sup> The Board notes that appellant made several errors in connection with his overpayment calculations. For example, he incorrectly indicated in his calculations that he received \$1,409.31 every 4 weeks during the period April and December 2000 and 1,457.00 every 4 weeks during the period January and August 2001.

<sup>4</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>5</sup> 5 U.S.C. § 8129(b).

overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.<sup>6</sup>

Section 10.436 of the Office's regulations<sup>7</sup> provides that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: "(a) [t]he 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) [t]he beneficiary's assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics." Section 10.437<sup>8</sup> states that recovery of an overpayment is also considered to be against equity and good conscience if the 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.

Section 20 C.F.R. § 10.438 states:

"(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."

Although appellant was provided with the opportunity, he submitted no financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act. In the absence of evidence to the contrary, there is a presumption that a letter properly addressed and mailed in the ordinary course of business is presumed to have arrived at the mailing address in due course.<sup>9</sup> The September 6, 2001 preliminary determination letter, containing the request for financial information, had appellant's proper address. There is no evidence to show it was not properly mailed and therefore it is presumed it reached appellant's mailing address. Absent evidence documenting appellant's financial status, the Office cannot determine whether appellant is entitled to waiver and waiver cannot be granted.<sup>10</sup> Further, appellant has not shown

---

<sup>6</sup> Appellant argued that the overpayment should be waived because he was not found to be at fault in its creation. But he would only be entitled to such waiver if it were shown, under the standards described in the text of this decision, that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

<sup>7</sup> 20 C.F.R. § 10.436.

<sup>8</sup> 20 C.F.R. § 10.437.

<sup>9</sup> *Marlon G. Massey*, 49 ECAB 650, 652 (1998).

<sup>10</sup> *Id.*

that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received. Accordingly, the Office properly determined that appellant was not entitled to a waiver of the overpayment in this case.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$80.00 from appellant's continuing compensation payments every 28 days.

Section 10.441<sup>11</sup> of the Office's regulations provides if an overpayment of compensation has been made to an individual 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 compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship. Since appellant did not submit any financial data, there is no sufficient information for the Board to perform an analysis of the reasonableness of the recovery rate of \$80.00 every 28 days. Appellant has therefore not shown that the Office abused its discretion in withholding \$80.00 from his monthly compensation payments every 28 days.

The October 10, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
December 27, 2002

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

---

<sup>11</sup> 20 C.F.R. § 10.441.