

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILBERT L. BAILEY and DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD, Portsmouth, VA

*Docket No. 01-607; Submitted on the Record;
Issued June 24, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant received an overpayment of \$28,290.07 in compensation; (2) whether the Office of Workers' Compensation Programs properly denied granting a waiver or compromise of the overpayment; and (3) whether the Office properly required repayment of the overpayment by withholding \$600.00 every four weeks from appellant's continuing compensation.

On August 12, 1983 appellant, then a 59-year-old pipefitter/insulator, filed an occupational disease claim, alleging that his asbestosis was employment related. He indicated that he was receiving a federal retirement annuity, which began July 1975. On the back of the form, the employing establishment noted that appellant's last day of work and exposure was June 30, 1975. The Office accepted the claim for asbestos-related pleural disease and appropriate compensation benefits were paid.

A federal employment record revealed that as of June 30, 1975 appellant received an hourly rate of \$7.52, which was adjusted to \$8.23 on July 20, 1975 and that his disability retirement was effective January 20, 1976.

On March 5, 1986 the Office issued appellant a schedule award for a 30 percent impairment of both lungs and, based upon a weekly rate of \$329.20 (at \$8.23 an hour), effective June 2, 1998, placed appellant on the automatic rolls for temporary total disability.

On October 7, 1999 pursuant to an audit the Office made a preliminary determination that an overpayment in the amount of \$27,332.44 had occurred due to the usage of an incorrect pay rate and found that appellant was not at fault in the creation of the overpayment.

On October 24, 1999 appellant requested that a waiver of the overpayment and a hearing be held. In a recovery form, appellant noted a total monthly income of \$3,959.92 and total assets

of \$101,013.89. Regarding expenses he listed a quarterly mortgage payment of \$570.24,¹ food \$400.00, clothing \$150.00, utilities \$315.00, other expenses -- \$350.00, debts of \$400.00 to J.C. Penney with a monthly payment of \$60.00, a \$45.58 monthly payment to Cox Cable, and a \$2,563.00 revolving account on a VisaGold card with payments of \$100.00 for total expenses of \$1,610.10.²

In a decision dated November 9, 1999, the Office found an overpayment in the amount of \$27,332.44, which had occurred due to the Office using an incorrect pay rate calculation. The Office informed appellant that it had incorrectly used a weekly pay rate of \$329.20 when the correct weekly pay rate was \$301.81, based on the correct hourly rate of \$7.52. Next, the Office found that appellant was without fault in creation of the overpayment, but determined that waiver was not appropriate as appellant had not responded to a request for financial information and thus, waiver of the overpayment would not be granted. Lastly, the Office stated that \$350.00 a week would be deducted from appellant's compensation benefits.

On December 6, 1999 the Office vacated the November 9, 1999 decision as appellant had requested a hearing. A hearing was held on May 24, 2000 at which appellant testified.

Subsequent to the hearing, appellant submitted an updated list of his expenses dated June 19, 2000. He listed his monthly income as a \$715.75 annuity check to his spouse, a private pension annuity of \$2,524.92 to him, \$813.00 Veterans benefits to him for a total combined monthly income of \$4,053.97.³ He also listed assets of \$10,409.30 in his checking account, \$5,130.59 and \$42.09 in Christmas club accounts, \$14,817.59 and \$5,130.59 in savings/CD accounts, \$51,142.06 in an IRA account and two cars. Under monthly expenses, he listed \$600.00 for food, \$150.00 for clothing, taxes \$47.52,⁴ insurance \$43.66, gas and fuel \$95.00,⁵ unreimbursed medical expenses \$59.00, charitable contributions \$195.00, globe insurance \$24.90, GEICO \$39.13, Fire insurance \$27.92, Cox Cable \$45.58, Beauty Parlor \$150.00, Barber Shop \$20.00, Hampton Roads Sanitation \$2.66, debts of unknown amounts to J.C. Penney with a monthly payment of \$65.00 to \$75.00, an unknown amount on a VisaGold card with payments of \$21.95, a debt of \$922.29 to Lane Bryant with monthly payments of \$65.00, a debt of \$1,496.50 to Naval Shipyard Ports with monthly payments of \$100.00, a debt of \$4,441.63 to Norfolk NSC Credit Union with a monthly payment of \$165.00+, debts of \$2,610.59 on American Express with monthly payments of \$50.00 for total expenses \$2,430.58.⁶

¹ A monthly payment would be \$190.08 based on \$570.08 being divided by 3. On June 19, 2000 appellant indicated that the mortgage was paid off.

² Appellant apparently made a typographical error when he noted \$205.58 as his total monthly expenses.

³ The hearing representative noted monthly income of \$4,042.67, which appears to be a mathematical error.

⁴ Appellant noted that this amount varied.

⁵ *Id.*

⁶ The hearing representative found that the evidence supported total monthly expenses of \$2,423.22 which is \$7.06 less than the calculation found in the amounts listed by appellant.

In a September 12, 2000 waiver of charges/compromise of principal work sheet, the Office stated that interest charges “must be waived if [appellant] is without fault in the creation of the overpayment and the application of charges will extend the period of indebtedness beyond the debtor’s life expectancy.” The Office found that appellant was without fault in the creation of the overpayment. The Office further found that the “period necessary to repay the debt with charges is 52.60 months, which is less than [appellant’s] life expectancy of 114 months. Therefore, charges cannot be waived.”

In a decision dated September 18, 2000, the hearing representative modified the overpayment amount to \$28,290.07.

The Board finds that appellant received a \$28,290.07 overpayment of compensation.

The overpayment of compensation in this case was based on use of an incorrect pay rate to calculate appellant’s compensation. Under the Federal Employees’ Compensation Act, the pay rate to be used in calculating compensation is either the pay rate as of the date of injury, the date disability began or the date disability recurred, if disability recurred more than six months after an employee returned to regular, full-time work with the United States, whichever is greater.⁷

Where an injury is sustained over a period of time, as in this case, the date of injury is the date of last exposure to the employment factors causing the injury.⁸ In the present case, the date of appellant’s last exposure to the employment factors that caused appellant’s asbestosis was June 30, 1975, the date he last worked for the employing establishment. The Office case history inquiry records indicate that appellant was paid utilizing a weekly compensation rate of \$329.20 for the period June 3, 1975⁹ through September 11, 1999. An employing establishment form indicated that appellant’s pay rate for the period June 3, 1975 was \$7.52 an hour. Appellant retired on January 20, 1976 and had received an increase in his pay rate to \$8.23 an hour on July 20, 1975. The Office utilized the pay rate in effect on July 20, 1975 when it calculated his compensation rate of \$329.20. The evidence of record establishes that appellant’s last day of work and exposure to asbestos was June 30, 1975. As June 30, 1975 was the last date of exposure, the correct pay rate was the \$7.52 an hour, which was in effect as of that date and not the \$8.23 an hour rate, which was effective July 20, 1975. The Board finds that the Office properly calculated the amount of compensation appellant should have received for this period utilizing the proper hourly rate of \$7.52 or weekly pay rate of \$301.81. Thus, the Office properly determined that appellant had received an overpayment in the amount of \$28,290.07 due to the receipt of compensation based upon an erroneous pay rate.

⁷ 5 U.S.C. § 8101(4).

⁸ *Jack R. Lindgren*, 35 ECAB 676 (1984).

⁹ The Board notes that there appears to be some confusion regarding the Office’s determination of appellant’s date of injury. Appellant’s employer noted that appellant stopped work on June 30, 1975 on the back of his CA-2 form. It appears that a typographical error had been made when the Office found June 3, 1975 to be the date of injury since a review of the record supports June 30, 1975 as the date of appellant’s last exposure.

The Board also finds that the Office properly denied granting a waiver or compromise of the overpayment.

Section 8129(a) of the Act¹⁰ 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. 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 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.”¹¹

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.¹² 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 10.434-10.437 of the implementing federal regulations.

Section 10.436¹³ provides that 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 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 the beneficiary’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. For waiver under the “defeat the purpose of the Act” standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base of \$3,000.00.¹⁴

In determining that appellant was not entitled to waiver of the overpayment, the Office obtained figures from appellant’s most recent overpayment recovery questionnaire dated June 19, 2000. The Office determined that appellant had a total monthly income of \$4,4043.67, consisting of the combined monthly income of appellant and his wife. The Office determined that appellant’s monthly expenses totaled \$2,423.22, based on expenses listed and the supporting evidence. The Office further found that appellant had a savings account balance of \$5,130.59, \$51,142.06 in an IRA account and \$10,409.30 in a checking account. The Office found that as appellant’s assets exceeded the dollar criteria, recovery would not defeat the purpose of the Act. It further found that repayment in this case would not be against equity or good conscience.

¹⁰ 5 U.S.C. § 8129(a).

¹¹ 5 U.S.C. § 8129(b).

¹² *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

¹³ 20 C.F.R. § 10.436.

¹⁴ *James Lloyd Otte*, *supra* note 12; *Jesse T. Adams*, 44 ECAB 256, 260 (1992).

The Board has stated that the guidelines for recovery of an overpayment from an individual who is without fault were meant to read conjunctively and that the overpaid individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his income to meet his current ordinary and necessary living expenses and also that his assets, those which are not exempted, do not exceed a resource base of \$3,000.00 (or \$5,000.00 with a spouse or dependent).¹⁵

In determining that appellant was not entitled to waiver of the overpayment, the Office obtained figures from his overpayment recovery questionnaire dated June 19, 2000.

With respect to whether recovery would be against equity and good conscience, section 10.437 of the implementing regulations provides: “[R]ecovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or notice that such payments will be made, relinquished a valuable right or changed his position for the worse.”¹⁶ Appellant asserts that he was totally unaware that the amounts he received were incorrectly calculated overpayment checks and there is no evidence to suggest that appellant relinquished a valuable right or changed his position for the worst due to this overpayment. As appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience” the Board finds that the Office properly denied waiver of recovery of the overpayment.

Regarding the issue of compromise or waiver of interest and other charges, the Office’s procedures provide, in relevant part, as follows:

“There are only three circumstances under which charges may be waived. Waiver is mandatory under (a) and (c) below; it is discretionary under (b).

(a) If the principal is repaid in full within 30 days of notification that charges are applicable, then charges are waived....

(b) If the full amount of the principal is paid after charges have accrued and the additional cost of recovering the charges is greater than the amount of the accrued charges, then the Office may, at its discretion, waive the charges.

(c) Where the debtor is without fault in the creation of the debt and a repayment agreement has been established, if the monthly payment is so small that it does not cover the interest, or there is so little left after interest that the debt will not be paid off within the lifetime of the debtor as determined by actuarial tables, then charges are waived. Waiver of

¹⁵ *Robert E. Wenholz*, 38 ECAB 311 (1986).

¹⁶ 20 C.F.R. § 10.437.

charges under this provision is determined by completing the Waiver of Charges Worksheet....”¹⁷ (Emphasis omitted.)

The Board notes that the Office exercised its discretion, completing a waiver of charges worksheet dated September 12, 2000. The Office noted that, with the imposition of interest charges, repayment of the debt would be accomplished in 52.60 months. The Office, therefore, found that appellant’s current age of 77 indicated that the imposition of interest would not extend the period of indebtedness beyond his life expectancy of 114 months. The Office further found that appellant was not eligible for a compromise of the interest charges as the application of interest charges would not increase the amount of indebtedness by more than 35 percent. The Office, therefore, found that appellant did not qualify for a waiver of interest charges.¹⁸

The Board also finds that the Office properly required repayment of the overpayment by withholding \$600.00 from appellant’s monthly continuing compensation benefits.

“Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual any other relevant factors, so as to minimize any resulting hardship upon such individual.”¹⁹

In the instant case, the evidence establishes that appellant had a combined monthly income of \$4,053.97 with total monthly expenses of \$2,430.58 and monthly excess of \$1,623.39. Based on appellant’s information regarding his income, assets and expenses, the Office hearing representative determined to withhold \$600.00 every four weeks from appellant’s continuing compensation payments as his monthly income exceeded his monthly expenses by \$1,623.30 and is, therefore, appropriate under the circumstances of this case. Therefore, the Board finds that recovery of the overpayment by withholding \$600.00 every four weeks from appellant’s continuing monthly compensation benefits does not constitute an abuse of discretion.

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.4 (September 1994); see *Linda D. Lane*, 46 ECAB 727 (1995).

¹⁸ See *Marie D. Sinnet*, Docket No. 90-606 (issued October 30, 1990).

¹⁹ See *Roger Seay*, 39 ECAB 441 (1988); 20 C.F.R. § 10.321(a).

The September 18, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 24, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member