

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WADE BAKER and DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL TOBACCO & FIREARMS, Anchorage, AK

*Docket No. 01-123; Submitted on the Record;
Issued November 21, 2002*

DECISION and ORDER

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

The issues are: (1) whether an overpayment of compensation occurred in the amount of \$5,548.96; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying waiver of the overpayment.

On February 28, 1977 appellant, then a 47-year-old special agent in law enforcement, filed a notice of traumatic injury and claim for continuation of pay/compensation, alleging that on February 22, 1977 he fell on an icy sidewalk and injured his scrotum. On January 22, 1979 appellant filed a notice of traumatic injury (Form CA-1), alleging that on January 17, 1979 he skidded on an icy sidewalk and jerked to regain balance to avoid falling, which reactivated the previous injury. He had his left testicle removed in an operation on July 16, 1987.

By decision dated October 1, 1992, appellant was granted a schedule award based on 100 percent permanent loss of use of the left testicle. The total amount of this award was \$38,009.06. The Office noted that appellant's weekly pay was \$682.62, and awarded weekly compensation at \$751.25, based on cost-of-living adjustments. The period covered by the award was from July 16, 1987 the date of surgery, to July 13, 1988. The award was based on appellant's rate of pay on February 20, 1979.

On April 25, 2000 the Office determined that there had been an overpayment made in the amount of \$5,548.96. The Office noted that it incorrectly credited appellant with cost-of-living increases. In a decision dated July 20, 2000, this finding of overpayment was made final.

The Board finds that the Office properly determined that appellant was overpaid in the amount of \$5,548.96.

Section 8146a(a) of the Federal Employees' Compensation Act¹ provides that compensation payable on account of disability or death which occurred more than one year before the effective date of a cost-of-living increase, determined in accordance with the provisions of the section, shall be increased by the percent of the increase. In *Franklin L. Armfield*,² the Board reviewed the legislative history of 5 U.S.C. § 8146a, which provides for cost-of-living increases and held that this section applied only in those situations where a claimant had been entitled to compensation for more than a year prior to the effective date of the increase. In the instant case, appellant was not entitled to receive compensation until the date of his surgery, July 16, 1987, which was the date that the schedule award commenced. Since he was entitled to compensation for 52 weeks,³ he would not be entitled to cost-of-living increases, as he was not entitled to compensation for more than a year.

Appellant's pay rate as of the date of his surgery, July 16, 1987, was \$832.33 a week. He should have been paid at 75 percent of this rate (\$624.25) for 52 weeks or the amount of \$32,461.00. As appellant received \$38,009.96, this resulted in an overpayment of \$5,548.96 (\$38,009.96 minus \$32,461.00 equals \$5,548.96). Accordingly, the Office properly found an overpayment in the amount of \$5,548.96.

The Board also finds that the Office did not abuse its discretion in denying waiver of the overpayment that occurred in this case.

Section 8129(a) of the Act⁴ provides that an overpayment of compensation 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." Thus, a finding that appellant was without fault does not automatically result in waiver of 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.⁵

Section 10.436 of the implementing regulations⁶ 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: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or 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.⁷ An individual is deemed to need substantially all of his or her

¹ 5 U.S.C. § 8146a(a).

² 29 ECAB 500 (1978).

³ 20 C.F.R. § 10.404(a) provides that for 52 weeks of compensation for a 100 percent loss of use of one testicle.

⁴ 5 U.S.C. § 8129(a).

⁵ *Id.*

⁶ 20 C.F.R. § 10.436 (2000).

⁷ *Id.* at § 10.437.

income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an 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

Under section 10.438 of the regulations, “the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office].” 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.⁹

In this case, the Office found that appellant was not at fault in the creation of the overpayment. However, he did not provide any financial information to show that recovery of the overpayment would defeat the purpose of the Act. Appellant likewise has not alleged and the evidence does not demonstrate that he relinquished a valuable right or changed his position for the worse due to the payment of the erroneous amount of compensation. Because 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.

The decision of the Office of Workers Compensation Programs dated July 20, 2000 is hereby affirmed.

Dated, Washington, DC
November 21, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁸ *Id.*

⁹ *Id.* at § 10.438.