

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROGELIO JIMENEZ and DEPARTMENT OF THE AIR FORCE,
AIR LOGISTICS CENTER, McCLELLAN AIR FORCE BASE, CA

*Docket No. 02-1930; Submitted on the Record;
Issued February 4, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant received a \$1,753.58 overpayment of compensation; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$100.00 from appellant's compensation payments every four weeks.

In May 1998 the Office accepted that appellant, then a 51-year-old aircraft worker, sustained an employment-related impingement syndrome of his left shoulder. The Office paid appropriate compensation for periods of disability.¹ On January 8, 2001 appellant returned to work for a private employer as a customer service representative. By decision dated March 26, 2001, the Office determined that the actual wages from this position represented appellant's wage-earning capacity. By decision dated April 18, 2002, the Office determined that appellant received a \$1,753.58 overpayment of compensation. The Office further determined that appellant was not at fault in the creation of the overpayment, but that the overpayment was not subject to waiver.²

The Board finds that appellant received a \$1,753.58 overpayment of compensation.

In the present case, appellant received total disability compensation for part of the period from January 8 to October 6, 2001, despite the fact that he was not entitled to such compensation for this period because he had returned to work effective January 8, 2001, in a lower paying job, which had been determined to represent his wage-earning capacity. The record contains evidence which shows that appellant received \$15,740.22, in compensation during this period

¹ Appellant also received schedule awards for a total permanent impairment of his left shoulder of 14 percent.

² In its preliminary determination, the Office calculated that overpayment to be \$1,978.97 and determined that appellant was at fault.

when he was only entitled to receive \$13,986.64. Therefore, the Office properly determined that appellant received a \$1,753.58 overpayment.

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

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.³ 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 incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."⁴ Since the Office found that appellant to be without fault in the matter 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.⁵

Section 10.436 of the Office's regulations⁶ provides that recovery of an overpayment would 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.⁷ 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 expenses by more than \$50.00.⁸

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.⁹

³ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁴ 5 U.S.C. § 8129(b).

⁵ Appellant argued that the overpayment should be waived because he was not found to be at fault in its creation but he would only be entitled to such waiver if it were shown, under the standards described below, that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

⁶ 20 C.F.R. § 10.436 (1999).

⁷ 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, 301 (1991).

⁸ See *Leticia C. Taylor*, 47 ECAB 198, 203 (1995).

⁹ 20 C.F.R. § 10.437.

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. The record reveals that appellant has monthly income of approximately \$4,886.00.¹⁰ The record further reveals that he has approximately \$4,728.00 in monthly expenses.¹¹ Therefore, appellant's monthly income exceeds his monthly ordinary and necessary expenses by approximately \$158.00. As appellant's current income exceeds his current ordinary and necessary living expenses by more than \$50.00 appellant has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses. Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.¹² Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, he has failed to show that the Office abused its discretion by refusing to waive the overpayment.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$100.00 from appellant's compensation payments every four weeks.

Section 10.441¹³ provides that, if an overpayment of compensation has been made to an individual entitled to further payments and 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. The record reveals that the Office properly considered the above noted factors in determining that the overpayment should be repaid by deducting \$100.00 from appellant's compensation payments every four weeks.

¹⁰ This figure is comprised primarily of \$1,449.00 in Office benefits, \$1,076.00 in rental income, \$2,091.00 from his wife's earnings and \$249.00 from another income bearing property. It should be noted that financial figures have been rounded to the nearest dollar.

¹¹ Appellant's major monthly expenses include \$2,686.00 for loan payments (including mortgage, car and credit card payments), \$500.00 for food, \$220.00 for property management and \$200.00 for clothing.

¹² See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

¹³ 20 C.F.R. § 10.441.

The April 18, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 4, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member