

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAVID J. GRIFFEN and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Indianapolis, IN

*Docket No. 02-1593; Submitted on the Record;  
Issued November 4, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$824.30 overpayment of compensation from April 28 to December 1, 1997; and (2) whether the Office properly denied waiver of the overpayment.

On August 26, 1996 appellant, then a 39-year-old custodial worker, sustained a lacerated forehead when he was attacked by a coworker. The Office accepted appellant's claim for laceration of the forehead and later expanded this to include major depression and post-traumatic stress disorder.

Appellant worked intermittently from August 26, 1996 to December 1, 1997.

In a December 20, 2001 overpayment worksheet, the Office calculated that appellant received \$7,462.36, at the pay rate of \$698.00 for the period April 28 to August 9, 1997. The pay rate was based on the pay rate for the second shift of \$17.45 per hour times 40 hours a week. He was paid \$575.85 for the period August 10 to December 1, 1997. However, the correct pay rate was \$680.59, which was based on the actual pay received for the year prior to account for the difference between the second and third shift. The Office determined that the compensation due for leave without pay for the period April 29 to December 1, 1997, was \$7,092.80 less the compensation paid for the same period of \$7,917.10. The Office calculated that this resulted in a \$824.30 overpayment.

On January 17, 2002 the Office made a preliminary finding that appellant had been overpaid benefits in the amount of \$824.30. The Office noted that the overpayment occurred because appellant was paid compensation for the period April 28 to December 1, 1997, at the incorrect pay rate of \$698.00 per week as opposed to the correct pay rate of \$680.59. Appellant was paid \$575.85 for the period August 10 to December 1, 1997. The Office also determined that appellant was without fault in the matter of the overpayment. The Office indicated that

appellant had the right to submit, within 30 days, evidence or arguments regarding the overpayment and his eligibility for waiver of the overpayment.<sup>1</sup>

By decision dated April 4, 2002, the Office found that appellant received a \$824.30 overpayment of compensation from April 28 to December 1, 1997, for which he was without fault in creating. In an accompanying memorandum, the Office indicated that no additional financial evidence or argument was submitted by appellant to support eligibility for waiver and, therefore, waiver of overpayment was not granted. The Office requested that appellant remit the amount of \$824.30 in full.

The Board finds that appellant received an overpayment of \$824.30 in compensation from April 28 to December 1, 1997.

The record indicates that appellant was paid compensation for the period April 28 to December 1, 1997, at the incorrect pay rate of \$698.00 per week as opposed to the correct pay rate of \$680.59. The Office also determined appellant was without fault in the matter of the overpayment. The Office properly determined that for the period April 28 to December 1, 1997, appellant received an overpayment of \$824.30. Appellant does not dispute that he received the overpayment in question and the Board finds that the Office properly determined the amount of the overpayment that covered the period April 28 to December 1, 1997.

The Board further finds that the Office did not abuse its discretion in denying waiver of the overpayment.

Section 8129 of the Federal Employees' Compensation Act<sup>2</sup> provides that an overpayment 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." (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the 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.<sup>3</sup>

Section 10.438 of the implementing regulations<sup>4</sup> requires the individual who received the overpayment to submit additional information to substantiate a waiver request. 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. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result

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<sup>1</sup> In a letter dated February 20, 2002, appellant submitted a copy of all his medical bills incurred as a result of his accepted employment injury.

<sup>2</sup> 5 U.S.C. § 8129(a)(6).

<sup>3</sup> See *James M. Albers, Jr.*, 36 ECAB 340 (1984).

<sup>4</sup> 20 C.F.R. § 10.438.

in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.

Appellant was advised by the Office to provide the necessary financial information by completing the overpayment recovery questionnaire issued on January 17, 2002 if he wanted to request waiver. Appellant, however, did not respond to the preliminary overpayment notification. In his May 29, 2002 appeal letter before the Board, appellant provided a letter delineating his correspondence to the Office with a copy of the OWCP-20, however, the Board cannot review such evidence for the first time on appeal.<sup>5</sup> As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act. With respect to whether recovery would be against equity and good conscience, section 10.323(b) of the federal regulations provides that “[r]ecovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse.” Appellant has not alleged and the evidence does not demonstrate, that he relinquished a valuable right or changed his position for the worse in reliance on the overpayments. The Office properly denied waiver of recovery of the overpayment.

The Board further finds that it does not have jurisdiction to review the Office’s finding that the overpayment of compensation would be recovered through a lump-sum payment. It does not appear from the record that appellant is receiving continuing compensation benefits. The Board’s jurisdiction to review recovery of an overpayment is limited to the situation where recovery is made from continuing Act benefits. This is not the situation with respect to lump-sum collection.<sup>6</sup>

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<sup>5</sup> 20 C.F.R. § 501.2(c).

<sup>6</sup> As appellant is no longer receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office’s recovery of the overpayment; *see Lewis George*, 45 ECAB 144 (1993); *Levon H. Knight*, 40 ECAB 658 (1989); *Edward O. Hamilton*, 39 ECAB 1131 (1988).

The April 4, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
November 4, 2002

Michael J. Walsh  
Chairman

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member