

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN R. KAUFFMAN and DEPARTMENT OF THE ARMY,
LETTER KENNY ARMY DEPOT, Chambersburg, PA

*Docket No. 03-475; Submitted on the Record;
Issued June 20, 2003*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$619.18 for the period December 1 through 22, 1999; and (2) whether the Office abused its discretion in denying waiver of the overpayment.

On December 19, 1991 appellant, a 43-year-old heavy mobile equipment mechanic, sustained an injury in the performance of duty, which the Office accepted for contusion of the right leg. On November 23, 1998 appellant filed a claim for a recurrence of disability, which the Office adjudicated as a new claim and accepted for a torn medial meniscus. On December 2, 1999 appellant filed a claim for wage-loss compensation from December 1 through 17, 1999; he filed a second claim for wage-loss compensation from December 20 through 22, 1999, on January 5, 2000. Appellant sought compensation for two hours a day for 11 days, or 22 hours total. On June 7, 2000 appellant telephoned the Office and notified them that he had not received a check, to which he was entitled for the period from December 1 through 22, 1999. The Office inadvertently sent a check to appellant in the amount of \$887.71, based on an 8-hour workday for the period claimed, instead of a check for \$268.53, representing the 22 hours of wage loss, to which appellant was entitled.

On September 16, 2002 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$619.18 for the period from December 1 through 22, 1999 because he received an erroneous amount of compensation. The Office noted that appellant had received a check for \$887.71, based on compensation for an 8-hour workday, instead of a check for \$268.53, representing the 22 hours of wage loss to which he was actually entitled. The Office found that appellant was without fault in the creation of the overpayment, finding that he could not have been reasonably aware that the payment he received was incorrect. The Office advised appellant that if he disagreed with the fact or amount of the overpayment he could submit new evidence in support of her contention. The Office further advised appellant that recovery might not be made if it could be shown that such recovery would defeat the purpose of the law or would be against equity and good conscience. The Office informed

appellant that he had the right to request a prerecoupment hearing on the matter of the overpayment and that any response he wished to make with regard to the overpayment should be submitted within 30 days of the September 16, 2002 letter.

Appellant completed the overpayment questionnaire, requested waiver and submitted documentation pertaining to his financial situation.

In a decision dated and finalized on November 15, 2002, the Office found that appellant was not entitled to waiver. The Office considered the financial information appellant submitted and determined that, based on his income, assets and resources, recovery of the \$619.18 overpayment would not result in undue hardship and would not defeat the purpose of the Federal Employees' Compensation Act.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$619.18 for the period December 1 through 22, 1999. The record shows that appellant had received compensation for this period in the amount of \$887.71, based on an 8-hour workday. This constituted error on the part of the Office, as appellant was entitled to compensation of \$268.53, representing 22 hours of wage loss at the \$16.22 hourly rate. The Office incorrectly paid appellant compensation from December 1 through 22, 1999, creating an overpayment of \$619.18.

The Board finds that the Office did not abuse its discretion in denying waiver of the overpayment after finding that appellant was without fault with respect to the creation of the overpayment.

Section 8129 of the Act¹ provides that an overpayment 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 the Act or would be against equity and good conscience." (Emphasis added.) Thus, a finding that appellant was without fault is insufficient, in and of itself, for the Office to waive the overpayment. The Office must then 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 10.436² and 10.437³ of the implementing federal regulation.

¹ 5 U.S.C. § 8129(a)(b).

² 20 C.F.R. §§ 10.436.

³ 20 C.F.R. § 10.437.

With regard to the “defeat the purpose of the Act” standard, section 10.436 of the regulation 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.”

With regard to the “against equity and good conscience” standard, section 10.437 of the regulation provides:

“(a) 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.

“(b) Recovery of an overpayment is also 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.

(1) 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.

(2) 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.”

A finding that appellant was without fault is insufficient, in and of itself, for the Office to waive the overpayment.⁴ 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

⁴ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

conscience” pursuant to the guidelines provided in sections 10.434-437 of the implementing federal regulations.⁵

Office regulations provide 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.⁶ The Board has found that an individual is deemed to need substantially all of his or her income to meet current ordinary and necessary expenses by more than \$50.00.⁷ Additionally, the guidelines for recovery of an overpayment from an individual must meet both conditions to find that recovery of the overpayment should be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his or her income to meet current ordinary and necessary living expenses and also that his or her assets, those which are not exempted, do not exceed a resource base.⁸

Office procedures provide that recovery will defeat the purpose of the Act if the individual’s assets do not exceed the 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 claimant’s assets that are not exempted from recoupment.⁹ The first \$3,000.00 or more, depending on the number of the individual’s dependents, is also exempted from recoupment as a necessary emergency resource.¹⁰

In the instant case, in determining that appellant was not entitled to waiver of the overpayment, the Office reviewed the overpayment questionnaire and financial information submitted by appellant. The Office considered appellant’s income, expenses, assets and general financial circumstances and found that, as appellant’s total monthly income is \$4,831.00 and his

⁵ 20 C.F.R. §§ 10.434-10.437 (1999).

⁶ *Frederick Arters*, 53 ECAB ____ (Docket No. 01-1237, issued February 27, 2002).

⁷ *Id.*

⁸ *John Skarbek*, 53 ECAB ____ (Docket No. 01-1396, issued June 21, 2002).

⁹ The Office procedure manual provides that an individual’s assets include liquid assets such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds, certificates of deposit and the like and nonliquid assets such as the fair market value of an owner’s equity in property such as a camper, boat, second home and furnishings/supplies therein, any vehicles above the two allowed per family, jewelry, artwork, etc. Assets do not include the value of household furnishing of the primary residence, wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which is maintained as the principal family domicile or income from income-producing property if the income from such property has been included in comparing income and expenses. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.a(4) (September 1994).

¹⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Waiver of Recovery*, Chapter 6.200.6.a(1)(b) (September 1994).

monthly expenses are \$4,402.15, recovery of the overpayment would not cause undue hardship. Since appellant's monthly income exceeded his monthly expenses by \$428.85, he did not need essentially all of his monthly income to meet his expenses. The financial information submitted by appellant, therefore, showed that he did not meet the financial criteria, under which the Office would consider waiver of recovery of the overpayment on the grounds that recovery would defeat the purpose of the Act. Thus, as appellant's monthly assets substantially exceeds his monthly income as outlined above, the Office properly found that he was not entitled to waiver on grounds that recovery would defeat the purpose of the Act.¹¹

Further, there is no evidence in this case, nor did appellant allege, that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received from December 1 through 22, 1999.

Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory and regulatory guidelines. The issue on appeal, therefore, is whether the Office's denial of waiver constituted an abuse of discretion.¹² As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion by issuing its November 15, 2002 final decision denying waiver of recovery of the overpayment in the amount of \$618.19.

The decision of the Office of Workers' Compensation Programs dated November 15, 2002 is hereby affirmed.

Dated, Washington, DC
June 20, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹¹ See *Robert D. Clark*, 48 ECAB 422 (1997); *Nina D. Newborn*, 47 ECAB 132 (1995).

¹² *James M. Albers, Jr.*, 36 ECAB 340, 344 (1984) and cases cited therein at note 4.