

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES CORBIN and DEPARTMENT OF THE NAVY,
NAVAL REWORK FACILITY, Norfolk, VA

*Docket No. 00-2066; Submitted on the Record;
Issued February 21, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment in the amount of \$19,825.95 was created due to the payment of augmented compensation during a period when appellant had no dependents; (2) whether the Office properly denied appellant's request for waiver of recovery of the overpayment;¹ and (3) whether the Office properly determined that appellant should repay the overpayment by withholding \$300.00 from appellant's continuing compensation.

On May 12, 1982 the Office accepted that appellant sustained acute back strain, left elbow fracture and left wrist fracture on January 13, 1982 while in the performance of duty. The Office paid compensation from June 23, 1982 to November 24, 1984 at the augmented rate of three-fourths of appellant's pay,² on the basis that he had an eligible dependent.

By letter dated May 8, 1989, the Office advised appellant that compensation for his daughter was to stop as soon as she became 18 years old. The Office advised appellant that compensation could continue after her 18th birthday only if the dependent was unmarried and either incapable of self-support or a full-time student.

By EN1615-0189 forms dated September 21, 1991 and March 27, 1992, appellant notified the Office that he was responsible for a dependent daughter, born on June 2, 1972.

By letter dated April 20, 1992, the Office advised appellant that he no longer had dependents under 18 years old. It asked appellant to submit evidence that would establish whether he was responsible for a dependent. The Office further noted that a dependent was a son

¹ The record does not reflect a specific request from appellant to waive the requirement to repay the overpayment.

² 5 U.S.C. § 8110. The Office initially paid appellant at a 66 and 2/3 percent rate but on December 10, 1984, the Office increased his compensation rate to 75 percent to include a dependent daughter. The Office also paid appellant an adjusted compensation check to eliminate the underpayment.

or daughter over 18 years of age who was a full-time student. The Office noted that appellant had 30 days to submit the requested evidence.

By EN1615-0189 forms dated March 15, 1993 and February 15, 1994, appellant notified the Office that he was responsible for his dependent daughter, born on June 2, 1972.

By EN1615-0189 forms dated March 10, 1995, February 27, 1996, February 20, 1997 and March 5, 1998, appellant notified the Office that he did not claim compensation on account of dependent children.

By letter dated March 19, 1998, the Office notified appellant that it had made a preliminary determination that he received an overpayment of compensation based on an incorrect compensation rate. The Office stated that since his completion of the Office's questionnaire in March 15, 1993, appellant did not have dependents eligible for compensation, and that therefore from April 25, 1998, his compensation check would reflect a reduction in his compensation rate. The Office further asked appellant to advise the Office if his daughter continued school after her high school graduation and that if no proof of continued education was possible then "the overpayment would commence from the date that she graduated from high school."³

On November 4, 1999 the Office again notified appellant that it had made a preliminary decision finding that he received an overpayment of compensation in the amount of \$19,825.95 for the period June 2, 1990, when his daughter turned 18 years old, to March 28, 1998. During that time, appellant was paid compensation at the rate of 75 percent which was incorrectly based on consideration of appellant's daughter as a dependent. Because she did not qualify as a dependent during that time, appellant's compensation rate should have been 66 and 2/3 percent. The difference between the two rates from June 2, 1990 to March 28, 1998 was \$19,825.95. The Office made a preliminary determination that appellant was without fault in the creation of the overpayment and was informed that he could request a prerecoupment hearing or a telephone conference and that he may request waiver of recovery. The Office informed appellant that the overpayments may be waived when appellant is without fault and that recovery of the overpayments would defeat the purpose of the Federal Employees' Compensation Act or the recovery would be against equity and good conscience and described the circumstances under which recovery may be considered to defeat the purpose of the Act or would be against equity and good conscience. The Office also informed appellant that information regarding his financial circumstances was important and requested that he complete and submit the enclosed "overpayment recovery questionnaire" with supporting documents, as well as any other relevant information. The Office advised appellant to submit a completed financial questionnaire to assist the Office in deciding whether or not to waive the overpayment or in the event that waiver is not granted, to assist the Office in deciding how to recover the overpayment.

In reports of telephone calls dated December 3 and 14, 1999, the Office claims examiner indicated that she had attempted to return appellant's call about his overpayment and left messages on his answering machine to return her call and that she would schedule a conference with him. In a letter dated December 14, 1999, the claims examiner advised appellant that she

³ The record shows that appellant notified the Office for the first time in March 1995 that he had no dependents.

was attempting to schedule a conference with him regarding his overpayment. And that he should contact her as soon as possible.

On December 29, 1999 the Office issued a decision finding that an overpayment in the amount of \$19,825.95 had been made in appellant's case and that the sum of \$300.00 would be withheld from his compensation checks every four weeks starting January 2000 and continuing until repaid on or about November 2005.⁴

The decision was reissued on May 5, 2000 as a result of appellant's assertion that he had not received the December 29, 1999 decision.⁵

The Board finds that appellant received an overpayment of \$19,825.95 in compensation.

In its November 24, 1999 preliminary finding, the Office found that appellant received an overpayment of compensation in the amount of \$19,825.95 from June 2, 1990 to March 28, 1998. During that time, appellant was paid compensation at the incorrect rate of 75 percent which was based on consideration of appellant's daughter as a dependent. However, his daughter turned 18 years old on June 2, 1990, but appellant continued to receive compensation checks at a 75 percent rate based on appellant's submissions. It was not until March 10, 1995 that appellant did not claim a dependant in his income questionnaire. Because appellant's daughter did not qualify as a dependent from June 2, 1990 to March 28, 1998, appellant's compensation rate should have been 66 and 2/3 percent. The difference between the two rates from June 2, 1990 to March 28, 1998 was \$19,825.95. The evidence in this case shows that appellant claimed his daughter as a dependent until March 10, 1995 but that the Office continued to pay compensation at the higher rate until March 28, 1998.

Appellant, therefore, received an overpayment of compensation for the period June 2, 1990 through March 28, 1998, because he received compensation at the augmented rate when he was not entitled to it.

The Board further finds that the Office properly determined that appellant was not entitled to waiver of the overpayment.

Section 8129(a) of the Act⁶ provides that where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations

⁴ The claims examiner also called appellant for a third time on December 29, 1999. The answering machine noted that the call could not be accepted at that time. The claims examiner also noted that appellant had not responded to her December 14, 1999 letter.

⁵ The record included reports of telephone calls from appellant to the Office on March 20 and May 1, 2000 which note his interest in discussing his overpayment case. In a report of a telephone call on May 4, 2000, the claims examiner discussed the overpayment decision with appellant who claimed he did not receive the December 29, 1999 decision. However, he did receive the November preliminary decision letter as he called the Office several times to discuss the case with his claims examiner at that time. The Office returned his call each time and wrote him on December 14, 1999 regarding his claim. Further, there is no indication that at any time after his receipt of the November preliminary decision that he asked for a precoupment hearing or a telephone conference.

⁶ 5 U.S.C. §§ 8101-8193.

prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. Section 8129(b) describes the only exception to the Office's right to adjust later payments or recover overpaid compensation:

“Adjustment or recovery 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.”⁷

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.⁸ The Office must 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,” pursuant to the guidelines provided in sections 10.434-.437 of the implementing federal regulations.⁹

Section 10.436 provides that recovery of an overpayment will defeat the purpose of the Act if:

“(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] as determined from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.”¹⁰

Section 10.437 provides that recovery of an overpayment would be considered to be against equity and good conscience if any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.¹¹

The Office's procedures manual states that recovery would cause hardship if:

“(a) The individual from whom recovery is sought needs substantially of his or her current income (including FECA monthly benefits) to meet current ordinary and necessary living expenses, and

⁷ *Id.* § 8129(d).

⁸ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

⁹ 20 C.F.R. §§ 10.434-437.

¹⁰ 20 C.F.R. § 10.436.

¹¹ 20 C.F.R. § 10.437.

“(b) The individual’s assets do not exceed the 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....”¹²

In this case, appellant failed to complete and submit the questionnaire and thus the Office has no financial information upon which to determine whether to waive recovery of the overpayment. The Office properly denied waiver in this case.

The Board also finds that the Office properly determined the rate of recovery of the overpayment.

Section 10.441(a) states in pertinent part: “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 payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”¹³ The record establishes that appellant failed to submit an overpayment recovery questionnaire or any other evidence from which the Office could determine what amount appellant could afford to repay out of his continuing compensation benefits and did not reply to the Office’s repeated attempts to determine his interest in a prerecoumment hearing or a telephone conference prior to finalization of the overpayment decision on December 29, 1999 or before May 5, 2000, the date of the reissuance. The Board notes that appellant called the Office on two occasions in December 1999 and in March and May 2000. However, appellant failed to return the Office’s December calls in a reasonable period of time, failed to reply to its December 14, 1999 letter and failed to specifically address his interest in a prerecoumment hearing or a telephone conference in either his March or May 2000 telephone conversation with the claims examiner. The Office, therefore, considered the total amount of compensation appellant was receiving and determined that a \$300.00 withholding every four weeks from compensation would promptly repay the overpayment with the least amount of burden on appellant. The Board finds that the Office did not abuse its discretion in this calculation.

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (September 1994).

¹³ 20 C.F.R. § 10.441(a).

The decision of the Office of Workers' Compensation Programs dated May 5, 2000 is hereby affirmed.

Dated, Washington, DC
February 21, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member