

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDDIE VALDEZ and DEPARTMENT OF THE AIR FORCE,
AIR FORCE COMMISSARY, F.E. WARREN AIR FORCE BASE, WY

*Docket No. 02-2202; Submitted on the Record;
Issued April 10, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation was created in the amount of \$4,487.58; (2) whether the Office properly refused to waive an overpayment of compensation in the amount of \$4,487.58; and (3) whether the Office properly required repayment of the overpayment by withholding \$50.00 each month from appellant's continuing compensation payments.

The Office accepted that appellant sustained a linear skull fracture and herniated disc at L4-5 and authorized a lumbar laminectomy as a result of a forklift accident on February 14, 1984 while appellant, then 36 years old, was working as a store worker.

The record indicates that appellant advised the Office that he had a dependent daughter. On August 3, 1999 appellant reported that he had stopped paying child support for his daughter who was 19 years old. On July 6, 2001 he again reported that he had no dependents. By letter dated November 19, 2001, the Office advised appellant that he had reported having no dependents and requested that he verify this information. On December 3, 2001 appellant verified the previously submitted information.

On January 25, 2002 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$4,487.58 that arose because he received compensation at the 3/4 rate of compensation rather than at the 2/3 rate during the period August 3, 1998 through January 26, 2002 because his only eligible daughter turned 18 years of age on August 3, 1998. The Office also determined that appellant was without fault in the matter of the overpayment. The Office allotted appellant 30 days to request a telephone conference, review of the written evidence or hearing, and to submit financial information by completing an overpayment recovery questionnaire (Form OWCP-20) to allow the Office to determine if it should waive recovery of the overpayment.

In a February 27, 2002 letter, appellant requested waiver of recovery of the overpayment and a telephone conference.

In a May 15, 2002 telephone call, appellant advised the Office that he mailed a completed Form OWCP-20 to the Office. On April 5, 2002 the Office left a telephone message for appellant advising him that he had failed to submit any financial documents or a completed Form OWCP-20. The Office further advised appellant to return the telephone call within three days. In a May 15, 2002 telephone call, appellant advised the Office that he had mailed a completed Form OWCP-20 on April 5, 2002.

By decision dated June 21, 2002, the Office finalized its preliminary determination as to the amount of the overpayment and appellant's lack of fault in the creation of the overpayment. The Office refused to waive recovery of the overpayment on the basis that appellant did not provide financial information. The Office stated that the overpayment of compensation would be recovered by withholding \$50.00 per month from each of appellant's continuing compensation payments beginning July 13, 2002.¹

The Board finds that the Office properly determined that an overpayment of compensation was created in the amount of \$4,487.58.

Appellant does not contest the fact of overpayment or amount of the overpayment. The record supports that the overpayment occurred because appellant was incorrectly paid at the augmented three-fourths rate for the period August 3, 1998 through January 26, 2002 and, therefore, received an overpayment of \$4,487.58.

The Board further finds that the Office properly refused to waive an overpayment of compensation in the amount of \$4,487.58.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.² These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when [an] 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."³ Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

¹ The Board notes that, subsequent to the Office's June 21, 2002 decision, the Office received a Form OWCP-20 completed by appellant on June 28, 2002. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501.2(c).

² See *Robert Atchison*, 41 ECAB 83, 87 (1989).

³ See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

Section 10.436 of the implementing regulations⁴ 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.⁵ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁶

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.⁷

Section 10.438 of the regulations provides that “[t]he 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 on an overpayment would defeat the purpose of the Act or be against equity and good conscience.”⁸ However, in this case, appellant failed to provide the requested financial information to the Office prior to its June 21, 2002 decision.

As no financial information was submitted, it must be found that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience.

Inasmuch as appellant has not shown that recovery of the overpayment 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 of compensation in the amount of \$4,487.58.

The Board also finds that the Office properly required repayment of the overpayment by withholding \$50.00 each month from appellant's continuing compensation payments.

⁴ 20 C.F.R. § 10.436.

⁵ An individual's assets must exceed a 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. This base includes all of the individual's assets not exempt from recoupment. *See Robert F. Kenney*, 42 ECAB 297 (1991).

⁶ *See Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

⁷ 20 C.F.R. § 10.437.

⁸ 20 C.F.R. § 10.438.

The method by which the Office may recover overpayments is defined by regulation. The applicable regulation, 20 C.F.R. § 10.441(a), provides as follows:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship....”

Appellant did not provide any information for the Office to consider in determining the amount to be withheld from his continuing compensation and the Board finds that the Office did not abuse its discretion in determining that the overpayment sum of \$4,487.58 would be recovered by deducting \$50.00 from appellant’s continuing compensation benefits.

The June 21, 2002 decision of the Office of Workers’ Compensation Programs is affirmed.

Dated, Washington, DC
April 10, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member