

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS S. JOHNSON and DEPARTMENT OF JUSTICE,
U.S. BORDER PATROL, Chula Vista, CA

*Docket No. 02-2020; Submitted on the Record;
Issued February 5, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$5,496.41; (2) whether the Office of Workers' Compensation Programs abused its discretion in denying waiver of recovery of the overpayment; and (3) whether \$50.00 should be withheld from appellant's continuing compensation checks to recover the overpayment.

This case is on appeal to the Board for the second time.¹ In the first appeal, the Board affirmed the Office's November 29, 1999 decision, finding that appellant did not establish that he had more than an eight percent permanent impairment to his left upper extremity for which he received a schedule award.

On January 25, 2002 the Office advised appellant that it had made a preliminary determination that an overpayment of compensation existed in the amount of \$5,496.41 because appellant was paid his schedule award from April 7, 1999 through March 21, 2001 at the three-quarter augmented compensation rate when he was entitled to only the statutory two-third rate. The Office found that appellant was divorced on April 7, 1999, that his daughter turned 18 years old on August 3, 1998 and therefore appellant had no eligible dependents as of April 7, 1999. The Office found that appellant was without fault in the matter of the overpayment. The Office informed appellant that he should provide information regarding his income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of the Federal Employees' Compensation Act to recover the overpayment.

In an overpayment recovery questionnaire, Form OWCP-20, dated February 7, 2002, appellant indicated that he had a total monthly income of \$1,608.08, that he had monthly payments consisting of \$113.95 in mortgage or rent, \$450.00 for food, \$50.00 for clothing, \$385.00 for utilities and \$274.00 for other expenses, or total monthly expenses of \$1,272.95. He indicated that he had total funds of approximately \$11,179.97, consisting of \$27.12 for cash on

¹ Docket No. 00-2204 (issued June 7, 2001). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

hand, \$817.90 for a checking account balance, \$3,834.77 for a savings account balance and \$6,500.00 for a 1974 boat, 1988 trailer and firearms.

In an attached letter, appellant stated that he was divorced on April 7, 1999 and that, in addition to the division of property, his ex-spouse was awarded 36 percent of his retirement benefit. Appellant stated that he believed this was spousal support. He also stated that, in listing expenses on the OWCP-20, he did not include approximately \$50.00 a month for long distance telephone calls or \$80.00 a month for food and veterinary costs for his dog. Appellant stated that he also did not include recreational and social pursuits.

On April 24, 2002 the Office had a telephone conference with appellant addressing the requirements for the waiver. The Office determined that appellant's treatment for the logs in his log home was a \$100.00 monthly expense and he had a \$12.00 monthly expense for chemical treatment of the interior and exterior of his home. The Office also determined that care of appellant's dog for food and veterinary care was \$80.00 a month, his long distance calls per month were \$50.00, and he had a monthly expense of \$7.00 for hunting and fishing licenses. The Office noted that appellant's assets including the trailer, boat and firearms totaled \$6,500.00.

By decision dated May 16, 2001, the Office finalized its determination that appellant received an overpayment in the amount of \$5,496.00 because he received compensation under the schedule award at the augmented rate of three-quarters when he should have been paid at the two-third statutory rate in accordance with his single status. The Office instructed appellant to make \$50.00 a month payments until the overpayment was repaid. The Office determined that appellant's average monthly income of \$1,608.09 exceeded his average monthly expenses of \$1,272.95 by more than \$50.00 and that appellant's assets exceeded \$11,000.00 and therefore was above the \$3,000.00 maximum limit. The Office therefore found that it was proper to deny appellant waiver of recovery of the overpayment.

The Board finds that appellant received an overpayment in the amount of \$5,496.14. Office documents show that \$5,496.14 was the correct amount of overpayment from April 7, 1999 to March 21, 2001. Section 20 C.F.R. § 10.403 states that compensation for partial disability is paid at the 66 2/3 rate if the employee has no dependents and at the augmented 75 percent rate the employee has at least one dependent. Under the Act a dependent means a wife if she is a member of the same household as the employee and she is receiving regular contributions for her support or the employee has been ordered by a court to contribute to her support.² Because appellant was divorced on April 7, 1999, his former spouse does not come within the meaning of the term "wife", despite the 36 percent financial contribution the court ordered him to make toward her support from his retirement benefit.³ The Office therefore properly determined that an overpayment was made to appellant in the amount of \$5,496.14.

The Board finds that the Office properly denied appellant's request for waiver of the overpayment.

² 5 U.S.C. § 8110(1) (A)(B)(C).

³ See *Blaine E. Bedeger*, 48 ECAB 418, 420 (1997).

Section 8129(a) of the Act⁴ 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. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustments or recovery by the United States may not be made when incorrect payments 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.”⁵

Thus, a finding that appellant was without fault is insufficient, in and of itself, for the office to waive the overpayment.⁶ 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 conscience,” pursuant to the guidelines provided in sections 10.434-10.437 of the implementing federal regulations.

Section 10.436 of the Office’s regulations⁷ 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) [t]he 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) [t]he beneficiary’s assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor statistics. Section 10.437⁸ states that recovery of an overpayment is also considered to be against good conscience if the 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.

Section 20 C.F.R. § 10.438 states:

“(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 all 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.”

In this case, the Office considered in detail that appellant’s monthly income of \$1,608.09 exceeded his monthly expenses of \$1,272.95 by \$335.14 and that his assets totaled approximately \$11,000.00. Therefore, the Office reasonably determined that appellant did not need substantially all of his current income to meet ordinary and necessary living expenses and it

⁴ 5 U.S.C. § 8129(a).

⁵ 5 U.S.C. § 8129(b).

⁶ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

⁷ 20 C.F.R. § 10.436.

⁸ 20 C.F.R. § 10.437.

would not be against good equity and conscience to recover the overpayment because appellant would not experience severe financial hardship in attempting to repay the debt. The Office therefore properly determined that appellant was not entitled to a waiver of the overpayment in this case.

The Board finds that the Office properly required appellant to pay the Office \$50.00 a month until the overpayment was recovered.

Section 10.441⁹ 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 Office made a lengthy analysis of appellant's financial status. The Office's requirement that appellant pay the Office \$50.00 a month until the overpayment is recovered is reasonable.¹⁰

The May 16, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 5, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁹ 20 C.F.R. § 10.441.

¹⁰ It was not clear whether the Office incorporated the additional expenses it addressed in the April 24, 2002 telephone conference consisting of \$112.00 a monthly expense for appellant's treatment of his log home, \$80.00 a month for care of his dog, \$50.00 a month for long distance calls and \$7.00 for hunting and fishing licenses or a total of \$249.00 into its calculations. The additional amount of \$249.00, however, would not render the Office's findings regarding waiver or recovery unreasonable.