

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROYCE M. GARSHAK and DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, FEDERAL CORRECTIONAL COMPLEX, Beaumont, TX

*Docket No. 03-392; Submitted on the Record;  
Issued April 8, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to waive recovery of an overpayment of compensation in the amount of \$51,715.91.

Appellant sustained traumatic injuries to his knees on July 11 and December 29, 1999 in the performance of his duties as a correctional officer. Following the second injury, he received continuation of pay from January 8 to February 21, 2000.

The Office paid appellant compensation for temporary total disability from February 22, 2000 until he returned to work on May 28, 2000. Appellant again stopped work on July 5, 2000 and the Office resumed payment of compensation for temporary total disability. Compensation payments were based on a rate of pay of \$1,389.17 per week.

By decision dated July 20, 2002, the Office reduced appellant's compensation effective July 14, 2002. The Office found that the pay rate of \$1,389.17 it had used as the basis of appellant's compensation payments was incorrect and that the correct rate was \$752.20 for payments from February 22 to May 28, 2000, and \$852.92 for payments made on and after July 5, 2000.

On August 29, 2002 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$51,715.91 that occurred because he was paid at an incorrect pay rate from February 22 to May 28, 2000 and from July 5, 2000 to July 13, 2002. The Office found that appellant was without fault in creating the overpayment, and requested that, if he believed the overpayment should be waived, he submit financial information on his income and expenses.

In a telephone conference on October 15, 2002, appellant advised the Office of his income, assets and expenses. In response to an October 15, 2002 Office request, appellant provided documentation of his expenses.

By decision dated November 5, 2002, the Office found that appellant received an overpayment of compensation in the amount of \$51,715.91 that occurred because he was paid at an incorrect pay rate from February 22 to May 28, 2000 and from July 5, 2000 to July 13, 2002. The Office preliminarily found that appellant was without fault in the creation of the overpayment, but that waiver of recovery of the overpayment was not warranted because his monthly income exceeded his monthly expenses by \$320.93.

The Board finds that appellant received an overpayment of compensation in the amount of \$51,715.91.

The pay rate that the Office used as the basis of appellant's compensation payments beginning February 22, 2000 was incorrect. This pay rate, \$1,389.17, was reached by adding the total hourly amount appellant earned while working nights and Sundays to his base pay, instead of adding the differential appellant received for night and Sunday work. The difference between what appellant was paid at the incorrect rate and the amount to which he was entitled using a correct pay rate is the amount of the overpayment of compensation, \$51,715.91.

The Board finds that the Office abused its discretion in refusing to waive recovery of appellant's overpayment of compensation.

The Office found that appellant was not at fault in the creation of the overpayment, but that appellant was not entitled to waiver.

Section 8129 of the Federal Employees' Compensation Act<sup>1</sup> 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 this subchapter of the [Act] or would be against equity and good conscience." 20 C.F.R. § 10.436 provides:

"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 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. A higher amount is specified for a beneficiary with one or more dependents."

In finding that appellant's income exceeded his ordinary and necessary living expenses by \$320.93 per month, the Office considered monthly payments and insurance for only one of

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<sup>1</sup> 5 U.S.C. § 8129.

two vehicles for which appellant was making monthly payments. The Office's procedure manual states that ordinary and necessary living expenses include "expenses for one or two vehicles (loan payments with date each will be paid off; gas and oil; maintenance)." The procedure manual also provides: "If the amount of certain expenses are found not to be ordinary and necessary -- particularly regarding the significant expenses of food, clothing and vehicles -- the [Office] must show in writing the reasons for this finding. The finding must be supported by clear and complete rationale...."<sup>2</sup> The Office did not provide any reason for not allowing the expense (\$570.00 for the monthly payment and \$96.66 per month for insurance) of appellant's second vehicle, in a situation where appellant is attending school and his wife is working 37 hours per week.<sup>3</sup>

The Office also incorrectly computed appellant's wife's income. In a telephone conference on October 15, 2002, appellant advised the Office that his wife had "just started a new job" at a pay rate of \$9.60 per hour for 37 hours per week. The Office calculated that appellant's wife earned \$1,539.20 per month, but noted, in its memorandum of the telephone conference, that the wife's "income figure is gross and not net. Allowance must be made for income tax; SSA-FICA deductions etc." A notation that appellant's wife's salary was gross and not net also appears on the Office's final computation of appellant's income and expenses. Despite these notations, the Office used appellant's wife's gross rather than her net monthly income in its determination of whether appellant's monthly income exceeded his monthly expenses. This was incorrect. The Office's procedure manual provides: "The individual's total income includes any funds which may reasonably be considered available for his or her use, regardless of the source."<sup>4</sup> The amount appellant's wife pays in taxes and other deductions from her monthly paycheck are not reasonably available for appellant's use to pay his monthly expenses and thus should not have been included in his monthly income.<sup>5</sup>

As the Office erroneously computed both appellant's expenses and his income, it abused its discretion by refusing to waive recovery of his overpayment of compensation.

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<sup>2</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200a(3) (September 1994).

<sup>3</sup> See *Tom M. Hurst*, 33 ECAB 1432 (1982).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200(a)(2) (September 1994).

<sup>5</sup> See *Linda D. Lane*, 46 ECAB 727 (1995) (income was improperly calculated where a deduction was not made from gross income for health benefits insurance).

The November 5, 2002 decision of the Office of Workers' Compensation Programs is affirmed with regard to the amount of the overpayment of compensation and set aside with regard to the Office's refusal to waive recovery of the overpayment. The case is remanded for further consideration of the issue of waiver.

Dated, Washington, DC  
April 8, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member