

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT D. POORE and DEPARTMENT OF THE ARMY,  
ANNISTON ARMY DEPOT, Anniston, AL

*Docket No. 02-1539; Submitted on the Record;  
Issued October 21, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether appellant received an overpayment in compensation of \$697.35; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment.

On January 6, 1997 appellant, then a 50-year-old machinist, was lifting a power turbine and felt a sharp pain in his neck and back. He stopped work that day and was placed on the periodic rolls. The Office accepted the conditions of cervical strain and posterior cervical laminectomy C5-6. Appellant returned to work as a modified machinist on September 1, 1999. By decision dated October 30, 2000, the Office determined that the position of modified machinist fairly and reasonably represented appellant's wage-earning capacity.

On May 22, 2001 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$697.35 which arose because he had returned to work on September 1, 1999 and was in receipt of compensation for temporary total disability through September 11, 1999. The Office further found that appellant was without fault in the creation 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 would be used to determine whether he was entitled to a waiver and that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment. The Office enclosed a worksheet detailing its calculation of the overpayment.

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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.

In a letter dated May 31, 2001, appellant's designated representative advised that appellant had informed him that he had already paid the overpayment. The representative stated that he had instructed appellant to search his records for any correspondence concerning this issue and the canceled check to verify the payment. The representative additionally noted that appellant had purchased some sick leave about this time and it was possible that he confused the two issues.

In an April 29, 2002 decision, the Office finalized its preliminary determination that appellant received an overpayment in compensation in the amount of \$697.35. The Office further noted that appellant did not respond to the preliminary overpayment determination other than the May 31, 2001 letter. Accordingly, the Office implicitly found that his case did not warrant waiver of recovery of the overpayment because he failed to submit the required financial information. The Office determined that recovery of the overpayment would be paid in full within 30 days from the date of its decision.

The Board finds that appellant received an overpayment of compensation in the amount \$697.35.

The record in this case reflects that, during the period September 1 through September 11, 1999, appellant was paid temporary total disability although he had returned to work on September 1, 1999. For the period September 1 through September 11, 1999, appellant received \$777.64 minus health benefits/life insurance deductions of \$80.29 which amounted to an overpayment of \$697.35. As appellant had returned to work on September 1, 1999, he was not entitled to temporary total disability for the period September 1 through September 11, 1999. Therefore, an overpayment in compensation in the amount of \$697.35 was created.

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

Section 8129(a) of the Federal Employees' Compensation Act<sup>2</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>3</sup> The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "[a]djustment 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."<sup>4</sup> Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.<sup>5</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

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8129(a).

<sup>4</sup> 5 U.S.C. § 8129(b).

<sup>5</sup> *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

conscience,” pursuant to the guidelines provided in sections 10.434-437 of the implementing federal regulations.<sup>6</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 [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.

“(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>7</sup>

In its letter dated May 22, 2001, the Office clearly instructed appellant that he should return the requested information within 30 days. Appellant did not comply. 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, could properly find that appellant was not entitled to waiver on the grounds that recovery would defeat the purpose of the Act.<sup>8</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>9</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>10</sup>

While on appeal, appellant generally contended that the Office, through neglect, caused him to lose his medical coverage and forced him to pay all his medical bills out of pocket. He additionally contended that when he transferred to disability retirement, the Office mixed up the paperwork, caused him to be without a check for months, which created extreme hardship for him and his family. The Board notes that these arguments are irrelevant to the overpayment issue. The Board, therefore, finds that, as appellant 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 could properly find that recovery of the overpayment would not be against equity or good conscience.

The decision of the Office of Workers’ Compensation Programs dated April 29, 2002 is hereby affirmed.

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<sup>6</sup> 20 C.F.R. § 10.434-437 (1999).

<sup>7</sup> 20 C.F.R. § 10.438 (1999).

<sup>8</sup> See *Gail M. Roe*, 47 ECAB 268 (1995).

<sup>9</sup> 20 C.F.R. § 10.437(a) (1999).

<sup>10</sup> 20 C.F.R. § 10.437(b) (1999).

Dated, Washington, DC  
October 21, 2002

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member