

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DANIEL REEVES and DEPARTMENT OF THE ARMY,  
FORT HAMILTON, Brooklyn, NY

*Docket No. 00-2477; Submitted on the Record;  
Issued February 20, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) whether appellant received an overpayment in compensation in the amount of \$23,965.46; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment; and (3) whether the Office abused its discretion in denying appellant's request for a hearing.

On September 11, 1997 appellant, then a 40-year-old police officer, filed an occupational disease claim, stating that on that day he sustained employment-related chest and arm pains and difficulty in breathing. He was hospitalized and did not return to work. By letter dated January 23, 1998, the Office accepted that appellant sustained employment-related post-traumatic stress and he was placed on the periodic rolls.

The Office continued to develop the claim and, in a letter dated October 20, 1998, proposed to terminate his compensation benefits on the grounds that he had changed his initial description of the events of September 11, 1997 that led to his hospitalization. By decision dated November 25, 1998, the Office rescinded acceptance of appellant's claim. On January 5, 1999 the Office issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$23,965.46 which arose because the acceptance of his claim had been rescinded. The Office found that appellant was not at fault in creating the overpayment and enclosed a worksheet detailing its calculation of the overpayment. On an attached Office form, the Office requested that appellant indicate whether he wished to contest the existence or amount of the overpayment or to request waiver of the overpayment.<sup>1</sup> The Office also asked him to complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. The Office indicated that the financial information

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<sup>1</sup> The form provides a claimant with three choices: (1) A request of waiver and a telephone conference; (2) a request of waiver with the Office making the decision on the written record; and (3) a request of waiver with a hearing before the Branch of Hearings and Review. With each of these choices, a claimant is to provide supporting financial documents.

would be used to determine whether he was entitled to waiver and that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment.

On January 7, 2000 the Office reissued the preliminary overpayment determination with accompanying documentation.<sup>2</sup> In a February 10, 2000 decision, the Office finalized its preliminary determination that appellant received an overpayment in compensation in the amount of \$23,965.46 and that he was without fault in the creation of the overpayment. The Office determined that the circumstances of appellant's case did not warrant waiver of recovery of the overpayment as he had failed to submit the required financial information.

In a letter dated April 17, 2000, appellant requested a hearing before the Branch of Hearings and Review. He enclosed a copy of a certified mail receipt which indicated that on February 24, 1999 something had been mailed to the district Office. By decision dated June 8, 2000, an Office hearing representative denied appellant's request for a hearing on the grounds that it was not timely filed. The instant appeal follows.

The Board finds that appellant received an overpayment of compensation in the amount of \$23,965.46.

The record indicates that, for the period October 27, 1997 to October 10, 1998, appellant received wage-loss compensation in the amount of \$20,967.50 and the Office paid medical expenses totaling \$2,997.96. As the acceptance of his claim was rescinded, he received an overpayment in compensation that totaled \$23,965.46. Appellant has not shown and the record does not otherwise establish, that the Office erred in calculating the amount of the overpayment. Therefore, an overpayment in compensation in the amount of \$23,965.46 was created.

The Board further finds that, while appellant was not at fault in the creation of the overpayment, he is not entitled to waiver.

Section 8129(a) of the Federal Employees' Compensation Act<sup>3</sup> provides that, where an overpayment of compensation has been made "because of an error of fact or law" adjustments shall be made by decreasing later payments to which an individual is entitled.<sup>4</sup> The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustments or recovery by the United States may not be made when incorrect payments 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."<sup>5</sup>

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<sup>2</sup> The record indicates that the case file was misplaced and was, therefore, reconstructed. It was found on January 12, 2000 and the two case records were combined. The January 7, 2000 preliminary overpayment determination letter was returned to the Office. After finding the original case record, it was determined that, as appellant had been sent the original preliminary notice in 1999, it was assumed that he received it. The Office, thus, deemed it appropriate to issue a final decision regarding the overpayment in compensation.

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8129(a).

<sup>5</sup> 5 U.S.C. § 8129(b).

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.<sup>6</sup> 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.<sup>7</sup> Furthermore, section 10.438 of the federal regulations provides:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. 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.”<sup>8</sup>

In the instant case, the Board finds that appellant did not make a good-faith effort to fully complete an overpayment recovery questionnaire.<sup>9</sup> On January 5, 1999 the Office mailed him a questionnaire and requested that he furnish the requested information within 30 days. Appellant did not respond within the allotted time period.<sup>10</sup> Without an accurate and complete breakdown of appellant’s monthly income, monthly expenses and assets, supported by financial documentation, the Office was not able to calculate whether appellant’s assets exceeded the specified resource base. The Office therefore properly found that appellant was not entitled to waiver on the grounds that recovery would defeat the purpose of the Act.<sup>11</sup>

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt<sup>12</sup> or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.<sup>13</sup>

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<sup>6</sup> *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

<sup>7</sup> 20 C.F.R. § 10.434-437 (1999).

<sup>8</sup> 20 C.F.R. § 10.438 (1999).

<sup>9</sup> See *Gail M. Roe*, 47 ECAB 268 (1995).

<sup>10</sup> While appellant submitted evidence indicating that something had been mailed to the Office on February 24, 1999, this was not within 30 days of the January 5, 1999 preliminary overpayment determination.

<sup>11</sup> *Id.*

<sup>12</sup> 20 C.F.R. § 10.437(a) (1999).

<sup>13</sup> 20 C.F.R. § 10.437(b) (1999).

Appellant, however, has submitted no evidence to establish that he relinquished a valuable right or changed his position for the worse in reliance on the overpaid compensation. The Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.<sup>14</sup>

The Board also finds that the Office did not abuse its discretion in denying appellant's request for a hearing.

Here, the Office denied appellant's request for a hearing on the grounds that it was untimely filed. In its June 8, 2000 decision, the Office stated that appellant was not, as a matter of right, entitled to a hearing since his request dated February 24, 1999 had not been made within 30 days of its November 25, 1998 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue of whether he sustained an employment injury could be addressed through a reconsideration application.

The Board initially notes that in the June 8, 2000 decision denying appellant's request for a hearing, the Office cited to the November 25, 1998 decision in which the Office rescinded acceptance of appellant's claim. The preliminary overpayment determination was dated January 5, 1999.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>15</sup> In the present case, appellant's request for a hearing was postmarked February 24, 1999<sup>16</sup> and was thus made more than 30 days after the date of issuance of the Office's prior decisions, those dated both November 25, 1998 and January 5, 1999. The Office was therefore correct in stating in its June 8, 2000 decision that appellant was not entitled to a hearing as a matter of right.

While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office, in its June 8, 2000 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue of whether the Office properly rescinded acceptance of his claim could be addressed through a reconsideration application. The Board further finds that section 8124(b)(1) of the Act is unequivocal in setting forth the limitation in requests for hearings. Where, as in the instant case, appellant's request for a precoupment hearing was received more than 30 days after the Office issued its preliminary

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<sup>14</sup> With respect to recovery, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Where appellant was no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment under the Debt Collection Act. *Robert S. Luciano*, 47 ECAB 793 (1996).

<sup>15</sup> *Henry Moreno*, 39 ECAB 475 (1988).

<sup>16</sup> The Branch of Hearings and Review apparently determined that the certified mail receipt constituted a valid request for a hearing.

determination which informed him that he had 30 days to request a hearing, appellant waived his right to a prerecoupment hearing regarding the overpayment in compensation.<sup>17</sup>

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.<sup>18</sup> In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.<sup>19</sup>

The decisions of the Office of Workers' Compensation Programs dated June 8 and February 10, 2000 are hereby affirmed.

Dated, Washington, DC  
February 20, 2002

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>17</sup> See *Gregg Manston*, 48 ECAB 226 (1996).

<sup>18</sup> See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

<sup>19</sup> The Board notes that appellant submitted additional evidence subsequent to the June 8, 2000 Office decision and with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).