U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL E. BOONE and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Charlotte, NC

Docket No. 03-167; Submitted on the Record;
Issued February 27, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied waiver of the $3,998.00 overpayment that occurred in appellant's case.

On March 13, 1997 appellant, then a 29-year-old criminal investigator, sustained an injury in the performance of duty when he attempted to remove a role player from the front door of a residence during a training exercise. The Office accepted his claim for left elbow contusion and loose bodies and authorized a left ulnar nerve neuropathy.

Appellant initially received a schedule award for a 6 percent permanent impairment of the left arm. The Office subsequently issued an amended award for an additional impairment of 2 percent. The Office based both schedule awards on a weekly pay rate of $1,295.68.

On January 31, 2002 the Office issued an amended schedule award for an additional impairment of 8 percent, or a total of 16 percent. The Office based this award, however, on a weekly pay rate of $1,080.08.

The Office determined that it had based the previous schedule awards on an incorrect pay rate. On March 27, 2002 the Office made a preliminary finding that appellant was overpaid $3,998.00 from August 24, 1998 through February 14, 1999 because of this incorrect pay rate. The Office found that appellant was without fault in the matter.

On April 26, 2002 appellant responded that he agreed with the Office's finding that he was overpaid $3,998.00 and with the finding that he was without fault in creating the overpayment. He requested waiver on the grounds that recovery would be against equity and good conscience "because I, acting on incorrect information from the [Office], spent or committed the funds in ways which I otherwise would not have done and would suffer a financial loss as a result." Appellant made several arguments: (1) He stated that a claims examiner had told him over the telephone that he would not have to repay any of the overpayment because the overpayment resulted from an error by the Office; (2) He stated that the overpayment occurred as part of checks dated October 16, 1998, January 1 and October 8, 1999 and that none of those funds were in his possession; (3) The Office, knowing of the overpayment, failed to deduct the amount from his check dated February 8, 2002; (4) He stated that having to repay the debt, in conjunction with approximately $17,000.00 owed on an automobile and approximately $35,000.00 owed on a loan, would adversely affect his ability to qualify for the purchase of a residence in Atlanta, Georgia, where he was now assigned as part of a new position; and (5) He stated that he used approximately $35,744.44 of the total schedule award to satisfy attorney's fees, medical bills and other expenses related to pursuing his claim for a schedule award.

Appellant explained: "Because my waiver request does not involve a claim of severe financial hardship, the income statement portion of Form OWCP-20 is not applicable and was not completed. Therefore, I have not provided any related supporting documentation, *i.e.*, income tax returns, bank account statements, bills and canceled checks, pay slips and other records for income and expenses."

During a telephone conference held on July 16, 2002, appellant stated that when he began receiving his schedule award in 1998 and 1999, he decided to sell his condominium and pay off debts so that he could qualify to purchase a larger house. He used the first $8,623.75 of his schedule award to pay off the residential loan from his Thrift Savings Plan. He paid off credit card debt of $14,694.90. Appellant asserted that he suffered a financial loss of $3,607.94 when he sold his condominium and suffered a financial loss of $26,096.25 when he sold the house about a year after he purchased it. These losses, he stated, directly related to how he spent the overpaid funds.

Appellant submitted a July 16, 2002 statement to provide greater detail and additional evidence to support his request for waiver. He explained that without the funds from his schedule award he would not have been able to pay off the original residential loan from his Thrift Savings Plan so that he could obtain a second residential loan from that source to purchase the larger house.

In a decision dated September 3, 2002, the Office finalized its preliminary findings and denied waiver. The Office noted that the schedule award was only slightly more than it should have been and that appellant had not shown detrimental reliance on the overpaid amount. The Office also noted that the immediate consequence of the overpayment was appellant's repayment of debt, which was a gain, not a loss. The overpayment had nothing to do with the selling of his house for a loss.

The Board finds that the Office properly denied waiver.

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.[1] If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of the Federal

[1] 20 C.F.R. § 10.433(a) (1999).

Employees' Compensation Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.[2]

Appellant has made clear that he does not seek waiver based on financial hardship. The question for determination, therefore, is whether adjustment or recovery of the overpayment would be against equity and good conscience based on detrimental reliance.

Recovery of an overpayment is considered to be against equity and good conscience when any 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. In making such a decision, the Office does not consider the individual's current ability to repay the overpayment. To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. Donations to charitable causes or gratuitous transfers of funds to other individuals are not considered relinquishments of valuable rights. To establish that an individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss.[3]

The overpayment in this case, \$3,998.00, arose from an incorrect pay rate in appellant's first two schedule awards. The third schedule award, which used the correct pay rate, did not contribute to the overpayment and is, therefore, irrelevant to the issue of detrimental reliance.

Appellant argues that but for the receipt of the overpaid funds, \$3,998.00, he would not have been able to pay off the initial residential loan from his Thrift Savings Plan in the amount of \$8,623.75. Because he received and was entitled to more than \$20,000.00 from his first two schedule awards, appellant's argument is not well taken. Appellant paid off credit card debt of \$14,694.90, which theoretically would have required the use of a portion of the overpaid amount, but appellant has not shown how paying off these debts resulted in a loss. While paying off debt did not itself result in a loss, appellant argues that it enabled him to qualify for the purchase of a larger house, which did result in a loss when he sold it about a year later. Appellant has not established, however, that he could not have qualified without the overpaid amount. Appellant borrowed \$40,000.00 from his Thrift Savings Loan to make the purchase and has not shown that he could not have borrowed something more to make up any difference needed. Finally, the Office correctly observes that selling the larger house for a loss about a year after purchase had nothing to do with the overpayment. Appellant has not established that he would not have sold the house but for the overpaid amount.

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[2] *Id*. at § 10.434. 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. *Id*. at §10.436. Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. *Id*. at §10.437(a).

[3] *Id*. at § 10.437(b).

The Board finds that appellant has failed to establish that he changed his position for the worse in reliance on the overpaid funds. As the evidence fails to establish that adjustment or recovery of the overpayment would be against equity and good conscience, the Office properly denied his request for waiver.

The September 3, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 27, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member