

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of ARTHUR M. KELLY, Jr. and DEPARTMENT OF THE NAVY,  
MARINE CORPS AIR STATION, Cherry Point, NC

*Docket No. 02-1784; Submitted on the Record;  
Issued December 2, 2002*

---

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$1,089.96; and (2) whether the Office properly denied waiver of the overpayment.

On June 29, 2001 appellant, then a 42-year-old maintenance mechanic, filed a notice of traumatic injury alleging that on that same day he was descending a stepladder and injured his right foot. The Office accepted appellant's claim for a rupture of the achilles tendon on the right side. Appellant was paid compensation benefits from August 14 through October 6, 2001. He returned to light-duty work on September 24, 2001.

By decision dated April 26, 2002, the Office made a preliminary finding that appellant was overpaid benefits in the amount of \$1,089.96 and was without fault in creating the overpayment. The Office stated that the overpayment occurred when the claims examiner was not able to delete appellant from the periodic rolls on time and a compensation check was already scheduled to be sent to appellant. On June 3, 2002 appellant submitted financial information including an overpayment recovery questionnaire, monthly credit card payment information and leave and earnings statements. By decision dated June 3, 2002, the Office finalized its preliminary determination and denied waiver of recovery of the overpayment.

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$1,089.96.

The Office found in its April 26, 2002 preliminary determination that appellant received an overpayment of \$1,089.96 from September 24 through October 6, 2001 because the claims examiner was not able to delete the periodic rolls on time and the check was already scheduled to be sent to appellant. The Employment Standards Administration computer printout dated September 13, 2001 supports the fact that appellant received compensation for the period in question. Since appellant returned to work on September 24, 2001, he was not entitled to

compensation benefits after that date. Further, appellant does not refute the fact of an overpayment and there is no evidence to the contrary.

The Board further finds that the Office properly denied waiver of the overpayment.

Section 8129 of the Federal Employees' Compensation Act<sup>1</sup> 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.<sup>2</sup>

Section 10.436 of the implementing federal regulations<sup>3</sup> 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 which recovery may be considered to "defeat the purpose of the Act." Section 10.438 of the regulations<sup>4</sup> 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, the appeals rights attached to the Office's April 26, 2002 preliminary finding clearly state that appellant may request waiver within 30 days of the date of the Office's letter by submitting his reasons for requesting waiver, a completed overpayment recovery questionnaire (Form OWCP-20) and supporting financial documents. The letter states: "Also please note that under 20 C.F.R. § 10.438, we will deny waiver if you fail to furnish the information requested on the enclosed Form OWCP-20 (or other information we need to address a request for waiver) within 30 days." Since the Office's letter was dated April 26, 2002 and appellant's financial information was received on June 3, 2002, the Board find that appellant did not submit the requested information within 30 days of the date of the Office's letter and the Office properly denied waiver of the overpayment.

---

<sup>1</sup> 5 U.S.C. § 8129.

<sup>2</sup> *James M. Albers, Jr.*, 36 ECAB 340 (1984).

<sup>3</sup> 20 C.F.R. § 10.436.

<sup>4</sup> 20 C.F.R. § 10.438.

The June 3 and April 26, 2002 and July 19, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
December 2, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member