

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM R. HUGHES and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, Cecil Field, FL

*Docket No. 02-2062; Submitted on the Record;
Issued December 19, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant was with fault in an overpayment of \$15,751.61, that occurred from August 3, 1986 through July 1, 1989; (2) whether the Office of Workers' Compensation Programs properly denied waiver of an overpayment of \$82,411.11, that occurred from July 2, 1989 through March 24, 2001; and (3) if so, whether the Office properly set the rate of recovery from future compensation payments.

On October 23, 1980 appellant, then a 47-year-old firefighter, injured his back while in the performance of his duties. The Office accepted his claim for back sprain and a herniated disc at the L4-5 level and approved surgery. On February 23, 1982 appellant reinjured his back while in the performance of his duties. He stopped work on March 1, 1982 and did not return. The Office accepted his claim for a herniated disc at L4-5 and approved another surgery. The Office later accepted that appellant's employment had caused a permanent aggravation to degenerative cervical disc disease.

On July 18, 1986 the Office found that appellant was not totally disabled for work due to the effects of his injuries and advised that effective August 3, 1986 his compensation would be reduced to reflect his capacity to earn wages as a ticket clerk. The Office advised appellant that his net compensation each four weeks would now be \$1,050.48 and that the first such check would cover the period August 3 through August 30, 1986.

After issuing its July 18, 1986 decision, the Office neglected to reduce appellant's compensation payments. On August 30, 1986 the Office issued appellant a compensation check in the amount of \$1,492.00 for the period August 3 to August 30, 1986, which was the same amount he was previously receiving and which was \$441.52 more than the July 18, 1986 decision stated he was entitled to. The Office continued to pay appellant at this rate, plus applicable cost-of-living increases.

On July 28, 1989 the Office advised appellant that he was currently in receipt of net compensation reflecting a partial wage-earning capacity in the amount of \$1,563.02 every 28 days: "This will continue as long as your disability continues."

The Office did not correct its error until 2001. On April 2, 2001 the Office notified appellant that it had been paying him compensation at the incorrect rate since August 3, 1986, the effective date of its July 18, 1986 decision on wage-earning capacity.

On September 18, 2001 the Office made a preliminary determination that an overpayment of \$60,525.58 occurred from August 3, 1986 to April 27, 1996 because it failed to reduce appellant's compensation in accordance with the July 18, 1986 decision on wage-earning capacity. The Office made a preliminary determination that appellant was at fault in the creation of this overpayment because he knew or reasonably should have known that his compensation was not reduced and that the Office's July 18, 1986 decision was never overturned. The Office added that appellant had a copy of the entire case record and also had expert legal advice.

On September 18, 2001 the Office made another preliminary determination that an overpayment of \$37,600.55 occurred from April 27, 1996 to March 24, 2001 for the same reason. The Office determined, however, that appellant was without fault in creating this portion of the overpayment.

Appellant requested a prerecoumpment hearing. He completed an overpayment recovery questionnaire indicating that he had assets in excess of \$5,000.00. He asserted that if he was overpaid, he was not aware of it. At the hearing, which was held on January 31, 2001 appellant testified as to what he thought when he received the Office's July 18, 1986 decision and whether it was going to affect his compensation: "I can[no]t even recall it." He stated that it never occurred to him that he was being overpaid.

In a decision dated May 9, 2002, the hearing representative found that appellant was with fault in the overpayment of \$15,751.61 that occurred from August 3, 1986 through July 1, 1989, as he accepted payment he knew or should have known was incorrect. The hearing representative also found that appellant was without fault in the overpayment of \$82,411.11, that occurred from July 2, 1989 through March 24, 2001. She denied waiver of this portion of the overpayment on the grounds that appellant did not need substantially all of his currently monthly income to meet ordinary and necessary monthly expenses and on the grounds that his assets exceeded the designated resource base.

The hearing representative noted that appellant had monthly income of \$1,674.12, monthly expenses of \$1,329.35, and assets of \$19,238.00 with one dependent, his wife. Considering appellant's financial circumstances, the hearing representative determined that the Office could recover the overpayment by deducting \$200.00 a month from ongoing compensation checks without creating a severe financial hardship on appellant. For repayment of the debt for which appellant was with fault, the Office would recover \$150.00 a month. For repayment of the debt for which he was without fault, the Office would recover \$50.00 a month. The hearing representative waived interest charges so long as appellant did not default on the debt.

The Board finds that appellant was with fault in an overpayment of \$15,751.61, that occurred from August 3, 1986 through July 1, 1989.

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).¹

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.²

In this case, the circumstances of the overpayment that began on August 3, 1986 support that appellant was at fault. The Office notified him on July 18, 1986 that his compensation was being reduced. The Office was very specific about the amount of compensation he would be receiving and when the reduction would take effect. The first check, for the period August 3 to August 30, 1986, was supposed to be for \$1,050.48. When appellant instead received a check for that period in the amount of \$1,492.00, the same amount of compensation he was previously receiving, he should have known that the payment was incorrect, that it was \$441.52 more than the July 18, 1986 decision stated he was entitled to.

The fact that the Office may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual was also at fault in accepting the overpayment.³ Because appellant accepted payment that he should have known was incorrect, the Office cannot consider waiving the overpayment that occurred from August 3, 1986 to July 1, 1989. The Board will affirm the Office's finding of fault with respect to this portion of the overpayment.

The Board also finds that the Office properly denied waiver of an overpayment of \$82,411.11, that occurred from July 2, 1989 through March 24, 2001.

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁴ If the Office finds that the

¹ 20 C.F.R. § 10.433(a) (1999).

² *Id.* at § 10.433(b).

³ *Id.* at § 10.433(a).

⁴ *Id.*

recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁵

Recovery of an overpayment will defeat the purpose of the Act 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.⁶ Under Office procedures, an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. If this condition is met and the individual's nonexempt assets do not exceed \$5,000.00 (the asset limit for an individual with a spouse), recovery of an overpayment will defeat the purpose of the Act and warrant waiver. Waiver requires that both conditions be met.⁷

In this case, appellant's monthly income exceeds his monthly expenses by \$344.77 and his assets exceed \$5,000.00. Because he does not meet the conditions for waiver, based on financial hardship, adjustment or recovery of the overpayment is not deemed to defeat the purpose of the Act.

Recovery of an overpayment is considered to be against equity and good conscience when any 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.⁸ Appellant makes no allegation and the record fails to support that he detrimentally relied on the overpaid compensation. Adjustment or recovery of the overpayment is not deemed to be against equity and good conscience.

The Board will affirm the Office's denial of waiver.

The Board will also affirm the rate of recovery from future compensation payments.

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future

⁵ *Id.* at § 10.434.

⁶ *Id.* at § 10.436.

⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6.a(1), .6(a)(4) (September 1994).

⁸ 20 C.F.R. § 10.437(b) (1999).

payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.⁹

The hearing representative properly took these factors into account in setting the rate of recovery at \$200.00, a month from ongoing compensation payments. The Board notes that interest on the debt was conditionally waived and that the recovery still leaves appellant with more than \$140.00, a month in disposable income.

The May 9, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
December 19, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁹ *Id.* at § 10.441(a).